LEX/BDHC/0113/2002

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IN THE SUPREME COURT OF BANGLADESH
(HIGH COURT DIVISION)

Criminal Miscellaneous (Contempt) Case Nos. 6506 of 2000 with 6722 of 2000

Decided On: 20.05.2002

State **Vs.** Chief Editor, Manabjamin and others

Hon'ble Judges/Coram:
Syed Amirul Islam and A.K.M. Shafiuddin, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Mahmudul Islam, Attorney-General with Mahbubey Alam, Additional Attorney-General and Bazlur Rahman Chana, Deputy Attorney-General

For Respondents/Defendant: Rokanuddin Mahmud with MK Rahman, Awsafur Rahman, Sheela R Rahman, Adilur Rahman Khan, Nihad Kabir and Asaduzzaman, Advocates - For Daily Manabjamin and Daily Sangbad, Mainul Hosein with Md Azizul Haque, Md Mozammel Haque, Iqbal Malik, Manzur Kadir and Shamim-ul Alam, Advocates - For Daily Ittefaq, Khandoker Mahbub Hossain with Miftahuddin Ahmed, Khandker Bashir Ahmed and Afzal Hossain, Advocates - For HM Ershad, M Amirul Islam with Tania Amir, Monzil Murshid and Dr. Shirin Afroz, Advocates For 'Daily Janakantha' and Dr. Kamal Hossain and M. Amirul Islam, Advocates - For Justice Naimuddin Ahmed

JUDGMENT

Syed Amirul Islam, J.

1. These Rules arise out of a news item in the Daily Manabjamin under the caption "একটি রাজকীয় কেলেঙ্কারীর খসড়া" published in its issue dated 16-9-2000, corresponding to 1st of Ashwin, 1207 BS. After publication of the aforesaid news item the learned Attorney-General filed an application enclosing a copy thereof, to the Registrar of this Court to bring the same to the notice of the learned Chief Justice. It was duly placed before the learned Chief Justice who thereafter referred the matter to us for consideration. After hearing the learned Attorney-General and examining the contents of the news item we issued the Rule upon the reporter, writer, Chief Editor, printer and publisher of 'Daily Manabjamin'. Along with the said application the copies of the other daily newspapers were annexed wherein news items were published which referred to the news published by 'Manabjamin'. On perusal of the same, we also, on the same day, issued Rule upon the Chief Editor, Editor, Printer, owner and Special Reporter of Daily Sangbad for publishing the news item in their paper of 21st of September, 2000, corresponding to 6th Ashwin, 1407 BS under the caption "সেই ক্যাসেটটি রাষ্ট্রপ্রতি ও প্রধান বিচারপতি দপ্তরে"।
Similarly, we issued Rule against the Chief Editor, Editor, Printer, Publisher, owner and diplomatic reporter of the 'Daily Janakantha' for publishing another news item in their paper of 31st of October, 2000 corresponding to the 16th of Kartic, 1407 BS under the caption

"টাকা দিয়ে রায় পাল্টে ফেলার কথিত ঘটনার মত গুরুতর অভিযোগ পত্রিকায় ছাপা হওয়ার পরও আদালত থেকে স্যুয়োমটো রুল ইস্যু করা হয়নি।"

2. We also issued Rule upon the Chief Editor, Editor, Printer, Publisher, Owner and reporter of the Daily Ittefaq, Dhaka, for publication in their aforementioned newspaper a news published on the 1st of November, 2000, corresponding to the 17th of Kartic, 1407 BS with the caption

"টাকা দিয়ে রায় পাল্টাইয়া ফেলার অভিযোগ প্রকাশিত হইলেও স্যুয়োমটো হয় নাই।"

3. It may be mentioned that when we heard the learned Attorney-General at the time of issuing the aforesaid Rule we intended to issue a Rule upon Justice Naimuddin Ahmed for making a derogatory statement in a seminar, which has been published in the aforesaid newspapers. However, the learned Attorney-General then submitted that the said statement of Naimuddin did not amount to contempt of Court and so, on the first day, we did not issue any Rule against him. By our order dated 15-11-2000 we asked the Editor of 'Manabjamin' to produce the cassette in question with a transcript and directed him to disclose the source from which he obtained the cassette in question. Subsequently the Editor submitted the cassette with a transcript. We played the cassette in our chamber in presence of the learned Advocates of 'Manabjamin' and as well as in presence of the Deputy Attorney-General Mr Bazlur Rahman. After listening to the conversation recorded in the cassette it appeared that the transcript was not a complete one and parts of the conversation have been omitted therefrom. The cassette was again played in our chamber in presence of the learned Advocates representing all the parties. They were asked to give a correct transcript duly signed by them, which they did and the revised transcript is kept with the record. A copy of the said transcript was given to the learned Advocates of the parties. It is further mentioned that in response to the Rule issued by us on 8-11-2000 all the opposite parties appeared except the editor, printer, publisher and the reporter of Janakantha. Instead they published a news item in their paper on 22-11-2000 under the caption,

"আমি আদালত অবমাননা করিনি। আদালতের কাছে আমার কৈফিয়ত।"

4. We have the occasion to go through the news item published in the aforesaid newspaper and after hearing the learned Attorney-General we issued a contempt Rule against them on 22-11-2000 in response to which, they eventually appeared before the Court and in due course submitted two affidavits-in-opposition; one by the editor and the other by the reporter. On 27-11-2000, after considering the contents of the statements of Mr Justice Naimuddin Ahmed, we felt it necessary that we should also issue a Rule upon

him and so did issue a Rule upon him in response to which he appeared before this Court on 4-12-2000 and filed an affidavit-in-opposition.

5. After playing the cassette in the chamber it appears that HM Ershad had a conversation with one of the judges of this Court over the outcome of a criminal appeal which was heard by a Division Bench in which the learned judge sat. After hearing the tape HM Ershad admitted that he indeed had talked over phone with the learned judge concerned. We, therefore, issued a contempt Rule against him, HM Ershad, for trying to pervert the course of justice by influencing a judge of this Court.

6. In his application the learned Attorney-General has drawn our attention to the news item published in the front page of 'Manabjamin' on 16-9-2000 under the heading, "একটি রাজকীয় কেলেঙ্কারীর খসড়া" and quoting the relevant portions of the report he drew our attention to the box news as it appeared in the newspaper with a leading column captioned, "কি আছে ক্যাসেটা" and he contends that this box news item was published to impress upon the readers that the report is not an imaginary story but a fact. The following words were highlighted just below the aforesaid caption

"এই ব্যতিক্রমী রিপোর্টটি ঠিক রূপকথার ভিত্তিতে রচিত হয়। সত্য ঘটনা অবলম্বনে রচিত। বোধগম্য কারণেই এভাবে পত্রস্থ করা হলো। – সম্পাদক।"

7. It is therefore, contended by the learned Attorney-General that the story speaks of corruption of the 'Kazis' (Judges) and the Government's interference with the administration of justice. Reading the report a conscious citizen who keeps information about important events happening in the country is left in no doubt that the report refers to the famous criminal trial popularly known as "Janata Tower Case" which was pending in the appellate jurisdiction of the High Court Division and ended with a judgment delivered by a Division Bench of the High Court Division on 24th August, 2000. The report conveys the message that the judge took bribe to deliver a judgment favorable to a particular accused person but could not do so because of intervention by the Law Minister. It is, therefore, contended that a reader is bound to reach two conclusions, Judges take bribes and the Government interferes with the administration of justice and so the judges are not independent in performance of their functions. Reading the report a reader with a reasonable frame of mind is sure to develop an aversion for the judges and diffidence about the impartiality and integrity of the learned judges of the Supreme Court. It is also calculated to erode and undermine the confidence of the people in the administration of justice. One cannot think of a greater harm and obstruction to the administration of justice than this. There cannot be any doubt that this report constitutes gross form of contempt of Court. How this report has been understood by the general public and what message it has carried to the people can be clearly understood from the following report wherein he has quoted a relevant portion of news item published in the 'Manabjamin' on 16th of September, 2000 and the Daily Sangbad of 1st of September, 2000. He has contended that the story is so outrageous that detailed description of the report is not given in the memo. By publishing the aforementioned report the Chief Editor, Printer and the owner of the daily newspaper 'Manabjamin' have committed the gravest contempt of Court. In the interest of rule of law and independence of judiciary and administration of justice it is necessary that the aforementioned person should be called upon to show cause why they should not be proceeded against for committing Contempt of this Court and punished. This

is the short background of issuing the aforesaid Rules, which are being disposed of by this judgment.

8. The chief editor, printer, owner, and publisher and special correspondent of the daily 'Manabjamin' submitted in due course an affidavit-in-opposition wherein it is contended that they have the highest regard and respect for this Court and they hold it in a very high esteem. They consider that as pre-condition for rule of law, independence of judiciary and administration of justice this Court should be treated with utmost respect and deference by all concerned. The dignity, prestige and image of the judiciary and that of the Supreme Court must be kept, maintained and protected by avoiding any comments demeaning it or lowering it in the estimation of the public at large. The power, prestige and image of this Court should remain above all controversy. It is contended that the 'Daily Manabjamin' ever since its birth endeavored with its entire means to uphold the prestige, dignity and image of this Court and that of the judiciary. It has never published anything which might even be remotely considered as contumacious of this Court. On the contrary, in all its reports and features there has been explicit effort and endeavor to up hold the dignity and prestige of this Court. It is further contended that the 'Daily Manabjamin' in its publication on 16th September, 2000 published a box news in the front page which contained a caption "what is in the cassette" (English translation provided), and in it was a reproduction of a report earlier published in the daily Jugantor. The said box report was reproduced/quoted by the learned Attorney-General in his application. It is evident from the said report that it merely mentioned of the existence of a cassette centering which there were a lot of sensation created in the Court area that although the truthfulness of the subject could not be verified yet, there was a never ending speculation about it. In the said report as reproduced/quoted by the daily 'Manabjamin', it was further stated that the cassette recorded a conversation of a judge who spoke about such a matter over the telephone with a very important political leader that it was really unbelievable. The conversation referred to a late night meeting on 24th of August, 2000 and it was recorded by a political leader. The entire item, which was under the said caption, was nothing but a reproduction of a report published in the daily Jugantor, which was already published on 13-11-2000. Therefore, the 'daily Manabjamin' cannot be held responsible for their said caption news item as it made very clear that the said captioned news item including the caption was a reproduction of report originally published in the daily Jugantar. It is further contended that the report as published could not be considered as contumacious. It merely reports the existence of a tape conversation between a political leader and a judge and the caption merely described the contents of the report. It is further asserted that as the existence of the tape has already been admitted by the President of the Republic, the Law Minister and the Attorney-General, the report as reproduced also appears to be true. No offense, therefore, may be taken for re-production of the report. Their further case is that no action has been taken against the daily Jugantor for publishing it and so there cannot be any proceeding against the daily 'Manabjamin' for the said news. It is contended that in the aforesaid publication there was a leading news item under the heading 'A draft of royal scandal (English translation provided). It is contended that the heading no where refers to the Court, judiciary or judge and there is nothing in the title to make any inference that it refers to them and the caption makes it clear that the report is a story which is not related to any particular fact or situation. Under the said heading there was another box caption, which contained an apology and explanation of the editor of the daily 'Manabjamin' to the effect that "This unusual report is not exactly based on fairy tale but it was composed on a true incident. For understandable reasons it has been printed in this manner." (English translation provided). It is therefore contended that it is evident from the apology that the report was nothing but spinning a yarn and parable and at worst an allegory and a metaphor. It has been denied that it was about any particular happening or incident far less about any judge or corruption by a judge. It was further contended that it was not intended to be contumacious of the Supreme Court or any other Court and the report as

published did not refer to any Court or judge of this country. The report was a parable about a Kazi in a kingdom, a former king of it and his predicament: the actions of the ruling king adding to the predicament of the former king. The tale was composed by the editor and used as a parable. The public awareness is intended to be created so that such state of affairs as in the parabolic tale should not be the fate of our country. By composing the tale the editor tried to create awareness in the public about the kind of society we should have and the kind of society we should avoid. It was written in the public interest in order to make them vigilant against such parabolic scenario depicted by spinning a yarn. It was not intended or purported to demean, defame or lower any person or institution of this country in the estimation of the people far less the judiciary and judges. Neither was it intended to commit contempt of Court or to be contumacious of our judiciary or the Court. It was further contended that the allegation about the report as raised by the learned Attorney-General is not correct and by going through the news item one cannot conceive to be referred to the criminal appeal of Janata Tower case. The said parabolic tale has absolutely no reference to or connection with the said case or the judgment of the said case and the report does not convey any message that the judges take bribe to deliver a judgment favorable to a particular accused person or he could not do so because of the intervention of the law minister as alleged by the Attorney-General. The readers from the reading of it will certainly not draw the two conclusions as alleged by the Attorney-General as in the said report there was no allegation of taking any bribe by any of our judges or interference by the government in the administration of justice so that judges are not independent in their performance of their functions. It is also mentioned in the affidavit-in-opposition that there is no reasons for a reader to develop any aversion for the judges or diffidence about the neutrality and integrity of the judges of the Supreme Court. It is not calculated or intended to erode and undermine the confidence of the people in the administration of justice. It is then contended that it would be a sad occasion if the report, which was a journalist's parable, were to be considered a contempt of Court and obstruction in the administration of justice because such an article or feature in a modern newspaper in a democratic society, that enjoys the freedom of press and freedom of speech as the fundamental right guaranteed under the Constitution, is a common thing. Such reports are not uncommon in modern journalism in order to keep the public aware of the evils or danger that may befall a society, so that corrective measures and appropriate steps may be taken in time and the society can guard itself against such evils. Such reports and features are written for the public in utmost good faith in the public interest without any malice, but as a measure of fair comment on a public issue. It is then contended that this Court should draw an inference in favor of the daily 'Manabjamin' about its good intention, well-meaning, respect, regard and deference for the Court, judiciary and the judges from its conscious omission and refrain from reproducing the cassette till date. It is further asserted that the existence of the cassette is admitted by all the concerned quarters and there is a growing demand for action against the judge in question by the highest authority of the republic in keeping with the constitutional obligations and duty and therefore the daily 'Manabjamin' should be commended for the restraint it had shown so far by not publishing the contents of the cassette out of respect for the honor and dignity of the Court and judiciary. It is asserted that had the existence of the cassette not been unearthed and brought to the notice of the public by the press in general, a grave wrong would not only have gone unremedied and undetected, but there was a risk of occurrence of such things as the cassette had unearthed, continuing unabated and causing the erosion of an important public institution and leaving the public in a helpless situation. It is further contended that the part of the report, which refers to the cassette, mentions only about an individual judge. A distinction ought to be made between an individual judge and the judiciary as an institution, and the judge as a person and the Court as an institution. A scrutiny of the conduct of a judge or a remark or report about a judge and his conduct unbecoming of a judge, cannot by itself be a contempt of Court. It is contended, referring to Article 39(2) of the Constitution, that the freedom of press is

now a guaranteed right of the citizen of this country. There is public interest in the free flow of information and the public should be informed if a judge of a superior Court has in any manner acted contrary to his code of conduct. The freedom of press is of fundamental importance in our society. It covers not only the right of the press to impart information of general and public interest or concern but also the right of the public to receive it. It is further contended that in publishing the report in question, the daily 'Manabjamin' has only fulfilled its duty and obligation to the members of the public in a most decent and harmless manner without demeaning, defaming or lowering any person or institution in the estimation of the public. It is submitted that if the report in the daily 'Manabjamin', in the consideration of the President and the Attorney-General warrant an institution of a contempt proceeding against it, it should also warranted at the same time the scrutiny of the cassette in the hands of the Honorable President by the Supreme Judicial Council. If the report based on such cassette is considered contumacious, then the contents of the cassette should also be the subject matter of Supreme Judicial Council's consideration under the provision of law and the Constitution. The Attorney-General and the President have the duty of ensuring that the provision of the law and the Constitution are enforced in all respects, and that their duty is not limited to merely initiating a contempt proceeding against the press. It is in the interest of justice that all violators of the law and the Constitution should be brought to book without any exception. The public must not get a perception that the judiciary is trying to shield the judge concerned. There is no denying of the fact that there is a growing public perception that the contempt proceeding has been invoked in an ill attempt to cover the misconduct of a judge and that there is now a confrontation between the judiciary and the press, which should be avoided at any cost. It is further asserted that the matter involves utmost public interest and the dignity and the respect of this Court. It is not the journalists and the press who are duty bound to uphold and maintain it, but such duty is also shared by everyone including the members of the judiciary and the legal profession. None should fail in their respective duties, and none should be treated with an uneven hand or have the feeling of being so treated. It is also averred that if it is thought that justice will be served by issuing contempt Rule and show cause notice it will not be served but denied. A mere proceeding against the journalists by this Court will leave the main issue unaddressed, when the burning issue is corruption free judiciary and its cleansing by eliminating corrupt elements. After all, the judiciary is the last resort of the public against all sorts of misdeeds. Although in an affidavit-in-opposition it is not required to bring the law nevertheless in this case the daily 'Manabjamin' also quoted law in their defense and relies on the observation given by Lord Denning in a celebrated English case as reported in (1968) 2 All England Law Report and thereafter the final assertion made by the daily 'Manabjamin' is that the report in question was published bona fide and in good faith, without any malice and as a fair comment, not having contained any contumacious comment regarding the Court and therefore they are not liable to be proceeded against on the charge of contempt of Court. However, they expressed their sincere regret and prayed that the report and the parable will be accepted in good grace and in the same spirit in which it was written, and its publication be condoned.

9. Now, we want to refer to the case made out by HM Ershad who had a conversation with a Judge of this Court. The affidavit-in-opposition was sworn by himself and it is stated that he had conversation with the learned Judge, being seriously aggrieved by the unexpected judgment against him in the appeal of Janata Tower Case. It is stated that he had firm belief that the said case was the product of conspiracy to harass and humiliate him with political motive by fabricating false evidence against him. He thought that he would be acquitted in the case upon proper appreciation of the evidence on record by the High Court Division. It is further admitted in his affidavit-in-opposition that the learned Judge was known to him from long before and he simply tried to know from him how such a harsh judgment was given even without mentioning and considering the arguments of his

learned lawyer who argued the case days together and the learned Judge during his conversation with him expressed his own views about the said judgment. It is further contended that during his conversation with the learned Judge there is not a single word or any indication by which it may be presumed that he in any way tried to influence the said Judge to pervert the course of justice. It is then asserted that he was the president of the country for about nine years and there is no instance that he ever interfered with the independence of the judiciary in any manner whatsoever. The golden example of his highest respect to the independence of the judiciary is the judgment of the Appellate Division by which his decision of setting up of five High Court Divisions in different areas of Bangladesh was knocked down and he as a law abiding citizen being the President of the country bowed down to that decision of the Supreme Judiciary of the country with respect. It is stated that he is always respectful to the judiciary and during the tenure of his office he tried his best for the judiciary and its Judges for the better interest of the country. He however, now realized with great regret and sorrow that in spite of his frustration due to unexpected judgment in his appeal he ought not have talked with the learned Judge about his case though he had done so innocently and without any ill motive. It is contended that his entire conversation was in the nature of an aggrieved person who considered that justice had been denied to him and it was an emotional act without any ill motive for which he is extremely sorry for his said emotional act and in the circumstances tendered unqualified apology for the same and therefore, he begged mercy of this Court and prayed for exonerating him from the charge by dropping the impugned proceeding.

10. As it has already been indicated that the Editor of Ittefaq entered appearance through Mr Mainul Hosein while the publisher of the said paper entered appearance through Mr Rokanuddin Mahmud. They have filed two separate sets of affidavit-in-opposition.

11. The case of the Editor of the 'Daily Ittefaq' is that they did not publish any report of their own which was detrimental to the dignity, integrity and prestige of the judiciary. They are aware of the importance of the judiciary for safeguarding the press freedom. It is contended that in the application the learned Attorney-General said nothing against the daily Ittefaq in his application before this Court for issuing contempt Rule against 'Manabjamin'. He submitted that the daily Ittefaq or its reporter or editor were not the author of the report, which is the subject matter of the main contempt proceedings and they published no contemptuous news about the Court. It is contended that they published an observation made by an important person like Mr Justice Naimuddin Ahmed, who himself was a Judge of the High Court Division of the Supreme Court and he is now the member of the Law Commission. They also asserted in their affidavit-in-opposition that till now no Rule has been issued against the maker of the statement, Mr Justice Naimuddin Ahmed. They had published the news item after it was published in the 'Daily Janakantha' and no rejoinder came from Mr Justice Naimuddin Ahmed. It is then contended that they had published the observation of Mr Naimuddin Ahmed not only because it became imperative for the 'Daily Ittefaq' to keep people informed about serious allegation concerning a vital organ of the state like the judiciary but also for maintaining their credibility with their readers. They then tried to justify their stand relying on an observation given by ourselves about the Judge concerned that his conduct was most unbecoming of a Judge, which supports their concerned anxiety and that the said observation of Mr Justice Naimuddin Ahmed was published in the interest of the judiciary. It is contended that they have not done anything that could be regarded as contemptuous of judiciary or the Court, rather they did what was thought essential for holding high the position of the judiciary. They published the observation of Mr Justice Naimuddin Ahmed in the belief that the dignity and integrity of the judiciary is best maintained when truth is faced bravely and public suspicion is removed through bold action.

12. The case of the printer and publisher of 'Daily Ittefaq' is that it is one of the oldest newspapers in Bangladesh which has been in publication for about last 50 years. It is

highly respected and very well regarded newspaper and it enjoys the largest circulation in the country. Its readers are from all classes and strata of society. It has been a catalyst for changes and reforms as well as political development in our country. It played a historical role during the war of liberation. The views expressed in the newspaper are always pro-people and it always contains features which are constructive criticism of various government programmes and policies. In its 50 years of publication, its publication was stopped in the past several times by various governments by arbitrary and authoritarian actions for expressing views upholding the rights of the people and publishing news regarding ill-designed action of the government. During the war of liberation the then Pakistani Army burnt down the press and the office of the 'daily Ittefaq'. It was also closed down by the Ayub regime on 1960. The 'Daily Ittefaq' played prominent role in all the democratic movements for the overthrow of autocratic regimes in the country at all times. It is further contended that it has the highest regard and respect for the Court and judiciary which has been demonstrated explicitly on various occasions in various reports and features by it. It is a firm believer in the independence of judiciary, Rule of law and administration of justice free from interference by the government. It also considers that as a precondition for Rule of law, independence of judiciary and an impartial administration of justice, the Court and the judiciary ought to be treated with due respect, regard and deference by all quarters irrespective of how high or how low. Unless the dignity and the prestige of the judiciary and those of the Court are kept, maintained and protected by all concerned by avoiding any comments demeaning it or lowering it in the estimation of the public at large, the edifice of our society will be seriously at risk. It also believes that the responsibility in this regard is to be shared equally by all, including the members of the judiciary and the legal profession. It is then contended that the 'Daily Ittefaq' in its publication on 1-10-2000 carried a news item under the captioned heading "No suo motu Rule was issued despite publication of allegation of change of judgment for gratification" (English translation provided). The report merely dwelt on the speech delivered by a retired Judge of the Supreme Court who is now a member of the Law Commission, at a public function in the Dhaka University. The said Justice in his speech referred to a tape conversation between a Judge and a convicted accused, and the alleged change of proposed judgment on gratification. The report was nothing but an accurate reporting of a speech delivered by a person no other than a retired Judge of the Supreme Court, who is now a member of the Law Commission. It is a matter of great public importance when a former Judge of the Supreme Court makes such scathing remark touching upon the conduct of a present Judge. The 'daily Ittefaq' would have failed in its duty and lost its credibility had it not reported such an important utterance touching upon such a public institution in which lies the ultimate resort of the public for the wrong to be remedied. It is further contended that the report was published in good faith and bona fide in public interest and without any malice. It enjoys the qualified privilege. A day prior to the publication of the report in question the daily Janakantha had also published a similar report about the said speech. If the making of the speech containing the aforesaid statements was not a contempt of Court by the said Justice the accurate reporting of it by the 'daily Ittefaq' cannot be contempt of Court. It is contended that Article 39(2) of the Constitution guarantees the freedom of speech and freedom of press and a free press has a duty to write and publish news items and features concerning matters of utmost public interest so that the members of the public are aware of the happenings surrounding them and are fully abreast with the developments surrounding institutions with which their interests are intertwined. It is finally contended that the report in question contains no disparaging remarks or demeaning words about any Judge or any Court and therefore no one can take exception to the publication of it, far less for contempt of Court and in the facts and circumstances no contempt has been committed by publication of the said report about the speech when the maker of the speech has not been alleged to have committed any contempt. In this case it has been asserted that a distinction ought to be made between an individual Judge as a person and the judiciary as an institution. The conduct of

a Judge is not the conduct of the judiciary, and it cannot be held responsible for the conduct of only an individual Judge who alone is responsible for his own conduct. To sum up, the report in question was published bona fide and in good faith, without any malice and as a fair comment, not having contained any contumacious comment regarding the Court, and therefore, it cannot give rise to a charge of contempt of Court.

13. The case of the Chief Editor, Editor, Printer, Publisher, Owner and special reporter of 'daily Sangbad' is similar to the one contained in the affidavit-in-opposition filed by 'daily Ittefaq'. It is contended that the 'daily Sangbad' is the oldest vernacular daily newspaper in Bangladesh having its publication for last 50 years which is a highly respected and well regarded newspaper and it enjoys a very wide circulation. It is contended that its readers are mostly well qualified and educated people of Bangladesh society belonging to various professional groups. It has been a catalyst for changes and reforms as well as political developments in our country and it played a historical role during the war of liberation. It is a firm believer in the independence of judiciary, rule of law and administration of justice free from interference by the Government. It is stated that in its publication on 21-9-2000 it carried a news item under the captioned heading "That cassette is in the offices of the President and the Chief Justice?" (English translation provided). The report merely dwelt on the location of the cassette and the debate and storm that was going on centering around the cassette. It was also mentioned that the news about the cassette had already been published in two other newspapers. The report contained comments about the contents of the news item in those newspapers. The other part of the report concerned the contents of the cassette which was said to be a conversation between a Judge and a top political leader about the judgment of the Court. In the said report the Daily Sangbad studiously avoided making any comment on the contents of the cassette or its supposed conversation. The report contains no remark about the Court or Judge or the judiciary. It was a mere report regarding the aforesaid cassette. There was nothing in the report that could even be remotely construed as contumacious or disrespectful about the judiciary, Judge or Court. It is further contended that even the Attorney-General in his application did not allege anything about the news item published in this paper. It is also contended that the news item published in this paper was cited by the learned Attorney-General in his application to show how the minds of the readers of the story published in 'Manabjamin' had been reacted upon. In other words, the learned Attorney-General in his application sought to use the report as an evidence in the contempt proceeding against the daily 'Manabjamin'. It is further asserted that the subsequent developments confirmed that the contents of the report published in the 'daily Sangbad' were not only true but it also warranted an immediate response from the highest authority of the country in terms of his and others constitutional obligation. It is further contended that a free press in a democratic society like ours where its freedom is guaranteed by the Constitution has a duty to write and publish news item concerning matter of utmost public interest so that the members of the public are aware of the happenings surrounding them and are fully abreast with the development surrounding a public institution with which their interest are intertwined. In publishing the report in question the 'Daily Sangbad' has only fulfilled its duty and obligation to the members of the public in a most decent and harmless manner without demeaning, lowering any person or institution in the estimation of public. Therefore, no one can take exception to the publication of it, far less for contempt of Court and therefore, by publishing this item they have not committed any contempt of this Court. Whatever they have done they have done in honest discharge of their duties and the report in question has been published bona fide and in good faith without any malice and as a fair comment, not having contained any contumacious comment regarding the Court and therefore, they are not liable to be proceeded on charge of contempt of Court.

14. We have already noted that at a belated stage the Chief Editor, Editor, printer, publisher and owner of 'Daily Janakantha' has entered appearance and filed affidavit in

opposition on 13-12-2000. Thereafter, on 24-1-2001 they have filed another affidavit-in-opposition with a prayer for accepting the same on the ground that the earlier affidavit-in-opposition contains innumerable printing mistakes. After hearing the learned Advocate for Janakantha the affidavit-in-opposition filed on 24-1-2001 was accepted. In such situation the earlier affidavit-in-opposition filed on 13-12-2000 was ordered to be kept with the record along with the present affidavit-in-opposition. Therefore, we shall confine to the averments made by the Janakantha in their affidavit-in-opposition dated 24-1-2001.

15. The case of the Janakantha is that the news item published in their issue of 31st October, 2000 was believed by them as by everyone else that Justice Naimuddin Ahmed wanted to bring the controversy, speculation and the gossip to an end which was aroused due to tape in question, by bringing the matter before the Court of law for proper adjudication. Thus with the motive of upholding the just image of the judiciary which is of utmost public importance, it was needed to be brought out in the public by the press. The 'Daily Janakantha', being one of the largest Bengali dailies, felt it was its bounden duty to publish the same. The said publication by Janakantha of the statement made by Justice Naimuddin Ahmed was neither made nor intended to tarnish the image of the Court or any Judge, nor to hurt or harm the efficacy of the justice delivery system. The said publication "is bona fide, reasonable and for public interest". The plea of Justice Naimuddin Ahmed was to draw the attention of the appropriate authorities to take proper action, thereby bringing this whole affair out into the open by Janakantha and other newspapers, it was to give it the much needed force and light to bring it out of darkness, as it is said that 'sunlight is the greatest disinfectant to any malady'. It is contended that the media in general, and the daily Janakantha in particular, believes in the open discussion for finding the truth and plays a significant role as a 'watchdog' for the law enforcement machinery of the republic. Rule of law, equal justice for all and strict law enforcement being a social and a constitutional postulate, 'Daily Janakantha' is committed to and dedicated for upholding those values. It is asserted that it has therefore not only an unequivocal faith in the judiciary as an institution safeguarding those values but has also been pursuing its role in mobilizing public opinion behind those values so that people may perceive the judiciary not only as having the glory of laws and ultimate say on laws but also as a place where people can have shelter as the last resort for complete justice and protection whenever such values are derogated and violated in the hands of the evils in society, fraudsters, blackmailers and perpetrators of crime. It is asserted that the 'Daily Janakantha', in this regard, has been pivoted to ensure that the well-known culprits, the mafia force, the terrorists, the abusers of women and children, violations of human rights, and particularly those criminal elements in the upper echelon of society involved in killing, 'white-collar' crime, corruption, abusing their power and usurpers of power through unconstitutional means, are held accountable through the due process of law and, on the other hand, ensure that, the poor and the disadvantaged, the weak and the oppressed may have access to justice. The role and objective of the "Daily Janakantha" has thus always been and shall continue to be for active campaign and mobilization of public opinion as well as to alert the appropriate authorities so that no one can escape the realm of law nor can bend the law or subvert the due process of law or pervert the course of justice. No matter how high or mighty he may be, he must be brought to book i.e.

"যে অপরাধী সে অপরাধীই। সে যেই হোক না কেন তার বিচার নিশ্চিত করতেই হবে।"

and 'Daily janakantha' firmy believes in this principle. When 'Daily Janakantha' was set up, one of its objectives was to advocate this principle and the application of the same standard of law and the enforcement of the same in respect of all, irrespective of his position in society. 'Daily Janakantha's' vision is to contribute through 'public interest journalism' for the establishment of a fair and just society based on rule of law and in

pursuance of the above objective, Janakantha has on many occasions successfully unmasked, though at great risk of its journalists and despite serious hazard from certain serious mafia activities, unearthed facts through its investigative journalism, and thereby mobilised public opinion for justice against those crimes. This role of the press and media is perhaps the most effective ingredient that strengthens the hand of the judiciary in doing justice against the powerful. In pursuing this investigative public interest journalism, 'Daily Janakantha's reporters took serious risk to their personal safety, in order to ensure that the justice delivery system can, in fact, work and does not fall prey to high and mighty, or subjected to threat and corruption. Late Journalist Mr Shamsur Rahman of 'Daily Janakantha' was such a brave soldier against the high and mighty power of evil, who lost his life for exposing for the first time the true facts regarding the syndicated criminals and exposing their underworld activities, including smuggling across the border. Irrespective of political color or complexion, every sensitive citizen highly appreciated this significant contribution and condemned this murder. Yet the murder of the Daily Janakantha's journalist Mr Shamsur Rahman still awaits the completion of full investigation by the police and trial of those who were responsible. His untimely and premature death has not gone in vain because many of his followers in the journalist circle, has immortalized his ideals and in practice many young journalists of 'Daily Janakantha' adopted the ideals of late Shamsur Rahman as role model for upholding the truth with courage and conviction. The 'Daily Janakantha' along with the other newspapers act for the establishment of the rule of law. It is further stated that in this view of the matter it takes indulgence of this Court in stating some of the illustrations how 'Daily Janakantha' along with other media serve the cause of justice and truth. It is stated that the 'Daily Janakantha' was to identify and unearth for the first time the activities of the 'mafia don' terrorist of Khulna, none other than 'Ershad Sikder' himself. 'Daily Janakantha' single-handedly ran continuous coverage and reports unmasking the gruesome activities of this notorious gang of terrorists, drawing the attention of all relevant law enforcement agencies, right thinking people and persisted in its commitments until it culminated in Ershad's eventual arrest and conviction. It is further stated that it was the Janakantha which first published the news about the rape and murder of Yasmin in Dinajpur in the hands of law enforcement agencies which shocked the conscience of the entire nation and the 'Daily Janakantha' also continued to play its role to mobilize public opinion so as to ensure that the offenders are tried and punished for their heinous crime and succeeded in achieving that outcome. It may be mentioned here that the convicts, by taking full advantage of the appeal procedure, have preferred an appeal before the High Court Division which is now being heard and 'Daily Janakantha' as part of its commitment to those fundamental issues and values, continues to run news items regularly arising out of this case, sensitizing the people that such crime do not go unpunished, thus reinforcing the faith of public in the justice delivery system and the Janakantha has also played a pivotal role in mobilizing public opinion for demanding justice in the rape and murder case of Shima Chaudhury in Chittagong at the hands of the police officers while she was detained in so called 'safe-custody'.

16. It is therefore contended that the Daily Janakantha, like millions of people, helplessly witness the Court giving bail to many of those who consider themselves to be above the law. Many who are released on bail again perpetrate crime and go beyond the reach of law. The 'Daily Janakantha' like the helpless citizens looks for balance in the justice delivery system to redress the imbalance in favor of the weak, the oppressed and the victims. It is further contended that the publication which is the subject matter of the contempt Rule was published by the 'Daily Janakantha' with sincere and genuine motive to uphold the image and prestige of this Court as well as by sensitising and activating the constitutional functionaries to draw their attention to take necessary steps. It is further stated that another recent example of the public interest journalism by 'Daily Janakantha' was when a poor father wrote a letter to a columnist, Mr Nirmal Sen of 'Daily Janakantha',

about the plight of his unfortunate daughter which was published in 'Daily Janakantha' and as a result a suo motu Rule was issued solely based upon the publication made by 'Daily Janakantha'. This is a proactive move by the judiciary, a trend now beginning to inspire faith in the people that the vice of the disadvantaged is echoed in the majesty of this house of justice and it is the expectation of the people that the highest Courts of the land will itself take notice of gross violation of human rights and abuse of power and 'Daily Janakantha' along with other newspapers are voicing for the people and for the establishment of rule of law through proactive, public interest journalism espousing a proactive role of the judiciary and public interest litigation. It is further contended that the publication, which is the subject matter of this contempt Rule, was published by 'Daily Janakantha' with the same motive and in the same spirit as that of the aforementioned news items, so that 'Daily Janakantha' may act as a 'handy maiden' of the justice delivery system; for upholding the image and prestige of this institution as well as by sensitizing and activating the constitutional functionaries whose duty is to clean the system and bring an end to these unfruitful speculations about the said tape and apprise the people about the truth and bring the entire matter in the open by activating constitutional mechanisms which provide for this type of situation and take appropriate action against those who are found to be responsible for the grave impropriety, which is clearly disclosed from the contents of the tape. It is further asserted that rather than fortifying the news media, including 'Daily Janakantha', as an aid and 'handy maiden' of the justice delivery system, the contempt power may not be exercised to weaken this role of the press. The press and the media play the most complementary and supporting role in mobilizing the opinions to ensure justice and due process of law and the present proceeding, it is contended, is the result, not of the reporting in the press but a helpless situation created due to non functioning of the constitutional obligation of the President of the country, failing to activate the investigative role of the Supreme Judicial Council and the silence of other investigation agencies into the matter. This Court may consider the grave concern and appropriate action against those who were, as it apparently seems, involved in the making of the tape and engaged in conversation therein, disclosing in substance certain impropriety which therefore merits attention from this Court and warrants invoking the investigative machinery for bringing those perpetrators to book who have made the tape and to find out the circumstances and the motive and the innuendo of the conversation and of its recording, indicating unimaginable impropriety to obtain a decision based on non-judicial consideration. It is further stated that instead, the newspapers are persecuted for doing their legitimate job, i.e., to genuinely report news, comment upon events, trends or views and to genuinely act as the 'voice' of the people or as a public watchdog, which has been done by 'Daily Janakantha' in a bona fide manner and 'without any malice or attempting to impair the administration of justice', but rather to fortify the hands of the justice delivery system and any attempt to curb the freedom of the press, expression, and speech in the name of contempt of Court is neither tenable in law nor desirable, since an important arm, i.e. the media, in the aid of the justice delivery system itself may be impaired. In the affidavit-in-opposition it has further been stated that 'the check and balance' in the overall system of governance will be disturbed and the media, often the 'hand maiden' of the justice delivery system would then be prevented from acting as a legitimate catalyst towards a more transparent society based on rule of law. It is further asserted that this legitimate role of 'Daily Janakantha' along with other newspapers as the 'People's Voice' doing public scrutiny and acting as the watchdog for and on behalf of the people is guaranteed under Article 39 of the Constitution, where the freedom of press, expression and speech, are guaranteed and this freedom can only be subjected to a reasonable restriction imposed by law in relation to contempt of Court and there is no law or jurisprudence in currency relating to the laws on contempt, authorizing such derogation so as to negate the very essence of freedom of the press or expression or speech, which the Court is oath bound to protect and defend as the guardian of the Constitution. It is further stated that the Janakantha's publication in question which is the subject-matter of

this contempt Rule, is not a criticism of the judiciary, but reporting of a speech delivered in a seminar by a former Judge of the Supreme Court and member of Law Commission to aid the judiciary and the objective of the 'Daily Janakanth's' report was not to scandalize the Judiciary but rather to draw the attention of the highest functionaries of the Republic to take appropriate steps which still remains wanting. It is contended that the motive or object of such speech by Justice Naimuddin Ahmed or the said report in Janakantha and other newspaper which are the subject matter of this contempt proceedings, was not to degrade or tarnish the image of the judiciary but to use it as a tool and a catalyst to bring about an 'in-house cleaning' so as to restore back the glorious image of the judiciary in the mind of the people as they would cherish to see. By unmasking the ill activities of a few 'rotten apples' the Judiciary as a whole is not attacked and unless appropriate and timely action is taken against those 'rotten apples' then there is danger that the entire institution may face a threat of irreparable harm. It is contended that the statements published in the 'Daily Janakantha' in any event, do not amount to any criticism of the Judiciary as a whole and therefore outside the scope of contempt and it is contended that the Contempt of Court Act, 1926 does not define as to what substantially tantamount to contempt, but merely prescribes punishment therein and there is no statutory laws in Bangladesh defining the parameters of contempt and if there has been any contempt at all, it has been caused by the atrocious and immoral activities of the concerned parties involved in the tape and not by the publication of 'Daily Janakantha' or any other newspaper reporting the same. It is further asserted that the statement made by Justice (Retd) Naimuddin Ahmed in a seminar/workshop does not fall within the purview of contempt laws or within the parameters of "reasonable restrictions" as contemplated in Article 39 of the Constitution. Otherwise, this Republic would be converted into a forbidden and a hidden society where even in academic seminars, people would be shy to express their views or of reporting of the views so expressed. The entire case against 'Daily Janakantha' is underpinned against the publication of the comments made by Justice Naimuddin Ahmed as they fairly and correctly perceived them to be so and even outspoken comments and rumbustious comments are permitted within the parameters of reasonableness when the freedom of speech and individual liberty is at stake which the Courts have always unfailingly upheld. Otherwise, wrongdoers would go unpunished because everyone would be too scared to tell the truth and the media would be persecuted and intimidated like that as would be done by a king executing the messenger or the 'bearer of the bad news'. It is further contended that the former Chief Justice Latifur Rahman in an article titled "Accountability of Judges" published in 1999 BLD 96 reconfirmed the role of the press as a watchdog over the judiciary. It is further asserted that the comments of Justice Naimuddin Ahmed and the publication thereof by 'Daily Janakantha' and others were done to be used as a tool by inviting the appropriate authorities to "improve the Judiciary" and did not cross the boundary between fair criticism and contempt of Court. It is further contended that with democracy, accountability and rule of law taking firm roots all over the world, the concept of contempt as "scandalizing a Court or a Judge" has gradually eroded away and become obsolete and the only other type of contempt that is left jurisprudentially today is in respect of disobedience of any lawful order of the Court to obstruct or interfere with the due process of law or justice. It is further emphatically asserted that the publications and comments in respect of the said tape are in respect of acts 'contrary to law or public good' and, as such, are immune and do not amount to any contempt as scandalizing any Court or a Judge. It is contended that Justice Naimuddin Ahmed as a member of the Law Commission is entitled to be critical of a system or a situation of unimaginable impropriety as was recognized by the Indian Supreme Court and was apprehended by their Lordship that unless the law of contempt is used in a restrictive manner members of the law Commission and journalists may run the risk of doing their professional duties. It is also part of the professional work of the Law Commission as it is also the professional duty of any journalist which involves unpleasant criticism of Judges, Judiciary and the system itself. It is stated that the law of contempt of Court cannot be used as an attempt to silence

the voice of scrutiny and under the Constitution of Bangladesh, the Sovereign People of the Republic and every individual citizen therein can hold accountable all organs of the Republic through public scrutiny. They have the right to know what is the state of each organ of the Republic, including the Judiciary, in respect of their functions and in discharge of their duties. Because such powers of the State functionaries in different organs of the Republic have been delegated by the sovereign people of the Republic through the Constitution as an embodiment of the 'solemn expression of the will of the people'; which cannot be subverted by using contempt petition or proceeding as a cloak or a shield. It is contended that the journalists and Justice Naimuddin Ahmed enjoys such rights and privileges simply on account of being citizens of Bangladesh, as part of the embodiment of the sovereign people of the Republic and therefore this contempt petition purports to brutally mutilate the standards of justice and democracy set by the sovereign people, as embodied in the Constitution, as well as annihilate the democratic practices and norms as recognized in any civilized society. Contempt actions therefore cannot be aimed at subverting such rights purporting to rob the inalienable right of the sovereign people and every citizen therein to question and hold accountable every organ of the Republic, including their judiciary, in respect of its functions and in discharge of its duties to the people, as observed in American Chief Justice Wilmot's note (Wilmot Edn. 1802). It is further contended that the contempt powers ought not to be used in attempts to silence the voice of the sovereign people of the republic and their right to hold their state functionaries accountable, including those that are in the Judiciary by misusing and misinterpreting the laws on contempt so as to use it as a shield or a cloak against the sovereign people and thereby encroach upon their inalienable right to hold all organs of the republic, including the Judiciary, accountable, inter alia, through bona fide ventilation of opinion of the people and by any individual citizen therein, whether these comments are from a former Judge or a Journalist. It is further asserted that the laws relating to contempt may be misrepresented or misused unless it is read and predicated in the context and meaning of freedom of speech. All the authorities, precedents and case laws from different jurisdictions around the world have emerged as a consistent and modern jurisprudence, which do not support the case for the alleged contempt in the instant case and it is now acknowledged that our Judges are mere mortals imbued with human follies and "if Judges have frailties-after all, they are human they need to be corrected by independent criticism" as suggested by Mr Justice Iyer. If judiciary has serious shortcomings which demand systems correction through socially oriented reform initiated through constructive criticism, contempt power should not be an indirect deterrent and it is stated that the legitimacy of the judicial organ of the State is closely connected with the perceived confidence of the people. Unlike the other organs of the republic, the Judiciary is not mandated to govern through election or accountable through election. Unlike the executive the Judiciary does not control or have power over the Army, Navy or the police of the Republic. It is finally contended that the unfortunate reality of the Judiciary in Bangladesh as reported in various recent opinion polls, survey and report of Transparency International (BD) discloses the concern of corruption in the judiciary and, in fact, the newspapers and the media have done a tremendous service to the nation by bringing this 'unimaginable impropriety' out in the open, so that the force of 'enlightenment' may initiate timely action and take appropriate steps against the 'ill-doers' as well as create an opportunity to regain the trust of the people by taking adequate preventive measure and thereby restore back the glory of the Judiciary and, in the above premises, it is contended that the proceeding against Justice Naimuddin Ahmed and all newspapers may be dropped.

17. The case of Justice Naimuddin Ahmed as stated in his affidavit is that his remarks were extempore. He has no recollection of what he exactly said. As there was no written text of his speech he is in difficulty to say whether his statements were correctly translated and reproduced by the 'Daily Janakantha' on 30-10-2000 and Ittefaq on 1-11-2000. In spite of the above difficulties, he did accept that the above two newspapers reported his

remarks, as they perceived them to be, honestly and correctly. It is further contended that he remembers that some of the participants and members of the audience raised points on the problems of the judiciary such as, backlog of cases, delay in disposal of cases, erosion of values, judicial accountability, law of contempt of Court. He was specifically requested by several members of the audience to give his views on those issues in the context of his experience as a Judge and in the above context, he might have remarked that like other areas of society some Judges might have lacked the sense of values and devotion to duties leading to accumulation of cases which were probably reported by the newspapers in question as follows:

"অন্য অনেক ক্ষেত্রের মত বিচারকদের মধ্যে থেকেও মূল্যবোধ প্রায় উঠে গেছে, তাদের কারণেই আদালতগুলোর মামলা পাহাড় জমেছে।"

It is further contended that while making the aforesaid statement he did not mean that all Judges of Bangladesh or the judiciary in Bangladesh as a whole, are devoid of any sense of values but he wanted to convey the message that among the Judges also there are some persons who lack sense of value and dedication to duty and that is why cases have accumulated in the Courts. The expression, "মূল্যবোধ প্রায় উঠে গেছে" has to be read in the context of the expression, "পাহাড় জমেছে" It is contended that being a Judge, though retired, he could not but be candid unlike many others, he could not mislead the audience in the workshop and lay all blame for the delay in disposal of cases can be done and backlog on the lawyers, the parties to the litigations and on the law. The expression, "মূল্যবোধ" has/had, no other context in his statement and cannot be understood in the general literal sense of values, far less as casting any aspersion on the Judges. He further asserted that it is now well settled that expeditious disposal of cases in the Subordinate Courts by proper case management and Court management is primarily the responsibility of the Judge and that was what he meant by the remark. It is further stated that when someone from the audience referred to a news-item published in a particular newspaper about an alleged conversation between a litigant and a Judge of the Supreme Court and wanted to know whether such publication amounted to contempt of Court, he expressed his grave concern at the publication of such a scandalous story implicating a Judge of the highest Court and asked himself as to why proceedings for contempt were not being initiated. It is further submitted that as he now looks in retrospect, he did not believe that there could be any conversation between a sitting Judge of the Supreme Court and a litigant in the manner as was reported and the above comments were entirely aimed at upholding the authority, dignity, honor and glory of an institution to which he belonged and which is the last resort of the people. Then he contended that the observation,

"বিচারকের সংখ্যা প্রায় ৪ গুণ বৃদ্ধি পেলেও মামলার নিষ্পত্তি দ্রুততর হওয়ার পরিবর্তে মামলার জট সৃষ্টি হচ্ছে।"

is a statement of fact and does not amount to any manner of contempt of Court and that the expression

"আইনজীবীরা বড় জোর কয়েকদিন মামলা বিলম্বিত করতে পারেন কিন্তু বিচারকগণ তা পারেন অনন্তকাল।"

is a widely accepted world-wide slogan which runs as follows:

> If a lawyer wants to delay a case, he can delay it for some time. If a Judge wants to delay a case he can delay it for all time to come" and, as such, he submitted that there is no element of contempt in the slogan as it simply means that if a Judge is determined to dispose of a case, no lawyer can stop him from doing so.

18. He further contended that the observation,

"বিচারক সত্তর সালের মত নিষ্ঠা ও একাগ্রতার সঙ্গে কাজ করলে আদালতগুলোয় এত মামলা জমতো না।"

is an honest expression of the comparison of the degree of devotion and dedication to judicial work of the Judges of the 70s and earlier and those of the Judges of the present day, among whom he is also included. The expression is not contempt but a self analysis and an attempt to establish the past glory of the judiciary. It is further contended that his entire efforts in making the statements in question were to vindicate the authority, respectability, honor and dignity of the judiciary of which he has been an integral part during the best period of his life and the aforesaid remarks made by him at the said workshop were neither "derogatory" nor "scandalous statements regarding the judiciary" but were intended to vindicate the authority, honor, dignity and respectability of the judiciary.

19. Mr Mahmudul Islam, the learned Attorney-General appearing for the State, submits that there are three categories of contempt of Court, (a) scandalisation of Court, (b) disobedience to the order of the Court or breach of undertaking given to the Court and (c) interference with the course of justice and in this case we are involved with the first and the third category. He then submits that for the protection of organized society and maintenance of rule of law there is the necessity of independent and fearless judiciary in which the public will have confidence as dispenser of justice. Therefore a publication which scandalizes the Court attributing unfitness, unfairness or corruption in discharge of duty is contempt of Court and Article 39 of the Constitution guarantees freedom of expression with the limitation that reasonable restriction on the freedom of expression may be imposed in relation to contempt of Court. He further submits that unless a balance is struck between the need to keep the administration of justice free from influence and pressure and the freedom of expression and the law of contempt is interpreted to forbid all criticism of judicial work, the law will not be reasonable. The Privy Council ruled allowing criticism made of judicial work in Ambard vs. AG of Trinidad and Tobago, AIR 1936 PC 141 and the observation of the privy council is applicable with greater force where the constitution guarantees freedom of expression and accordingly, he submits that fair criticism of judicial work has to be and is allowed and in the absence of any imputation of motive or bias or corruption a severe criticism even on incorrect premises was held not to constitute contempt of Court and, in support of his contention, he relies on the following decisions: R. vs. Metropolitan Police Commissioner ex p. Blackburn, (1968) 2 QB 150; P.N. Duda vs. Shiv Shankar, AIR (1988) SC 1208; Viswanath vs. Venkataramaih (1990) 2 CrLJ 2179; Moinul Hosein vs. Sheikh Hasina Wazed, : LEX/BDHC/0220/2000 : 53 DLR 138. The learned Attorney-General then submits that while dealing with the subject Bradley and Ewing observed that the work of the Courts should not be outside the scope of political

discussion and citing some criticisms of judicial work they commented, "Instant political reaction to events such as this may sometimes be ill-informed or exaggerated, but a corrective is needed when Judges are seriously insensitive to changing social opinion." He frankly urges upon us that the instant case must be considered keeping these principles in mind. He submits that a proceeding for contempt of Court is a quasi-criminal proceeding and the case of each contemner has to be considered separately on the basis of materials on record.

20. The learned Attorney-General then makes his submission in respect of the case of each of the contemners. He first makes his submission in respect of the case of 'Manabjamin' and contended that it is now an undisputed fact that Mr Ershad had a telephonic talk with a Judge of this Court and it was recorded in a cassette and 'Manabjamin' had the cassette in its possession, 'Manabjamin' in its publication referred to this cassette and thereafter published a story giving the readers a prominent notice that the story was based not on a fairy tale, but on facts and thereby impressed upon the readers that the story is true in substance though not in details and the story is a scandalisation of the Judges of the highest kind. The learned Attorney-General further submits that reference to certain facts and figures in the story clearly bring home to the readers that the story refers to Janata Tower case, disposed of by a Division Bench of the High Court Division only a few days before the offending publication and the report conveys the message that the Judges took bribe to deliver a judgment favorable to a particular accused, but could not do so due to the intervention of the Law Minister. The learned Attorney-General then submits that there are some general statements about "Kazis" and the readers get an impression that the Judges in this land are amenable to extraneous influence of various kind. The learned Attorney-General referring to the contents of the cassette submits that the talk recorded in the cassette bears no relation to the story published and there is nothing in the cassette to support the story published and if the talk recorded in the cassette would have been published, the newspaper men could have defended by saying that the people have a right to know what is happening but the story published is a far cry from the actual talk recorded in the cassette. The newspaper has gone for cheap sensationalism without having any foundation on truth and has rendered a severe blow to the efficacy of the administration of justice. There cannot be a graver contempt of Court than carrying the message to the people at large that Judges of the Supreme Court are open to bribe and corruption and nothing more deadly in eroding the confidence of the people in the administration of justice can be contemplated. The 'Manabjamin' people have not tendered unqualified apology, but pleaded justification for their action which is all the more serious. He then submits that reading the story the readers with reasonable frame of mind are sure to develop an aversion for the Judges and diffidence about the impartiality and integrity of the learned Judges of this Court. The 'Manabjamin' people are not contrite for that and therefore the case of the 'Manabjamin' has been established beyond reasonable doubt.

21. The learned Attorney-General then submits that the Sangbad has merely published the fact of the existence of the cassette and has expressed anxiety for the administration of justice in which all the citizens of the country have definite interest and all desire that the Judges do, in the very same way they have done in the past, enjoy the utmost confidence of the people. He further submits that the publication of the news by Sangbad about the cassette and its comments on it do not constitute contempt of Court. The learned Attorney-General further submits that the same is the case of 'The 'Daily Ittefaq" and it cannot be found guilty of contempt of Court.

22. The learned Attorney-General then submits that the Janakantha published the comments of Mr Justice Naimuddin Ahmed made in a seminar involving the judiciary and these comments have to be understood and appreciated in the context in which they were made. When Mr Justice Naimuddin Ahmed's comments do not constitute contempt of

Court, publication of the same cannot constitute contempt of Court. He pointed out that Janakantha people showed some recalcitrance in appearing before the Court, but ultimately, they did appear. He contended that contempt proceedings are initiated for the sake of administration of justice and the power has to be sparingly used. He then submits that the Judges are magnanimous in dealing with contempt and having regard to the practice of this Court, this Court may not take serious view of the aforesaid recalcitrance, particularly when this Court did not ask the Janakantha people to show cause against such recalcitrance and mere defiance of a notice of this Court does not amount to contempt.

23. The learned Attorney-General then makes his submissions about the statement made by Justice Naimuddin Ahmed. He submitted that his comments did not exceed the limit of fair criticism, though little harsh. He submits that Mr Justice Naimuddin Ahmed once adorned the Bench in the High Court Division with an alert mind and totally committed to do justice. He is respected as an worthy Judge of the Supreme Court and he made some comments regarding the efficiency and commitment of the Subordinate judiciary. He spoke of the rumour in the society in respect of the cassette in question and did not impute any motive or corruption to the Judges. His lamentation was directed towards improvement in the state of affairs in the arena of justice.

24. The learned Attorney-General finally turns to the case of HM Ershad. He submits that it is admitted by Mr Ershad that he talked to a learned Judge of this Court after pronouncement of the judgment in appeal in Janata Tower case. The Judge sat on the Bench which pronounced the judgment. Their conversation was recorded in the cassette in question. Talking to a Judge after the pronouncement of judgment though improper does not constitute contempt of Court as judgment having been pronounced, the question of interference with justice does not arise. He then submits that from the conversation recorded in the cassette there remains no doubt that Mr Ershad not only talked to the learned Judge after delivery of the judgment, but even before the delivery of the judgment in Janata Tower Case with a view to procure a reduced sentence. Communication with a Judge for the purpose of influencing him on the subject matter of the case pending before the Judge amounts to contempt of Court and in this respect he relies on the decision of Jawnad Singh vs Om Prakash reported in AIR 1959 Punj 632. The learned Attorney-General then draws our attention to the contents of the affidavit-in-opposition filed by HM Ershad and submits that in his affidavit-in-opposition he was trying to explain his conduct in talking to the learned Judge after the delivery of the judgment but has offered no explanation for his conduct in talking to the learned Judge prior to the delivery of the judgment and he also did not tender unqualified apology for his misconduct. In trying to influence the learned Judge while he was considering his appeal, Mr Ershad has committed contempt of Court. He then submits that Mr Ershad is an educated person and held the august position of the President of the Republic, and so he was expected to be more circumspect. The learned Attorney-General finally submits that though he was not asked to show cause specifically about his talking to the learned Judge before the delivery of the judgment nevertheless, he was asked to show cause about the talk recorded in the cassette which clearly showed that he talked to the learned Judge prior to delivery of the judgment and there was no need to ask him specifically to show cause about his talk with the learned Judge prior to delivery of the judgment and in the instant case he tried his best to influence one of the judge and pervert the course of justice and there is the ought to have been found guilty of causing obstruction in the administration of justice which amounts to criminal contempt.

25. Mr Rokanuddin Mahmud, the learned Advocate appearing for the Chief Editor, Printer, Publisher, Owner and Special Correspondent of the 'Daily Manabjamin', submits that in this case the captioned news which has been published in the 'Manabjamin', as has been quoted by the Attorney-General in his application, does not amount to contempt of Court. The reproduced/quoted report stated that the cassette contains conversation of a Judge

with an important political leader which was unbelievable and the conversation referred to a late night meeting on 24-8-2000 which was recorded by an important political leader and the boxed report was reproduction of the Daily Jugantor's report published on 15-9-2000. The boxed report, including the caption, being a reproduction, the 'Daily Manabjamin' cannot be liable for contempt for it. The learned Advocate emphatically submits that the said report contained nothing contumacious. It merely speaks of a taped conversation between a political leader and a Judge, the caption wondered about its contents and the existence of the tape has been admitted by the President, Law Minister and the Attorney-General. So, the reproduced report appears to be true. Therefore no offense may be taken for reproduction of a true report. He further submits that as no action has been taken against the Daily Jugantor for their publication so no offense can be taken of the publication by the 'Daily Manabjamin'. The learned Advocate then submits that the 'Daily Manabjamin' also published a leading news item under the heading "A draft of Royal scandal". He also submits that the heading contained no reference to Court, judiciary or Judge and therefore, it did not interfere with the administration of justice. He submits that the heading is clear that it is a story not related to any fact or situation and under the heading, there was another boxed caption which was an apology and explanation of the Editor that "This unusual report is not exactly based on fairytale but it was composed following a true incident. For understandable reasons it has been printed in such manner and it is evident from the apology that the report was nothing but spinning a yarn and parable, and at worst an allegory and a metaphor and therefore, it was not intended to be contumacious of the Supreme Court or any other Court as it is not about any particular happening of an incident about any Judge or corruption of a Judge. The learned Advocate further submits that on a reading of the newspaper, it appears that the report does not refer to any Court or Judge nor to the judiciary or judicial system. It is a parable about a Kazi in a kingdom, a former king and his predicament, actions of the ruling king adding to the predicament of the former king and it is intended to create public awareness so that such state of affairs as in the parabolic tale does not become the fate of our country. He then submits that the Editor composed the tale to create awareness in the public about the kind of society we should have and should not have. It is in public interest to make public vigilant against such parabolic scenario as depicted by spinning a yarn. He then submits that it was not intended or purported to demean, defame or lower any person, Judge, judiciary or institution in the estimation of people nor was it intended to commit contempt of Court or to be contumacious of the judiciary or Court. The learned Advocate further submits that the learned Attorney-General's allegation that the report leaves a conscious citizen in no doubt that it referred to the famous Janata Tower case is unfounded and it has no reference to or connection with the said case or its judgment. It does not convey any message that Judges take bribe to deliver judgment favorable to an accused, or that he could not do so because of the intervention of the Law Minister as alleged by the learned Attorney-General and no such conclusion can be drawn from a reading of it. In the report there is no allegation that Judges take bribe or there is interference by the Government in the administration of justice so that they are not independent in their performance. The learned Advocate emphatically submits that it is clear that the report refers to no case. There is no reason for a reader to have any aversion for Judges or diffidence about their neutrality or integrity and it was not calculated or intended to erode or undermine public confidence in the administration of justice. He then submits that the report was not about the administration of justice in our country. It would be a sad occasion if the report, which was a journalist's parable, is to be considered as contempt of Court and obstruction in the administration of justice because such an article or feature in a modern newspaper in a democratic society which enjoys the fundamental freedom of speech and expression is a common and acceptable thing in order to make the public aware of evils and dangers so that corrective measures and steps are taken to guard the society against such ills. Such reports and features are published in utmost good faith without any malice, and in the public interest and as a fair comment on a public issue.

Therefore, it is unfortunate that such a report is being considered by the learned Attorney-General as a contempt of Court and interference in the administration of justice, which was the least in the mind of the writer when he had composed it. Mr Mahmud then submits that an inference in favor of the 'Daily Manabjamin' should be drawn for its conscious omission and abstinence from reproduction of the cassette verbatim. By such abstinence, the 'Daily Manabjamin' demonstrated its good intention as well as its respect and regard for the Court, Judge and judiciary. The learned Advocate further submits that the cassette is a shameful event for the country. Former president HM Ershad has admitted talking to the Judge over phone and also admitted the contents of the cassette which has been submitted to the Court by the 'Daily Manabjamin'. The Judge in question has resigned accepting the blame and acknowledging the cassette and its contents and in view of this, the prosecution case against the 'Daily Manabjamin' for contempt has totally collapsed. He further submits that the parable cannot be interpreted as a contempt as there is no disparaging or demeaning word about the judiciary. He then submits that the existence of the cassette in question is admitted by all concerned. There is a growing demand from every quarter for action against the Judge in question by the highest authority of the Republic, keeping in mind their Constitutional obligation. The 'Daily Manabjamin' should be commended for the restraint it had shown so far by not publishing the contents of the cassette out of respect for the honor and dignity of the Court and the judiciary. He then submits that how can the daily 'Manabjamin' be held liable for contempt when the truthfulness of its report has been admitted by the people who have by their conduct brought the judiciary to a shame and disgrace. The part of the report that refers to the cassette only mentions about an individual Judge not the judiciary. The learned Advocate further submits that a distinction ought to be made between an individual Judge and the judiciary as an institution, and the Judge, as a person and the Court as an institution. The learned Advocate further submits that the cassette in question is admittedly in the hands of the President and the Law Minister admitted its existence. It was also the subject matter of scathing remarks by a former Attorney-General and former President of the Supreme Court Bar Association. A scrutiny of the conduct of a Judge or a remark or report about a Judge and his unbecoming conduct cannot by itself be a contempt of Court. The learned Advocate further submits that the rules of contempt of Court have evolved to safeguard the independence and dignity of the judiciary and the due administration of justice against any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice. He then submits that no definition of contempt of Court has been given in the Contempt of Court Act, 1926 and the provisions of the said Act has to be read subject to the fundamental rights guaranteed under the Constitution. The learned Advocate further submits that the article published in the 'Manabjamin' was not published with intent to interfere with or to bring the administration of justice into disrespect. There was no improper motive or malice intended behind the publication. The article was parable to bring to the notice of the public of a situation concerning the conduct of a Judge. In this age of information technology the print media continue to serve an important public function in the dissemination of information, particularly on matters of public interest. In publishing the report in question, the 'Daily Manabjamin' has only fulfilled its duty and obligation to the members of the public in a most decent and harmless manner without demeaning, defaming or lowering any person or institution in the estimation of the public. Therefore 'Manabjamin' is not liable to be proceeded against on charge of contempt of Court. The learned Advocate further submits that the Supreme Court is called upon to consider an allegation of contempt against it, a jurisdiction that should be sparingly used, more so when the Supreme Court itself has an interest in it. The duty to uphold and maintain the dignity of the Court is not merely of the press and the public but also of the members of the judiciary and the legal profession. None should be treated with an uneven hand or left with the feeling of being so treated. Justice must not only be done, but must also be seen to be done. Justice will not be served but will be denied if the cause of it is thought to be served by issuing a contempt Rule against the press and journalists. The

learned Advocate, referring to the contents of the tape-conversation made between the accused and the Judge concerned, submits that it is evident and obvious that one of the Judges of the Division Bench before whom the case of HM Ershad was pending for disposal was in touch with HM Ershad. The said Judge had conversation with the accused namely, HM Ershad more than once even before the disposal of the appeal by the said Bench and it is evident from the conversation that at least there was an understanding between the Judge concerned and the accused Ershad but ultimately he could not carry the other Judge who was the presiding Judge of the Bench, with him and so the understanding could not come to fruition. Referring to the conversation, the learned Advocate submits that the Judge concerned did say that he tried his best to minimize the sentence. The learned Advocate forcefully submits that the report in question was published bona fide and in good faith, without any malice and as a fair comment, not having contained any contumacious comment regarding the Court. He added that the 'Daily Manabjamin' is not liable to be proceeded against on charge of contempt of Court. He further submits that the 'Daily Manabjamin' expressed its deep and sincere regrets that such a misunderstanding has been caused by its report and the parable in question. Mr Mahmud further submits that it seems from the application of the learned Attorney-General that an exception has been taken to the publication of the said well intended and well meaning parable published in good faith and bona fide, considering the same to be in the interest of the public for the purpose of a public cause in the exercise of the fundamental freedom of the press as guaranteed under our Constitution. It was never intended by the 'Manabjamin' to hurt the feelings of or to demean any member of the judiciary and the legal profession, far less the dignity, honor and respect of the Court in general, including the Supreme Court. He then submits that it is their sincerest hope and expectation that the report and the parable will be accepted in good grace in the same spirit in which it was written, and thereupon condone its publication should anyone find it unacceptable to his sense of propriety. The learned Advocate then submits that the integrity and accountability of Judges was a current topic of debate and discussion before the publication by the 'Manabjamin' of the article in question and on receipt of the notice of show cause they duly appeared and submitted affidavit-in-opposition and there was no disobedience of the Court's order and the behaviour is a reflection of the due respect towards the judiciary that the 'Manabjamin' holds. The learned Advocate then very emphatically submits that if the report about the cassette results in a contempt proceeding against the 'Daily 'Manabjamin", its contents should also be the subject matter of scrutiny by the Supreme Judicial Council which is entrusted with the task of looking after the behavior of the Judges, in and out of the Court. The duty of the honorable President is not limited to initiation, through the learned Attorney-General, of Contempt proceedings against the press. He ought to have moved in the right direction to address the question raised by the publication of this article. Therefore, the learned Advocate submits that there must not be a perception in the public mind that the judiciary is trying to shield the Judge concerned and in order to hide its own shameful conduct it is silencing and gagging the press under the garb of a contempt. There is the risk and the danger of this contempt proceeding being viewed and perceived by the public as a confrontation between the judiciary and the press, which should be avoided at any cost in the greater interest of the nation. The learned Advocate drawing our attention to the repeated queries made by Ershad for the reasons why the learned Judge concerned could not carry the senior Judge with him, submits that in such a situation money cannot allure a Judge other than the offer of the post of not less than Chief Justice. Therefore, the 'Manabjamin' felt it their bounden duty to bring the matter before the members of the public through a parable.

26. Mr Rokanuddin Mahmud also represented the Chief Editor, Editor, Printer, Publisher, owner and Special Reporter of the 'Daily Sangbad' and in respect of the 'Daily Sangbad' he submitted that this is one of the oldest daily newspapers of the country and this paper from its inception played a historical role. During the Pakistan period it had never failed to

echo the voice of the public against the atrocities committed by the dictatorial regime. The learned Advocate then submits that the news item published in the 'Daily Sangbad' simply refers to the existence of a cassette and its contents. They have expressed their surprise that a Judge of this Court could enter into such a conversation and there was not the slightest intention on the part of the paper to demean or lowering the dignity and authority of this Court or the Judges or judiciary as a whole. He submits that even the learned Attorney-General also supports this contention that by publishing the news item the Sangbad did not commit any contempt and therefore the show cause issued against them should be dropped. Mr Mahmud also represented the Printer and Publisher of the 'Daily Ittefaq'. He made a submission on their behalf similar to the one made by him in respect of the 'Daily Sangbad'. He submitted that the said paper also played a historical role during the liberation war. He submitted that the printer of the newspaper 'Daily Ittefaq' do not come within the ambit of contempt of Court inasmuch as the statement made by Justice Naimuddin Ahmed cannot be said by any stretch of imagination to be contumacious to the judiciary and thus both the Sangbad and the printer and publisher of Ittefaq cannot be said to be guilty of contempt of Court.

27. Mr Mainul Hosein, the learned Advocate appearing for the Editor and Reporter of the 'Daily Ittefaq', submits that in the instant case they cannot be held to be guilty of contempt of Court, inasmuch as they as conscious journalists felt the necessity to publish the news item in respect of the statement and remarks made by Justice Naimuddin Ahmed in a seminar held by the Dhaka University. It is more so, when the same news item had been published in the 'Daily Janakantha' earlier. Mr Hosein submits that the 'Daily Ittefaq' or its reporter or editor were not the author of the report which is the subject matter of the main contempt proceedings. They published the observations of no less a person than Mr Justice Naimuddin Ahmed, who himself was a Judge of High Court Division of the Supreme Court and is now a member of the Law Commission. The said observations of Justice Naimuddin Ahmed were to be published in the interest of the judiciary and for keeping public faith in the judiciary. They published the said news item after the publication of the same in 'Daily Janakantha'. The learned Advocate also submits that if the statement and remarks made by Justice Naimuddin Ahmed does not amount to contempt of Court on what circumstances the Editor and reporter of Ittefaq can be called upon to show cause for contempt of Court. The learned Advocate further submits that they had to publish the observation of Justice Naimuddin Ahmed not only because it became imperative for the 'Daily Ittefaq' to keep the people informed about serious allegations concerning a vital organ of the state like the judiciary but also for maintaining faith and credibility with their readers. Mr Hosein finally submits that they did not do anything that could be regarded as contemptuous of the judiciary or the Court rather, what they did was thought essential for holding high the position of the judiciary and they published the observation of Justice Naimuddin Ahmed on the ground that the dignity and integrity of the judiciary is best maintained when truth is faced bravely and public suspicion is removed through bold action.

28. Mr M Amirul Islam, the learned Advocate appeared for the Chief Editor, Editor, Printer, Publisher and reporter of the 'Daily Janakantha' and also for Justice Naimuddin Ahmed. Mr Islam argued the case for days together for about a month and he has taken us through almost all the decisions of this sub-continent along with the decisions of the English Courts and American Courts. The crux of his submission is that the concept of contempt of Court has not been defined either in the common law or in the Contempt of Court Act, 1926. This concept is ever changing with the passage of time. What was contempt hundred years ago may not be contempt today. The learned Advocate drawing our attention to the case of EMS Namboodiripad vs T Narayanan Nambiar (1971) 1 SCR 697 and the case of P.N. Dua vs P. Shiv Shanker (: MANU/SC/0362/1988 : AIR 1988 SC 1208) submitted that trend in the judiciary has liberalized the concept of contempt of Court and it should be looked, particularly in view of the fact that now a days in all modern states freedom of

speech is a guaranteed right under the Constitution. The learned Advocate, drawing our attention to a number of cases decided within the Indian Jurisdiction as well as the English and American jurisdictions, submitted that the ratio-decidendi of the cases may be summarized in the following way;

a) That the committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. It should be used only from a sense of duty and under the pressure of public necessity.

b) That no criticism of a judgment, howsoever, vigorous, can amount to contempt of Court provided it keeps within the limits of reasonable courtesy and good faith.

c) That the right to fair criticism is part of the birthright of all subjects of Her Majesty, though it has its boundaries, that right covers a wide expanse and its curtailment must be jealously guarded. However, the criticism should first, be accurate and secondly, be fair.

d) That the Judges and the Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court.

29. Mr Islam then submits that the Court must harmonize the constitutional guarantee and fair criticism with that of authority for drawing up a contempt proceeding and that benefit of doubt being given generally against the Judge. He further submits that so far the contempt jurisdiction is concerned no wrong is committed by any member of a public who exercised the right of fair criticism in good faith or the act is not done with malice or with intention to interfere with the administration of justice. The learned Advocate submitted that the object of contempt proceeding is not to afford protection to Judges personally from imputation to which they may be exposed as individuals, it is intended to be a protection to the public whose interest would be very much affected if by the act or conduct of any party, the authority of this Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened. The learned Advocate then contends that administration of justice and Judges are open to public criticism and public scrutiny. Judgment can be criticized but motives to the Judge should not be attributed. Judges have their accountability to the society and their accountability must be Judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favor. The learned Advocate then submits that it is also the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The learned Advocate then submits that the vehemence of the language used is not alone the measure of the power to punish for contempt but the deciding factor is, whether it constitutes an imminent, not merely a likely, threat to the administration of justice and that the danger must not be remote or even probable, it must immediately imperil. The learned Advocate also submits that any unscrupulous and vindictive criticism of the judiciary is regrettable, but Judges must not retaliate by a summary suppression of such criticism for they are bound by the command of their oath. The learned Advocate further submits that in the modern world the media in general and 'Daily Janakantha' in particular, believes in the open discussion for finding the truth and plays a significant role as a 'watchdog' for the law enforcement machinery of the Republic and the rule of law, equal justice for all and strict law enforcement being a social and a constitutional postulate, 'Daily Janakantha' is committed to and dedicated for upholding those values. It has therefore not only an unequivocal faith in the judiciary as an institution, safeguarding those values but has also been pursuing its role in mobilizing public opinion behind those values, so that people may perceive the judiciary not only as having the glory of laws and

ultimate say on laws, but also as a place where people can have shelter as the last resort for complete justice and protection whenever such values are derogated and violated in the hands of the evils in society, fraudsters, blackmailers, and perpetrators of crime. He then submits that the role of Janakantha in this regard has been pivotal to ensure that the well-known culprits, the Mafia force, the terrorists, the abusers of women and children, violators of human rights, and particularly those criminal elements in the upper echelon of society involved in killing, white-collar crime, corruption, abusing their powers and usurpers of power through unconstitutional means are held accountable through the due process of law and, on the other hand, ensure that, the poor and the disadvantaged, the weak and the oppressed may have access to justice and in pursuance of the above objective, Janakantha has on many occasions successfully unmasked at great risk to its journalists and despite serious hazard, certain serious Mafia activities, unearthed facts through its investigative journalism and brought to public notice and thereby mobilized public opinion for justice against those crimes. This role of the press and media is perhaps the most effective ingredient that strengthens the hand of the judiciary in doing justice against the powerful. In pursuing this investigative public interest journalism, 'Daily Janakantha''s reporters not only took serious risk to their personal safety but some have also lost their lives on duty as martyrs to the cause of justice. The learned Advocate further submits that the publication, which is the subject matter of this contempt Rule, was published by 'Daily Janakantha' with the same motive and in the same spirit as that of the aforementioned news items, so that 'Daily Janakantha' may act as a 'hand maiden' of the justice delivery system, for upholding the image and prestige of this institution as well as by sensitizing and activating the constitutional functionaries whose duty is to clean the system and bring an end to the unfruitful speculation about the said tape and apprise the people about the truth and bringing the entire matter in the open by activating actions against those who are found to be responsible for the grave impropriety, which is clearly disclosed from the tape in question. The learned Advocate then submits that rather than fortifying the media, including 'Daily Janakantha', as an aid and 'hand maiden' of the justice delivery system, the contempt power may not be exercised to weaken this role of the press. The press and the media play the most complementary and supporting role in mobilizing the opinion to ensure justice and due process of law and now-a-days it is for the role of the press that such impropriety has come to light and hence the role of the press needs appreciation as well as the protection of this Court and therefore the press may not be reprimanded for reporting the event and the comment arising out of that event and he relies on Article 39(2) of the Constitution, where the freedom of press, expression and speech are guaranteed. He has further submitted that thorough research of jurisprudence and case law from across all common law jurisdictions as well as from the recent case involving the Honorable Prime Minister before the High Court Division and the Appellate Division judgment as reported in 51 DLR (AD) 68, do not support the contention that public interest journalism, or legitimate publications or criticisms when unmasking corruption or ill-practices in the judiciary tantamount to contempt of Court. Nor the fundamental right guaranteed as freedom of expression or speech can be curtailed upon some vague, undefined, unreasonable or absurd notions or misconstruction of the laws relating to contempt. And it is further submitted that silence was not an option for 'Daily Janakantha' or any other newspaper or any right thinking citizen when things are ill done to the proportion and magnitude of the unimaginable impropriety as has been disclosed to have been done by the tape in question. Mr Islam then submits that the 'reasonableness' is not restricted to only fair comment but also includes outspoken and rumbustious comments. Thus, the comments made by Justice Naimuddin Ahmed are within the above mentioned parameters of reasonableness. Hence, the utterance of those comments or the publication of the same by Janakantha or any other newspaper do not amount to any contempt of Court. The learned Advocate most emphatically argues that the law of Contempt of Court cannot be used as an attempt to silence the voice of scrutiny. Under the Constitution the sovereign people of the Republic and every individual citizen therein can

hold accountable all organs of the Republic through public scrutiny. Therefore, they have the right to know what is the state of each organ of the Republic, including the judiciary, in respect of their functions and in discharge of their duties, because such powers of the State functionaries in different organs of the Republic have been delegated to them by the sovereign people of the Republic through the Constitution. The learned Advocate further submits that any attempts whether in the guise of contempt petition, or otherwise to suppress the legitimate right of the people to express opinion regarding various organs of the Republic, including the judiciary, is derogatory to Article 7 of the Constitution. It is further submitted that it is also the duty of all the state functionaries in different organs of the Republic to be open to such criticism for the people since their power stems from the sovereign people as all powers in the Republic belong to the people. The learned Advocate further submits that the journalists enjoy such rights and privileges simply on account of being citizens of Bangladesh as part of the embodiment of the sovereign people of the Republic. He further submits that contempt actions cannot be aimed at subverting such rights which are the inalienable rights of the sovereign people. Every citizen may question and hold accountable every organ of the Republic including the judiciary in respect of its functions and in discharge of its duties to the people. The learned Advocate finally submits that the contempt power ought not to be used in attempts to silence the voice of the sovereign people of the Republic and their right to hold their state functionaries accountable including those that are in the judiciary by misusing and misinterpreting the laws on contempt so as to use it as a shield or a cloak to protect the Judges. Mr Islam concludes his submissions by drawing our attention to the observation of Justice Krishna Iyer that if Judges decay the contempt power will not save them and so the other side of the coin is that Judges like Caesar's wife, must be above suspicion.

30. Mr Mahmudul Islam, the learned Attorney-General has relied on the following decisions, namely-(1968) 2 QB 319 = (1968) 2 WLR, 204, Ambard vs AG of Trinidad and Tobago, AIR 1936 PC 141,: MANU/SC/0362/1988 : AIR 1988 SC 1208, Viswanath vs Vankataramiah (1990) 2 CrLJ 2179,: LEX/BDHC/0220/2000 : 53 DLR 138 Per Rashid, J and AIR 1969 PUNJ 632.

31. The learned Advocates of the contemners have also relied on the aforesaid decisions. Besides, they have also relied on the following decisions from different jurisdictions. The cases are 35 DLR (AD) 290, (1972) 1 SCC 374, AIR 1974 SC 710, (1971) 1 SCR 697: MANU/SC/0071/1970 : AIR 1970 SC 2015,: MANU/SC/0362/1988 : AIR 1988 SC 1208, (1970) 1 ALL ER 1079, AIR 1923 SC 780,(1968) 1 ALL ER. 268; (1968) 1 WLR 1, (1972) 1 ALL ER. 58,(1971) 1 WLR 1969, (1973) 3 WLR 298, (1900)26 B. 36,: MANU/WB/0182/1951 : AIR 1952 Cal. 258, (1893) AC. 138,(1899)AC. 549, AIR 1954 SC 10, : MANU/UP/0225/1950 : AIR 1950 ALL 556 (FB), AIR 1982 149, AIR 1936 AC. 322 AIR 1936 PC 141, AIR 1978 SC. 727; (1978)3 SCR 162; MANU/SC/0048/1964 : AIR 1965 SC. 745 (1965) 1 SCR 413, AIR 1943 PC 202. Besides the aforesaid decisions we shall refer to some other decisions as well when necessary, so to make it all comprehensive. We shall also refer to some Treaties on the law.

32. Mr Khandoker Mahbub Hossain, the learned Advocate appearing for the Contemner HM Ershad in Rule No. 6722 of 2000, submits that his client had, no doubt, conversation with the Judge after the pronouncement of the judgment because he was very much shocked by the judgment in view of the fact that he was absolutely innocent but has been falsely implicated by the political enemy and has been victimized by the political rivals. Therefore, he could not control himself and talked to the Judge who was previously acquainted with him and therefore, it cannot be said that by the said conversation with the learned Judge after the pronouncement of the judgment he had in any way either tried to influence the Judge or pervert the course of justice. The learned Advocate further submits that from the contents of conversation between the Judge and his client it is clear that he was surprised by the sentence given by the appellate Court and being aggrieved he could not control

himself. He talked to the learned Judge innocently and without any motive. He further submits that if the statement of the contemner is not accepted his client expresses deep regret and tenders unqualified apology, which in the facts and circumstances of the case may be accepted. His client may be exonerated from the charge.

33. At the time of hearing all the learned Advocates wanted us to give a comprehensive judgment touching all the points involving contempt of Court. Therefore, we have allowed all the learned Advocates to address us on the subject comprehensively. Since it is agreed by us that we shall deliver this judgment taking into consideration all the aspects of contempt law it would be profitable for us if we have a summary of the legal proposition on contempt of Court. This jurisdiction is enjoyed by all the superior Courts throughout the world. Bangladesh was a part of British India during the British rule in the sub-continent and, as such, we have in our legal system borrowed the concept of Contempt of Court from the English Jurisdiction, that is, common law of England. The concept of contempt has different dimensions in different countries and at different times. Therefore, we would like to state how this concept initially emerged in England and its application in British India and thereafter.

34. In England, after the Norman Conquest the common law system emerged wherein the King was the sole dispenser of justice and all Courts adjudicated/dispensed justice between the subjects as the representative of the King. The origin of the law of contempt is quite ancient which was evolved even before the emergence of common law system. In India as well as in western countries the King used to be considered as the fountain of justice. He held all the three powers, the legislative, administrative and the judicial. Even when a Judge used to decide a dispute between two citizens he was considered as the mouthpiece of the King and the judicial pronouncements were considered as the utterance of the sovereign, the defiance of which was considered to be contempt of the King and not of the Court. With the passage of time and with the establishment of constitutional monarchy in England the Court has assumed its authority under the Crown although its power of adjudication has assumed greater dimension. In British India as a colony of Great Britain the same law and same procedure were followed as were followed in England. With the passage of time and after the partition of the sub-continent a tremendous development of the democratic organs took place and the concept of separation of power which means the three organs of the state, namely-the legislature, the executive and the judiciary-found its place and this doctrine is technically called trichotomy of power. In India during the British rule the High Courts were established under the Letters Patent and the power to punish a contemner was given to the High Court. However, there were still some doubts as to the power of the High Court to punish contemners. To remove the aforesaid doubts the Contempt of Courts Act, 1926 (Act 12 of 1926) was enacted and the said Act was amended by the Contempt of Courts (Amendment) Act, 1937 and it was made applicable to all the Provinces of British India. Section 2 of the aforesaid law empowered the High Court of Judicature established by Letters Patent to exercise the same jurisdiction, power and authority in accordance with the same procedure and in respect of contempt of Court subordinate to them as they had exercised in respect of contempt of themselves. It also empowered the Chief Justice to have the same power as a High Court. Unlike common law, section 3 of the above Act provided the limit of punishment. Proviso to section 3 provided that an accused may be charged or the punishment awarded may be remedied on apology being made to the satisfaction of the Court. Though the Act did not provide for any procedure but by reference the Court adopted the procedure and the practice, which were followed in the High Court of Judicature established by Letters Patent. They were in fact following common law.

35. After the partition when this part of British India was a Province of Pakistan we had our first Constitution in 1956 which incorporated Article 176 empowering the Supreme Court and the High Courts to deal with the contemners. The above Constitution was

abrogated in 1958 and Martial Law was proclaimed. Thereafter, we had for the second time a Constitution in Pakistan in 1962. The 1962 Constitution in its Article 123 provided for the contempt of Court. It defined contempt of Court in detail. Then came the liberation war and Bangladesh emerged as an independent sovereign state on the 16th of December, 1971, Article 108 of the Constitution of Bangladesh has conferred upon both the Divisions of the Supreme Court, as the Court of record, the power of contempt of Court. Thus, in Bangladesh this field is governed by Articles 108, and 39 read with the Contempt of Courts Act, 1926. But in the meantime in India they had repealed and re-enacted the Contempt of Courts Act, 1926 in 1952 and lastly, they have Contempt of Courts Act 1971 which replaced the previous Act. In Pakistan they have Contempt of Courts Act 1976 pursuant to Article 204 of 1973 Constitution. Our law, however, remained in a state of stagnation and centers round the provisions of 1926 Act read with Article 108 of the Constitution but neither in the Act nor in Article 108 contempt has been defined. Therefore, in our country this point of law has developed from the precedents of common law and the subsequent enactment of 1926 and the constitutional developments made in 1958 and 1962 and finally 1972.

36. When we shall discuss the case of each of the contemner we will make an endeavor to talk about the relevant laws which are relevant for determining the issue involved therein but now we would like to give a resume of the ratio decidendi of the cases on this point. Since we have inherited the present legal system from British India it would be profitable if we first start with the English cases.

37. Let us now summarize the ratio decidendi of leading cases of foreign jurisdiction and the principles of law laid down by different authors in creaties/books on contempt. Since contempt of Court emerges from common law, let us now see the English cases and cases from other Commonwealth countries.

A. Ratio decidendi of English Case law.

(i) In a suit for recovery of damages in respect of an alleged libel, the question which is to be first decided is, whether the criticism bears the meaning that the plaintiffs have put upon it, and if it is fair temperate criticism, then the action will fail.

(ii) In the case of literary criticism it is not easy to conceive what would be outside the reasonable criticism, unless the writer went out of his way to make a personal attack on the character of the author of the work which he is criticizing, like imputing to the author that he has written something which in fact he has not written.

(iii) That the committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. It would be used only from a sense of duty and under the pressure of public necessity.

(iv) That a statement that the recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best Judges does not constitute contempt.

(v) That the authority and reputation of the Courts are not so frail that their judgments need to be shielded from criticism and the same safely be left to take care of themselves.

(vi) That it is the inalienable right of everyone to comment fairly on any matter of public importance. This right is one of the pillars of individual liberty, freedom of speech which the Courts have always unfailingly upheld.

(vii) That no criticism of a judgment, howsoever vigorous, can amount to contempt of Court provided it keeps within the limits of reasonable courtesy and good faith.

(viii) That the right to fair criticism is part of the birth right of all subjects of Her Majesty, though it has its boundaries, that right covers a wide expanse and its curtailment must be jealously guarded. However, the critic should first, be accurate and secondly, be fair.

(ix) That the Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court.

(x) That the order of conviction for contempt of Court having attained finality on account of non filing of an appeal, cannot be assailed through collateral proceedings alleging that the detention order for contempt was in violation of certain Article of the Constitution.

(xi) That if a litigant who seeks a judicial remedy also takes direct action to secure the substance of a remedy which he was seeking in judicial proceedings, it would not amount to contempt of Court

(xii) That no child, simply by virtue of being a child, is entitled to a right of privacy or confidentiality, However, the Court is competent to impose a limited confidentiality by issuing an injunction in aid of the parental functions of the Court, if the interest of justice and welfare of the minor so warrant, However, a careful balance between the public interest in freedom of comments on the one hand and issues of child welfare on the other is to be struck.

B. Ratio decidendi of Australian Case Law:

38. That to call a Judge as the political Judge because he was appointed on account of his services to the political party in power does not amount to contempt, as Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no exception can be taken.

(i) That if a Judge makes a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, the same would not constitute contempt of Court.

(ii) That imputing lack of judicial knowledge of facts well known to the parties, namely, slowing down practice in industry, does not constitute contempt of Court, as the above comment would not sap or undermine the authority of any Court in the mind of any reasonable person.

C. Ratio decidendi of New Zealand Case law:

(i) That if a person is charged with making imputations on a Judge beyond the bounds of criticism and fair comment in respect of the way in which the Judge has conducted a case which has been concluded, it would be open to the accused to bring forward evidence in justification in a contempt of Court proceedings and to show whether and how far his imputations were justified, which would include showing what took place at the hearing and what was done and said by the Judge in the course of

proceedings.

(ii) That Judges cannot compel public respect for the administration of justice by flouting public opinion. The Judges like all other public men must rely upon their own conduct to inspire respect.

D. Ratio decidendi of Canadian Case Law:

(i) That the utterance by a litigant who lost his case that 'this decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it', held by the Ontario Court of Appeal that it was no more than the whining of an unhappy loser and therefore, does not constitute contempt in view of section 2(b) of the Canadian Charter of Rights and Freedoms, guaranteeing comments on a matter of public interest concerning the functioning and operation of public institutions, specifically the Courts.

E. Ratio decidendi of European Human Rights Case Law:

39. That the House of Lords' direction to the trial Court to issue an interlocutory prohibitory injunction during the pendency of suits restraining the publication of articles in Sunday Times (English newspaper) on a drug namely, 'Thalidomide' which had been taken by a number of pregnant women who later gave birth to deformed children and in respect of which claims were sub judice before the Court, held to be contrary to Article 10 of the European Convention on Human Rights for the reason that interference with the applicant rights of freedom of expression was not justified under Article 10(2), which permits such restrictions as are prescribed by law and are necessary in a democratic society for maintaining the authority and impartiality of the Judiciary.

(i) that the Courts cannot operate in a vacuum and that while they are the forum for the settlement of disputes, this does not mean there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amount the public at large.

F. Ratio decidendi of Pakistan Supreme Court Case law:

(i) That paragraph (c) of clause (i) of sub-section (1) of section 12 of the Security of Pakistan Act, 1952, which permitted the Central Government to prohibit the publication of a newspaper for any reason whatsoever, was violative of Article 8 of the late Constitution of Pakistan, 1956 and hence the same was ultra vires. As a corollary, it must follow that any prohibitory order passed under the former was not sustainable in law.

(ii) That a contempt case is somewhat different from that of an accused person under the criminal law which presumes his innocence and places the burden upon the accuser to establish his accusation. Whereas in a contempt case the words by themselves place the onus upon the person charged provided they are prima facie defamatory, or special circumstances are shown, which give them a disparaging character.

(iii) That in an action for libel, the burden is on a plaintiff to satisfy the Judge in the course of proceedings, that the words, which he complains are defamatory; whereas in a motion for contempt, that stage has already been over passed and the respondent coming before the Court upon a writ is thus placed in peril to an extent which bears no comparison with that of a respondent to a libel action.

(iv) That the power of committal for contempt is given to the superior Courts in order that they may swiftly and summarily perform one of their most important duties, which is to protect themselves against wilful disregard or disobedience of their authority by visiting with prompt punishment in respect of any conduct which tends to bring their authority and the administration of justice into scorn or disregard.

(v) That the jurisdiction of the superior Courts to take action for contempt of its own authority which undoubtedly belongs to them should be jealously guarded but sparingly exercised. The dignity of the Courts rests on far more sure foundations of public trust and confidence, which become stronger by the noble and serene conduct of judicial rectitude on the part of the Judges rather than by coercive action taken in provocation or sensitiveness for vindicating their authority.

(vi) That unlike the popular belief and the first impression that the contempt law protects the Courts and the Judges, the real purpose or the raison d'etre of the law is the protection of the public, as without respect and public faith the administration of justice would be undermined and the law itself would fall into disrepute.

(vii) That the offense of contempt of Court is by its nature purely sui generis. It is a power given to superior Court to punish summarily any attempt of interference with the administration of justice.

(viii) That the categories of contempt are so manifold that it is not possible to attempt an exhaustive classification of what may or may not constitute a contempt, but, generally speaking any conduct that tends to bring the administration of law by a Court into disrespect or contumaciously disregards its processes or interferes with or prejudices parties or their witnesses during the litigation amounts to a contempt.

(ix) That the power of contempt would be used sparingly and only in serious cases, and that the Court should not be either unduly touchy or over astute in discovering new varieties of contempt, for its usefulness depends on the wisdom and restraint with which it is exercised.

(x) That the doctrine that an offense is to be forgiven if the offender expresses regret, truly repents his action, and makes a firm promise of amendment is aptly applicable to contempt proceedings, as it is also in line with the texts in the Scriptures of Islam which teach/ propagate the principles of "Awf" and "Toba" to him who repents after his transgression and makes amends, mercy be shown. Thus, an unconditional apology tendered by an alleged contemner at the earliest opportunity is to be considered favorably.

(xi) That there is no universal rule that if a contemner tenders unconditional apology for his contemptuous act the Court should accept the same, particularly in a case where gross contempt has been committed reflecting adversely on the integrity/honesty of the Judge.

(xii) That in a criminal prosecution under section 500 PPC for defamation, it is sufficient if the accused can show that the imputation was substantially true and that it falls within one of the exceptions to the offense.

(xiii) That it is true that judicial acts of Judges are not above criticism. The members of the public may, in good faith, criticize judicial acts. This is their ordinary right of criticism, but this right must be genuinely exercised and not in

pursuance of an improper motive or malice or in an attempt to impair or impede the course of administration of justice.

(xiv) That the proceedings for contempt of Court was an exception to the general rule that a Judge should not hear any matter in which he has personal interest in the decision of it.

(xv) That the contempt proceedings are not designed or intended to vindicate the character or conduct of an individual Judge, but their objective is to protect the Court from attack and calumny so as to keep the fountain of justice pure and unsullied and to maintain public confidence in the ability and power of the Courts to administer justice.

(xvi) That immunity provided under Article 248 of the Constitution does not extend to a criminal act, or any act which is contrary to law or illegal or unconstitutional, nor it would protect a contemptuous act /conduct.

(xvii) That an Appellate Court cannot accept the apology tendered at the stage of the appeal by the contemner/convict as the Court which has been scandalized can say it will pardon it and not any other Court.

(xviii) That if a contemner in reply to show cause notice for contempt in his written statement states that he respectfully begs to withdraw the contents of the letters containing contemptuous matter and reiterates the same orally before the Court, the same was considered as an unconditional apology and the contemner may be discharged.

(xix) That a Court of law is not required or compelled to take note of, or always to take action as and when its contempt is committed.

(xx) That severe admonition and reprimand during the course of contempt proceedings by a Bench of the Court can be treated as sufficient punishment by another Bench of the Court which finally disposes of the contempt proceedings and may not repeat admonition and reprimand in the final order.

(xxi) That a plea of bias on the part of Judge in a transfer application does not amount to contempt of Court, provided that such an application is worded in temperate words and is pressed before Court in a respectful manner and without any publicity.

F(1). Ratio decidendi of the cases of the Sindh and Lahore High Courts:

(i) That the view that a Judge in respect of whom a contempt proceedings were initiated could hear the contempt case himself was founded on the premises that the jurisdiction to punish for contempt was considered to be a special jurisdiction (sui generis) governed by its own rules, and that the object of proceedings for contempt was not the vindication of the character or conduct of a Judge, but to protect the Court from attack to maintain in it the confidence of the people.

(ii) That a Court while considering the question of quantum of punishment for a contemptuous act (while not losing sight of the element of deterrence), may also take into consideration the element of reform and if the Court is of the view that if the accused contemner is not sent to prison in his first case of contempt, he might with passage of time reform his attitude towards judiciary, the Court may postpone the imposition of punishment upon execution of reasonable bond or undertaking that in future he will not commit contempt of any Court nor he will

abet the same in any manner whatsoever.

(iii) That the editors, Printers and Publishers enjoy no special privilege in the matter of publication of briefs, pleadings or petitions even without comments, and if such publications, if one-sided, may well have the undesirable effect of prejudicing the party whose version is not placed before the public, the same would be punishable for contempt.

(iv) That the criticism without any malice directed against the appointments of the Judges in the superior Courts on the ground that the same are made on political consideration and not on merits would not attract penal provision of Article 204 of the Constitution, as such criticism is in public interest and would be protected by Article 19 of the Constitution.

(v) That whatever criticism is made in pursuance of improper motive or malice or in an attempt to impede the course of administration of justice, the same would attract above Article 204 of the Constitution and section 3 of the Act.

G. Ratio decidendi of Indian Case law.

(i) That in a suit of damages for libel, it is a defense that the material facts were truly stated in the article, though it might be that there were one or two small deviations from absolute accuracy on minor points which were of no influence on the conclusion.

(ii) That the question as to whether a particular Article comments on a decided case constitutes contempt of Court would depend on the factum what is the natural and probable effect of the Article/ comments and not the avowed intention of the editor manifested in his affidavit before the Court. If the Article/ comments as a whole would leave on the mind of the ordinary reader a clear impression that injustices has been deliberately done on political grounds to some of the accused who were apparently innocent, it would amount to attributing judicial dishonesty of the Judges and, therefore, would fall within the ambit of contempt.

(iii) The confidence of the public in Courts rests mainly upon the purity and correctness of their pronouncements and that such confidence is not likely to be shaken by a mistake or unfair criticism, but at the same time it cannot be overlooked that if the criticism is of such nature that it would affect the faith of the public in the fairness and incorruptibility of Judges, this would fall within the purview of contempt.

(iv) That the Court's jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as the substantial interference with the due course of justice.

(v) That where the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice, provided the same is not actuated with malice or with the intention to impair the administration of justice.

(vi) That justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

(vii) That the press, authors and publishers of books have no special privilege better than any other man in a criminal action brought against them under section

500 of the Penal Code for defamation.

(viii) That in assessing the value to be attached to words used in political pamphlets, and their effect upon the mind of the average reader, it is necessary to bear in mind this quality of average reader, namely, that he is now so well accustomed to political claptrap that the words employed do not produce upon his mind the effect which their dictionary meaning might suggest. The words are not to be taken literally but purely in a metaphorical sense.

(ix) That any speech, writing or act which does not have the effect of interfering with the exercise of their judicial functions by the Courts cannot be the subject of proceedings in contempt.

(x) The Halsbury's Laws of England divides contempt of Court into two categories, namely (1) criminal contempt; consisting in words or acts obstructing or tending to obstruct the administration of justice, and (2) contempt in procedure, consisting in disobedience of orders or other process of the Court resulting in a private injury.

(xi) That criminal contempt is again subdivided by Halsbury's Laws of England into several categories viz.:

(1) Contempt in the face of the Court which includes the act of insulting a Judge while actually sitting in Court or Chambers to administer justice;

(2) Speeches and writing tending to defeat the ends of justice;

(3) Obstructing persons officially connected with Court of proceedings;

(4) Obstructing parties to pending proceedings;

(5) Abusing the process of the Court; and

(6) Breach of duty by persons officially connected with Court or proceedings.

(xii) That the object of contempt proceedings is not to afford protection to Judges personally from imputations to which they may be exposed as individuals, it is intended to be a protection to the public whose interest would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.

(xiii) That if a party to a case complains that his case was disposed of after considerable delay and he had been put to inconvenience and expense, particularly on account of recalcitrant attitude of the Counsel of the opposite-party, it does not amount to contempt as the same reflects his genuine grievances.

(xiv) That no action of contempt of Court can be founded on a speech made by a Member of Provincial Assembly of India in view of clause (2) of Article 194 of the Indian Constitution.

(xv) That the question as to whether a particular portion of the speech made by a member of the Provincial Assembly in India was expunged by the Speaker or not, is to be decided by the Assembly itself and not by a Court in proceedings of contempt of Court.

(xvi) That the question as to whether the publication of the expunged portion of the speech amounts to violation of the order of the Speaker and a breach of the privilege of the House amounting to a contempt of the House, is to be determined by the House itself and not by the Court.

(xvii) That the effect of an order of a Speaker of a Federal or Provincial Legislature expunging certain portion of the speech of a Member of the Assembly is that in the eyes of law the expunged portion does not exist.

(xviii) That if a Provincial Assembly in India commits citizen, who is not a Member of the Assembly, to prison for the contempt of the House on account of the breach of its privilege, a High Court has the power to examine the legality of such committal to the prison and order his release upon filing of a writ of habeas corpus.

(xix) That to charge the judiciary as an instrument of oppression amounts to contempt. The law of contempt punishes not only acts which do in fact interfere with the Courts and administration of justice, but also those which have that tendency, that is to say, are likely to produce a particular result.

(xx) That the Judges by reason of their office are precluded from entering into any controversy in the columns of the public press, nor can enter the arena and to battle upon equal terms in newspapers as can be done by ordinary citizens.

(xxi) That a scurrilous attack on a Judge in respect of a judgment or past conduct has adverse effect on the due administration of justice.

(xxii) That a Judge of a superior Court in whom disciplinary control is vested functions as much as a Judge in such matters as when he hears and disposes of cases before him, though the procedure may be different or the place where he sits may be different. Any scurrilous attack by a subordinate Judicial Officer facing disciplinary proceedings directed against a Judge of the superior Court imputing malafides, improper motives, bias and prejudice to such a Judge constitutes contempt of Court.

(xxiii) That the cardinal rule in the branch of contempt power in respect of scurrilous attack against the Judge or the Court is a wise economy of use by the Court of this branch of its jurisdiction, but the Court will act with seriousness and severity where justice is jeopardized by a gross and or unfounded attack on the Judges, or where the attack is calculated to obstruct or destroy the judicial process.

(xxiv) That another well settled principle of this branch of law is that the Court must harmonize the Constitutional values of free criticism. A happy balance has to be struck between such values and that the benefit of doubt being given generously against the Judge.

(xxv) That making of a statement in general that the Judiciary should not criticize the Government in a style more severe than that of the opposition, without malice, does not constitute a contempt.

(xxvi) That when political considerations pollute the stream of life, sifting truth from falsehood becomes a formidable and forbidding task, particularly in face of denial by one and an assertion by the other without merit.

(xxvii) That administration of justice and Judges are open to public criticism and

public scrutiny. Judgments can be criticized but motives to the Judges should not be attributed. Judges have their accountability to the society and their accountability must be Judged by their conscience and oath of their office, that is, to defend and uphold the Constitution and the laws without fear and favor.

(xxviii) That any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of the Judges and brings administration into ridicule constitutes contempt.

(xxix) That the freedom of press is not absolute, unlimited and unfettered. The protective cover of press freedom must not be thrown open for wrong doings. The press has to recognize its duties and responsibilities towards the society and it should not compromise public order, decency and morality. If it exceeds the reasonable limit or limit of their fair criticism it is liable to be prosecuted for contempt.

(xxx) That it is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item.

(xxxi) That the Editor and Publisher are liable for illegal and false matter which is published in their newspaper. Such an irresponsible conduct and attitude on the part of the Editor, Publisher and the Reporter cannot be said to have been done in good faith.

H. Ratio decidendi of the USA Case Law:

That the vehemence of the language used is no longer alone the measure of power to punish for contempt, but the deciding factor is, whether it constitutes an imminent, not merely likely, threat to the administration of justice and that the danger must not be remote or even probable, it must immediately imperil.

(i) That the law of contempt is not made for the protection of Judges who may be sensitive to the winds of public opinion, but they are supposed to be men of fortitude, able to thrive in a hardy climate.

(ii) That any unscrupulous and vindictive criticism of the judiciary is regrettable, but Judges must not retaliate by a summary suppression of such criticism for they are bound by the command of the first Amendment. Any summary suppression of unjust criticism carries with it an ominous threat of summary suppression of all criticism.

(iii) That silence and a steady devotion by the Judges to duty are the best answers to irresponsible criticism, and those Judges who feel the need for giving a more visible demonstration of their feelings may take advantage of various laws passed for that purpose which do not impinge upon a free press and that liberties guaranteed by the First Amendment are too highly prized to be subjected to the hazards of summary contempt procedure.

(iv) That a free press lies at the heart of the USA democracy and its preservation is essential to the survival of liberty. Any inroad made upon the Constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.

(v) That the remarks of an office- bearer of a Union which had some 12,000

members in a telegram that the Judge's decision was outrageous and that the Union did not intend to allow State's Courts to override the majority vote of members in choosing its officers and representatives were held by the Supreme Court of United States that the same did not constitute contempt as the Court could not find that these would have affected a mind of reasonable fortitude.

(vi) That there is a marked distinction between the public comments on a pending trial or legal proceedings and public comments after complete disposal of the litigation. In the former the Court must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action.

(vii) That the press does not have the right, which is its professional function, to criticize and to advocate. But this is the public function which belongs to the press, which makes it an obligation of honor to exercise this function only with the fullest sense of responsibility, It should not and may not attempt to influence Judges and juries before they have made up their minds on pending controversies.

J: Gist of the various treatises/books on Contempt:

(i) That scandalising the Court has long been recognized as a form of contempt. However, lately there has been controversy as to the scope of the above type of contempt and in some of the above treatises, it has been suggested that the offence of scandalising the Court, which does not interfere with the working of the Court or which does not tend to shake the public confidence, should be abolished.

(ii) That the crime of contempt of Court by scandalising has no counterpart in American Law. Even in United Kingdom, in 1981 Reforms, an amendment to abolish the above type of contempt was moved but it was rejected on account of an incident. (See the treatise "Media Law", Second Edition (revised) by Geoffrey Robertson and Andrew G.L. Nicol).

(iii) That the society is more tolerant today of stronger language and has lost the habit of respect. Judges like other figures of establishment, have had to become used to being addressed and criticized. However, the principle remains the same that 'the abuse of a Judge amounts to contempt if it reflects upon his capacity as a Judge'.

(iv) That under Article 10 of the European Convention for the Protection of Human Rights, everyone has the right to freedom of expression which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(v) That liberty of the speech and press must not be confused with the abuse of such liberties. Obstructing by means of the spoken and written words the administration of justice by the Courts has been described as an abuse of the liberty of the speech or the press and as such is liable to be punished for contempt of Court.

(vi) That the right of freedom of press is only a specific instance of the general right of freedom of speech, persons engaged in the newspaper business cannot claim any other or greater right than that possessed by persons not in that business.

(vii) That in the United States some Courts have held, that for a newspaper account of pending action to constitute contempt of Court, the publication must

have an inherent tendency to influence, intimidate, impede, embarrass, or obstruct the Court's administration of justice.

(viii) That the right to criticize does not mean that there is a license to be scurrilously abusive. The factum as to whether a particular criticism falls within the category of scurrilous abuse may vary from Court to Court and country to country.

(ix) That the restrictions imposed on the freedom of speech and expression by contempt law fall within the ambit of reasonable restrictions referred to in Article 19 of the Indian Constitution.

(x) That the defense of fair comments requires that the material fact or facts on which any of the criticism is based should be truly stated and be a matter of public interest and that the same should be fair.

(xi) That the power of contempt of Court was considered in the United States by some American authors as a third inherent judicial attribute namely, the power of a Court to vindicate its dignity and authority which was regulated by Judiciary Act of 1789 and further restricted by Act of 1831, which limited punishable contempt to disobedience to any judicial process or decree and to misbehavior in the presence of the Court.

(xii) That in the United States, Judges are neither more or less susceptible to criticism than other Government officials so long as it does not amount to scurrilous abuse.

(xiii) That the Report of the Committee on Contempt of Court by Phillimore /Cameron published in England did not recommend abolition of the power of contempt of Court but recommended that the intentional contempt should, where possible, be dealt with under common law offence of obstructing or preventing the course of justice unless the threat to particular proceedings requires immediate judicial response.

(xiv) That while considering public speeches by public speakers with reference to the contempt law, the background and the usual character of such speeches and the context in which they were made, are to be considered by the Court.

(xv) That it cannot be assumed that what was held to amount to scurrilous abuse in 1900, would be held so in the 1990s.

(xvi) That if any Judge of a court makes a public utterance of such character as is to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Courts in any matter likely to be brought before it, any public comments on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matter of public interest is entitled under the law of libel.

(xvii) That the prevalent view in the United States is that if a publisher of a newspaper seeks to influence the Judge or jury in a particular case he may be punished for contempt of Court which does not mean that the Judge is free from criticism.

(xviii) That the newspapers in the United States have great freedom to comment on a pending trial. The majority of the Supreme Court has supported the view that

a newspaper free to attack does not constitute an imminent.....threat to the administration of justice. A Court's decision may be called "outrageous", (See Chapter V " The Constitutional Right of Freedom of Speech by Roger Fisher).

(xix) That in the United States, on the whole, since 1790 Presidents have tended to appoint men of their political persuasion, who would be in acceptable to the Senate. Yet over the history of the Court the independence of judiciary has been outstanding.

(xx) That in the United States the general criticism which Legislators have directed towards the Court has been predicated for the most part on a 'discordant social philosophy' i.e, an ideological dissent to the claimed liberal trend of judicial decisions. (See the treatise under the caption The Warren Court and its Critics by Clifford M. Lythe).

(xxi) That the brief sketch of judicial criticism in United States reveals number of problems which have distressed the academic critics; failure to adopt neutral principles in Constitutional adjudication, inadequate legal craftsmanship, excessive rendering of per curiam opinions, insufficient reasoning to support decision, preconceived ideas with respect to a decision, etc.

40. Ratio decidendi of Bangladesh Case-Law:

(1) The law laid down by our courts in this regard is more or less in line with the Indian decisions. In 35 DLR (AD) 290 it has been said that 'contempt of Court' has nowhere been defined in statutes, it has been conveniently described by referring to its ingredients and citing examples. 'Contempt' may be constituted by any conduct that brings authority of the Court into disrespect or disregard or undermines its dignity and prestige. Scandalising the Court is the worst kind of contempt. Making imputations touching the impartiality and integrity of a Judge or making sarcastic remarks about his judicial competence is also a contempt. Conduct or action causing obstruction or interfering with the course of justice is a contempt. To prejudice the general public against a party to an action before it is heard is another form of contempt.

2) In : LEX/HEPK/0338/1967 : 19 DLR 354 it has been laid down that an act constitutes contempt of Court if it is calculated to interfere or has the tendency of interfering with the due course of justice. The object of the discipline enforced by the court in the case of contempt of Court is not to vindicate the dignity of the Court or the person of the Judge but to prevent undue interference with the administration of justice. This is now intended for the protection of the public who should be vouchsafed the upholding and maintaining untarnished the glory and reputation of the Court as regarding its authority, fairness and impartiality. The confidence in course of justice which the public possess must in no way be tarnished, diminished or wiped out by contumacious behaviour of any person. An erring Judge and an erring contemner are both a danger to the pristine purity of the seat of justice. To the extent if any one affects by his conduct this sanctity and purity of the seat of justice he deserves condemnation.

> The law of contempt is a device to restore the balance in the scales of justice, when upset, by unauthorized interference with processes of law and punishment, which may lead to a cul de sac, has never been, by itself, the end of law. But another principle of law established in our jurisdiction is that conduct that tends to bring administration of justice in disrespect amounts to contempt and persons circulating and publishing

contemptuous matters are guilty of contempt. Effect of contemner's action is to be taken into consideration and not the intention. If the dignity and authority of the court is trampled and transgressed it is contempt and the court cannot be a silent spectator to that state of affairs.

41. Contempt of court is committed if there is imputed to the Judges any unfitness, whether on account of incompetence, lack of integrity or otherwise and in order that the words may constitute contempt it is not necessary that they should, in fact, interfere with the course of justice. All that is needed is that they should have a tendency to do so. Thus, if a person scandalizes a Judge of a superior court, it is no good defense to say that his intention was good and he did not like to scandalize the Judge. The test is, whether the writing complained of tended to interfere with due course of justice and not what was the intention of the writer, and truth of the statement cannot be set up as a defence.

42. Another proposition of law is that all publications which offend against the dignity of the court or are calculated to prejudice the course of justice will constitute contempt. Offences of this nature are of three kinds, namely - those which (i) scandalize the court; or (ii) abuse the parties concerned in causes there; or (iii) Prejudice mankind against persons before the cause is heard. The first category includes libels on the integrity of the court, its Judges, officers or proceedings. Another principle is that if a person says or writes anything which amounts to contempt of court, he is not permitted to lead evidence to establish the truth of his allegation as truth cannot be regarded as a valid defense to the charge of contempt of a Judge of a superior court. See : LEX/HEPK/0101/1964 : 16 DLR 393 (Full Bench)). It is also well established now that mens rea is not an ingredient of contempt. It is also well settled that anything in the nature of approach to a judicial officer outside the court while he is seized of a case, in relation to such a case, is per se an interference with justice. Besides, any conduct which tends to bring authority of law into disrespect or disregard or to interfere with or prejudice parties, etc., constitute contempt of court. Thus, the essence of contempt is an action or inaction which amount to an interference with or to obstruct due administration of justice.

43. The other branch of the law is that in the case of newspapers the Editor, the Manager, the Printer, the Publisher, as well as the Staff Reporter as the actual author, are legally responsible in the fullest measure for the publication made therein and the plea of ignorance as to the contents of the publication is no defense. In our jurisdiction scandalizing the court or a Judge is also contempt. The fair comment is no contempt if the essential condition for the plea of fair criticism is established. The essential condition for the plea is that the person concerned must abstain from imputing improper motives to those taking part in the administration of justice. Moreover, if a person charged with contempt seeks to take shelter behind the defense of legitimate criticism, the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and honest. In the case of Attorney-General of Pakistan vs Abdul Hamid and others reported in 15 DLR (SC) 96 it has been observed, " We would like once again to impress upon those concerned with the publication of newspapers that whilst we have no desire to curb in any way the legitimate freedom of the press or to restrict the denomination of news, they must remember that when they undertake the publication either of pleadings in a cause or of comments upon them whilst that cause has not yet been heard in a court of law, they undertake a perilous venture at their own risk and they would be well advised to take due note of what has already been said by this court in the case of Saadat Khaity vs State and another as to what reports of proceedings in courts can be published and at what stage. They must not be unmindful of the fact that they are equally responsible for safeguarding the due administration of justice in the wider interests of the public. It is a matter of common concern to all that both parties to cause or matter pending in a court of law should be heard at the same time and in the presence of others by an unprejudiced tribunal. This object will be entirely frustrated if newspapers are permitted to print extracts

of pleadings in advance, for it would constitute a serious interference with what is the court's duty, namely, the decision of the pending case. Similarly, articles published in newspapers scandalizing the Judges, charging the Judge with nepotism, favoritism and contravening procedural rules are calculated to bring the court into contempt and interfere with the administration of justice.

44. It is also now well settled that Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. Justice does not live in seclusion and protection of cloisters: it is an essential part of practical life and should, therefore, be open to fair comment. But, it should run in streams pure and clear and should not be contaminated with night soil. Thus, the courts on their part should not be too astute in such cases to discover hidden meaning in the words used in making such criticism nor be unduly touchy or sensitive nor should they take notice of any and every derogatory comment where there is no real likelihood of any substantial interference with the due course of justice.

45. In Nelson's Case (: LEX/SCPK/0001/1961 : 16 DLR SC 535) it has been laid dowr that a libelous statement which amounts to interference with the course of justice amounts to contempt even though the defendant is prepared to justify the libel. In the same case it has been laid down that no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way, the wrongheaded are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune, justice is not a cloistered virtue; he must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men. Thus it has been stated that any reasonable criticism of a judgment is to be welcomed. But the criticism of a judgment is to be distinguished from imputation of incompetence or mala fides to a Judge. While it is legitimate to criticize a judgment, it is contempt to impute to the Judge anything that lowers him in the public estimation. The mere fact that a judgment is criticized as incorrect is no imputation against the Judge for the most competent of Judges may deliver a wrong judgment. But the criticism of a judgment ought to be fair, and the facts should be correctly stated.

46. In order that criticism of the judicial acts of Judges should be immune from punishment under the Contempt of Courts Act, 1926, the criticism should be fair and not made with the object of lowering the authority of courts and should not impute motives to Judges nor should it be intended to depict Judges as incompetent people unfit to hold their onerous offices. It is also settled proposition of law that a statement scandalizing the Judge carries with it a presumption that it has a tendency to interfere with the administration of justice. It suggests that the fountain of justice itself has become tainted. This kind of contempt has always been held to be a gross form of contempt. In the case of Salimullah v State, reported in 44 DLR (AD) 309 it has been held by the Appellate Division that our Constitution ensures freedom of speech and freedom of press under Article 39 of the Constitution. It is an inalienable right of every citizen and it is only subject to a reasonable restriction imposed by law and also subject to contempt of court. It has been held that freedom of speech is a valuable right of every citizen in a democratic polity but it is not an unfettered right but subject to certain limitations and reasonable restrictions imposed by law. Therefore, be it a press or a citizen they are entitled to criticise any judgment or other acts of the Judges in good faith and without malice and without imputing any motive, bias, ill will or favoritism.

47. Now we would like to advert to the cases of the newspapers concerned. Before we do

that we think it would be advisable for us if we discuss the legal principles on this point. The media-men belong to the class of intellectuals of the society. They are men and women of great learning and wisdom and may as well be acquainted with the law of contempt of Court. If they are not already acquainted with the contempt law it may not be difficult for them to apprise themselves of it and they should better do that when they write something about the judiciary. In the modern society the role of press is great and, in fact, it moulds the public opinion from time to time on various national issues. The freedom of press has been ensured by Article 39(2) of our Constitution but subject to reasonable restriction as imposed by Article 39(2) itself. Therefore, the newspapers do not stand on a better footing than a citizen. In the case of newspapers, the Editor, the Manager, the Printer, the Publisher and also the Staff Reporter, who is the actual author, are legally responsible in the fullest measure for the publication made therein. Therefore, if any contumacious article is published in any newspaper no one can come with the defense that the contentions were not known to him. Therefore, the Editor, the Manager, the Printer, the Publisher along with the Staff Reporter would be responsible for such publication alike.

48. In the case of Attorney-General of Pakistan vs Abdul Hamid and others reported in 15 DLR (SC) 96 it has been observed. "We would like once again to impress upon those concerned with the publication of newspapers that whilst we have no desire to curb in any way the legitimate freedom of press or to restrict the dissemination of news, they must remember that when they undertake the publication of either of pleadings in a cause or of comments upon them whilst that cause has not yet been heard in a court of law, they undertake a perilous venture at their own risk and they would be well advised to take due note of what has already been said by this court in the case of Saadat Khaity vs State and another as to what reports of proceedings in the courts can be published and at what stage. They must not be unmindful of the fact that they are equally responsible for safeguarding the due administration of justice in the wider interest of the public. It is a matter of common concern to all that both parties to cause or matter pending in a court of law should be heard at the same time and in the presence of others by an unprejudiced Tribunal. This object will be entirely frustrated, if newspapers are permitted to print extracts of pleadings in advance, for it would constitute a serious interference with what is the court's duty, namely, the decision of the pending case." Similarly, if articles are published in newspapers scandalizing the Judges, charging the Judge with nepotism, favoritism and contravening procedural rules, they are calculated to bring the court into disrepute and interfere with the administration of justice and therefore those will amount to contempt of court (4 PLD Sind 8). It is also well established that all publications which are calculated to or have the tendency to either excite / prejudice against parties or other litigant while it is pending or to interfere with the due course of justice, will constitute contempt. The reasons for this is, "because their tendency and, sometimes, their object is to deprive the court of power of doing that which is the end for which it exists, namely, to administer justice duly, impartially and with reference solely to the facts judicially before him. See 15 DLR (SC) 355. Similarly, a person is guilty of contempt of court if, in respect of pending proceeding, he publishes writing in which he forecasts the probable judgment of the court and makes the comment that law and justice would be defeated by such judgment. See (1939) 1 Cal. 399. Thus, any act or writing tending to undermine the authority of courts of justice or to influence the result of pending litigation is contempt of court and a most serious offence. See (1934) 16 LAH 266 and 42 CWN 952. Here it may be mentioned that it is a fallacy to suppose that there is some kind of privilege attached to the profession of the press as distinguished from the members of the public. The freedom of the journalist is co-extensive with that of an ordinary citizen. The journalist can go to the same lengths as any other citizen may go and no further unless otherwise shielded. (41 Cal. 1023: 18 CWN 785). It is a misconception to think that publications of briefs, pleading or petitions even the comments can, in no circumstances, amount to a contempt.

Such publications, if one-sided, may well have the undesirable affect of prejudicing the party whose version is not also placed before the public. (: LEX/SCPK/0011/1962 : 15 DLR SC 81). Similarly, any publication in newspapers which is calculated or has the tendency to prejudice the public mind in favor of or against a party to a cause is a contempt. See : LEX/HEPK/0084/1969 : 23 DLR SC 1 and: LEX/BDHC/0027/1976 : 28 DLR 285. Here it may further be mentioned that there is no difference in principle between a comment on a question of fact and expression of an opinion on a question of law, for a court even when dealing with a question of fact is expected not to be influenced by facts which may have come to its knowledge otherwise than from the evidence adduced in the case. Therefore, if an expression of opinion on a question of a fact pending decision in a court can amount to a contempt there is no reason why an expression of an opinion on a question of law in similar circumstances should be incapable of producing a like pernicious tendency. (: LEX/HEPK/0108/1963 : 15 DLR SC 355).

49. In Re: Attorney-General of Canada vs Alexander a newspaper was held by the Supreme Court of the North-West Territories of Canada to have committed contempt for alleging a "cover-up" by Court official, participated in by a Supreme Court Judge, to shield a public figure for advance publicity. In New Zealand, a Solicitor was held by the Court of Appeal to have committed contempt for alleging that in a previous case Judges have been guilty of forgery, fabrication of evidence and partiality; in the Court's opinion, there could not be a clearer case of serious contempt of court. See Wiseman vs Re (1976) 65 DLR (3rd) 608. The contempt jurisdiction is not, therefore, to be found in "Banana Republics" but in democracies that abide by the rule of law. It is intended to uphold the authority and dignity of the courts of law, which on behalf of the State deliver justice and protect the public confidence that is, reposed in them.

50. Any act done or writing published which is calculated to bring a Court or a Judge into contempt or to lower his authority or to interfere with due course of justice is a contempt of the Court. Scurrilous abuse of a Judge or Court, or attacks on the personal character of a Judge are acts of contempt. See R V Gray (1900) 2 QB 36.

51. The question of contempt of court came up for consideration before the Indian Supreme Court in the case of CK Dephtary vs OP Gupta (:MANU/SC/0065/1971 : AIR 1971 SC 1132). The Indian Supreme Court held that under the law of contempt of court any publication which was calculated to interfere with the due course of justice or proper administration of law amount to contempt of court. A scurrilous attack on a Judge, in respect of a judgment or past conduct, has the inevitable effect of undermining the confidence of the public in the judiciary; and if confidence in judiciary goes administration of justice definitely suffers. In that case a pamphlet alleged to have contained such statement amounts to Contempt of Court.

52. The object of the discipline enforced by the Court in the case of contempt of Court is not to vindicate the dignity of the Court or person of the Judge, but to prevent undue interference with the administration of justice. Halmore vs Smith (1886) 35 Ch. D 449. In the case of Channing Arnold vs The King Emperor, 18 CWN PC 785, it has been held that no privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so may go journalist, but, apart from statute law, his privilege is no other and no higher.

53. This is not to say that judicial decision may not be subjected to criticism; they can, but not the Judges who took them. Lord Atkin in Ambard V AG for Trinidad and Tobago 1936 AC 322 = (1936) 1 All England Report 704 said: "the path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of

justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful criticism even though outspoken comments of ordinary man."

54. The question of fair and reasonable criticism came up for consideration before the Indian Supreme Court in the case reported in : MANU/SC/0051/1978 : AIR 1978 SC 921 = (1978) 3 SCR 497, where it has been held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because, after all, no one, much less the Judges, can claim infallibility. Such a fair criticism may fairly assert that the Judgment is incorrect or an error has been committed both with regard to law or established facts. But when it is said that the Judges had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused, or has a wayward bent of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring the administration of justice into ridicule. It must be remembered that criticism of Judges would attract greater attention than others and such criticism sometimes interfere with the administration of justice and that must be Judged by the yardstick whether it brings the administration of justice into ridicule or hampers administration of justice.

55. In our Constitution freedom of press has been ensured by Article 39(2)(b) of the Constitution and in the Indian Constitution unlike our Article 39 only freedom of speech and expression has been guaranteed by Article 19(i)(a). It has been held in the case of Namboodiripad, (1971) 1 SCR 697 = : MANU/SC/0071/1970 : AIR 1970 SC 2015 that the appellant (Namboodiripad) bore attack upon Judges which was calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions. According to the Chief Justice, it weakened the authority of law and law courts. It was further held that while the spirit underlying Article 19(1)(a), must have due play, the court could not overlook the provisions of the second clause of that Article.

56. Its provisions are to be read with Articles 129 and 215 which specially confer on the Supreme Court and High Courts the power to punish for contempt of themselves. Although Article 19(1)(a) guaranteed complete freedom of speech and expression; it also made an exception in respect of Contempt of Court. While the right is essential to a free society, the Constitution had itself imposed restrictions in relation to contempt of court and it could not therefore be said that the right abolished the law of contempt or that attack upon Judges and courts would be condoned.

57. There are a large number of decisions of the Supreme Court of India where the scope of freedom of speech as contained in Article 19(1)(a) of the Indian Constitution came up for consideration. It is consistently held that the court must harmonies the constitutional values of free criticism and the need for a fearless curative process and its presiding functionary, the Judge. To criticize a Judge fairly albeit fiercely is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure public justice cannot gag it or manacle it. But the court should act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the Judges where the attack was calculated to obstruct or destroy the judicial process. Similarly, it is held that when there is no imminent danger of interference with the administration of justice or bringing administration of justice into disrepute, it is not contempt. It is also the view that everyone is entitled to criticize the Judgment of the court but no one should attack the Judges who delivered the judgment as that denigrates the judicial institution and in the long term impairs the democratic process. See (1978) 3 SCR 162 = : MANU/SC/0067/1977 : AIR 1978 SC 727; (1987) 3 SCC 89 = AIR 1987 SC 1451; MANU/SC/0362/1988 : AIR

1988 SC 1208.

58. It is doubtless that freedom of speech and expression and freedom of the press as guaranteed by Article 39(2)(a)&(b) are the most precious liberties in our secular republic. Freedom of thought and conscience is also guaranteed. Thus freedom of expression is a prized privilege to speak one's open mind although not always in perfect good taste of all institutions. Since it opens up channels of open discussion, the opportunity of speech and expression should be afforded for vigorous advocacy, no less than abstract discussion. This liberty may be regarded as an autonomous and fundamental good and its value gets support from the need to develop our evolving society from unequal past to a vigorous homogeneous egalitarian order in which each gets equality of status and of opportunity; social, economic and political justice with dignity of person so as to build an integrated and prosperous Bangladesh. Transformation for that strong social restructure would be second when channels for free discussion are wide open and secular mores are not frozen. All truths are relative and they can be Judged only in the competition of market. Freedom of expression equally generates and disseminates ideas and opinions, information of political and social importance in a free marketplace for peaceful social transformation under rule of law. The doctrine of discovery of truth does require free exchange of ideas and use of appropriate language. Words are the skin of the language which manifests the intention of its maker or the speaker. The right to free speech is, therefore, an integral aspect of right to self-development and fulfillment of person's duties some of which are enshrined in Part III of the Constitution as Fundamental Rights. The end of the State is to secure to the citizen freedom to develop his faculties, freedom to think as he will, to speak as he thinks and reads as indispensable tools to the discovery of truth and realization of human knowledge and human rights. Public discussion is political liberty. The purpose of freedom of speech is to understand political issues so as to protect the citizens and to enable them to participate effectively in the working of the democracy in a representative form of government. Freedom of expression would play a crucial role in the formation of public opinion on social, political and economic questions. Therefore, political speeches are given greater degree of protection and special and higher status than other types of speeches and expressions. The importance of speaker's potential development on political and social questions is also relevant to encourage human development for effective functioning of democratic institutions.

59. If maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz, that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The State has legitimate interest, therefore, to regulate the freedom of speech and expression, which represents the limits of the duty of restraint on speech or expression not to utter defamatory or libelous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation. Therefore, freedom of speech and expression is tolerated so long as it is not malicious or libelous, so that all attempts to foster and ensure orderly and peaceful public discussion or public good should result from free speech in the market place. If such speech or expression was untrue and so reckless as to its truth, the speaker or the author does not get protection of the constitutional right.

60. Freedom of speech and expression, therefore, would be subject to Article 39(2) of the Constitution, in relation to contempt of court, defamation or incitement to an offence, etc. Article 7 read with the Universal Declaration of Human Rights grants to everyone liberty

and right to freedom of opinion and expression to which Bangladesh is a signatory which provides that everyone shall have the right to freedom of expression, to receive and impart information and ideas of all kinds but at the same time it imposes corresponding duty on the exercise of the right and responsibilities. It may, therefore, be subject to certain restrictions but these shall only be such as are provided by law and are necessary for the respect of life and reputations of others, for the protection of national security or public order or of public health or morale. It would thus be seen that liberty of speech and expression guaranteed by Article 39(2)(a) &(b) brings within its ambit, the corresponding duty and responsibility and puts limitations on the exercise of that liberty.

61. A citizen is entitled to bring to the notice of the public at large the infirmities from which any institution including the judiciary suffers from, indeed the right to offer healthy and constructive criticism, which is fair in spirit must be left unimpaired in the interest of the institution itself. Critics are instruments of reform but not those actuated by malice but those who are inspired by public weal. Bona fide criticism of any system or institution including the judiciary is aimed at inducing the administration of the system or institution to look inward and improve its public image. Courts, the instrumentalities of the State are subject to the Constitution and the laws are not above criticism. Healthy and constructive criticism is tools to augment its forensic tools for improving its functions. A harmonious blend and balanced existence of free speech and fearless justice counsel that law ought to be astute to criticism.

62. Thus liberty of free expression is not to be confounded or confused with license to make unfounded allegation against any institution, much less the judiciary. Therefore, in a free democracy everybody is entitled to express his honest opinion about the correctness or legality of judgment or sentence or an order of a court but he should not overstep the boundary. Though he is entitled to express that criticism obliquely and with a detachment in a dignified language and respectful tone with moderation, the liberty of expression should not be a license to violently make personal attack on a Judge. Subject to that, honest criticism of the administration of justice is welcomed since justice is not a cloistered virtue and is entitled to respectful scrutiny. Any citizen is entitled to express his honest opinion about the correctness of the judgment, order or sentence with dignified and moderate language pointing out the error or defect or illegality in the judgment, order or sentence. That is, after the event as a postmortem.

63. The journalist must also remember that scandalizing the court would mean hostile criticism of Judges as Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under the law of libel or slander. Yet defamatory publication concerning the judge as a Judge brings the court or Judges into contempt, a serious impediment to justice and an inroad on the majesty of justice. Any caricature of a Judge calculated to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalizing the Judge as a Judge, in other words, imputing partiality, corruption, bias, improper motives to a Judge is scandalisation of the court and would be contempt of the court. Even imputation of lack of impartiality or fairness to a Judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemner challenges the authority of the court, he interferes with the performance of duties of Judge's office or judicial process or administration of justice or generation or production of tendency bring the Judge or judiciary into contempt. The malicious or slanderous publication inculcates in the mind of the people a general disaffection and dissatisfaction on the judicial determination and indisposes their mind to obey them. If the people's allegiance to the law is so fundamentally shaken it is the most vital and most dangerous obstruction of justice calling for urgent action. Action for contempt is not for the protection of the Judge as private individual but because they are the channels by

which justice is administered to the people without fear or favour.

64. The Editors of at least responsible newspapers should be aware that it is the courts of law and not newspaper readers who have to try certain issues which courts alone are empowered to determine. The writer of an article of a responsible newspaper on legal matters and news concerning the courts or the Judges is expected to know that they must be within the bounds permitted by the Constitution and law. The judiciary is not immune from criticism but when that criticism is based on obvious distortion or quote gross misstatement and made in manner which is designed to lower respect of the judiciary and destroy public confidence in it, it cannot be ignored. Action for contempt of Court which is discretionary is not frequently or lightly taken. At the same time court will not abstain from using this weapon when its use is needed to correct standards of behavior in a grossly and repeatedly erring quarter. When there appears some scheme and design to bring about results which must damage confidence in the judicial system and demoralize Judges of the highest court by making malicious or scurrilous attacks, any one interested in maintaining high standards of fairness, impartial and unbending justice will feel perturbed. Thus, when the question is of injury to an institution such as the highest court of justice in the land one cannot overlook its effect upon national honor and prestige in the comity of nations. It becomes a matter deserving consideration. All serious-minded people who are interested in seeing that democracy does not flounder or fail in this country. If fearless and impartial course of justice are the bulwark of the healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks on them. In this connection it would be appropriate to quote some observations made by Justice Krishna Ayer on the subject:

> I have launched on this long, inconclusive essay in contempt jurisprudence bearing on scandalizing the Judges qua Judges, aware that not high falutin rhetoric but hard-headed realism, illumined by constitutional values, must set the limit and interpret the statute. It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalising Judges with flippant or motivated write-ups wearing a pro bono publico veil and mood of provocative mock-challenge. The Court shall not meditate nor hesitate but shall do stern justice to such 'professional' contemners, not shrink because they are scurrilous, influential or incorrigible. Even so, to be gentle is to be just and the quality of mercy is not strained. So, it is that a benign neglect, not judicial genuflexion, is often the prescription, and to inhibit haphazardness or injustice it is necessary that the Bar and the Press evolve a dignified consensus on the canons of ethics in this area, with due regard to
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> dated 2-11-2004 (Annexure 'J'), the Constitution and the laws, so that the Bench may give it a close look and draw the objective line of action. The process of arriving at these norms by those mighty forces who influence public opinion, cannot be delayed and until then the law laid down in precedents of this Court will go into action when Judge-baiting is indulged in by masked men or media might. Freedom is what freedom does and justice fails when Judges quail. For sure, my plea is not for judicial pachydermy, but for dignified detachment which ignores ill-informed criticism in its tolerant stride, but strikes when offensive excesses are established. Frankly, all these are hypothetical and have no specific reference to the present case. These obiter dicta are intended to indicate the pros and cons, not to pontificate on the precise limits for exercise of contempt power and to emphasise what Chief Justice Warren Burger mentioned in Nebraska Press Association (1976) 96 SC ct at 2803] as 'something in the nature of a fiduciary duty' of the press to act responsibly, and I may add, respectfully.

65. It is by now well settled that all publications which offend against the dignity of the

Court or calculated to prejudice the course of justice will constitute contempt. Offences of this nature are of three kinds; namely-those are-

(i) scandalizing the court,

(ii) abuse the parties concerned in the causes, and

(iii) prejudice, mankind against person before cause is heard.

66. The first category includes libels on the integrity of the court, its Judges, officers and proceedings. In the case of State vs M. Noman, : LEX/HEPK/0101/1964 : 16 DLR 393 a full Bench of the Dhaka High Court held that truth cannot be regarded as a valid defense to the charge of contempt of a Judge of a superior court. Similarly, in the Indian jurisdiction, the Allahabad High Court held that if a person says or writes anything which amounts to contempt of court, he is not permitted to lead evidence to establish the truth of his allegation. Entire principle of law is that persons circulating and publishing contumacious matters are guilty of contempt.

67. The view taken by us gets support from the decisions of our Appellate Division as well as Indian Supreme Court. Unlike our Constitution in India freedom of speech and expression is guaranteed by Article 19(1)(a) of the Constitution whereas in our Constitution freedom of speech and expression and freedom of press are guaranteed by Article 39(2)(a) & (b). The same question came up for consideration before the Indian Supreme Court in a number of cases. It has been consistently held by the Indian Supreme Court that it is true that freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution is one of the most precious liberties in any democracy. But, equally important is the maintenance of respect for Judicial independence which alone would protect the life, liberty and reputation of the citizen. So, the nation's interest requires that criticism of the judiciary must be measured, strictly rational, sober and proceed from the highest motives without being clouded by partisan spirit or pressure tactics or intimidator attitude. The court must, therefore, harmonies constitutional values of free criticism and the need for fearless curative process and its presiding functionary, the Judge. If freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it, but if the court considered the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious, beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream. In other words, the freedom is subject to the law of contempt.

68. The same position is in common law. Lord Denning in "The Due Process of Law " said:-

> The freedom of the press is fundamental in our constitution. Newspaper have and should have the right to make fair comment on matters of public interest. But this is subject to the law of libel and of contempt of court. The newspapers must not make any comment which would tend to prejudice a fair trial. If they do, they will find themselves in trouble.

69. In re Read and Huggonson (St. James Evening Post Case) (1742) 2 Atk 469 it has been held that it is undoubted law that where litigation is pending and actively in suit before the court no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance, by influencing the Judge, the jurors or the witnesses or even by prejudging mankind in general against a party to the cause. In Skipworth's case (1873) LR 9 QB 230, 234 Blackburn J., said that even if the person making the comment honestly believes it to be true, still it is a contempt of court if he prejudges the truth before it is ascertained in the proceedings. In

re William Thomas Shipping Co. Ltd [1930] 2 Ch. 368 and Vine Products Ltd vs Green [1966] ch 484 a further principle of law has been laid down which is that none shall by misrepresentation or otherwise bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defense or to come to a settlement on terms which he would not otherwise have been prepared to entertain. Professor Goodhart in his article on "Newspapers and Contempt of Court in English Law" in (1935) 48 Harvard Law Review, pp. 895,896 observed:

> I regard it as of the first importance that the law which I have just stated should be maintained in its full integrity. We must not allow "trial by newspaper" or "trial by television" or trial by any medium other than the courts of law.

70. Finally the House of Lords in Attorney-General V The Times Newspaper Ltd (1973) 3 All England Law Report 54 (H.L.), Lord Reid observed:

> There has long been and still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.

71. It is also well established that if a person scandalizes a Judge of a superior court it is no defense to say that his intention was good and he did not like to scandalize the Judge. The test is whether the writing complained of tended to interfere with due course of justice and not what was the intention of the writer, and truth of statement cannot be set up as a defense. Similarly, litigant or his lawyers must refrain from saying or doing anything which might have affect of scandalizing the court. In 57 DLR 485 it has been held that it is the grossest type of contempt to malign and scandalize the highest court and its Judges by publishing untrue and twisted news and comments in the newspapers. Thus, if Editors, Printers and publishers publish a news or comments even by anonymous author to malign or scandalize this court, the hands of this court are long enough to catch and punish them.

72. The reason why media trials are considered to be contemptuous is that they supplant the establishment, institution entrusted with the administration of justice and put the prospect of a fair trial in accordance with the substantive and procedural laws in jeopardy. In short, the moot objection to 'media trials' is that they put at risk the due administration of justice in the particular case. The long term fear, however, is that such trials could undermine confidence in the judicial system generally.

73. Lord Denning, MR, has extra-judicially observed in his book 'Road to Justice' that 'the press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and aboveboard.....(But) 'the watchdog may sometimes break loose and have to be punished for misbehavior'.

74. The necessity or justification of this rule can be appreciated from these illuminating observations of the renowned American Judge Frankfurter, J: is that, if men, including Judges and journalists, were angels, there would be no problems of contempt of court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding Judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for contempt of court is a safeguard not for Judges as persons but for the function, which they exercise. It is a condition of that function indispensable for a free society that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence." See Pennekamp vs Florida (1946) 90 Led 1295 at page 1313.

75. Now let us see what is the law relating to press in regard to freedom of press. In our

Constitution, Article 39(2)(b) guarantees freedom of press and this aspect of the law was considered by our Appellate Division in the case of Salimullah 44 DLR (AD) 309 wherein it has been observed that this right is also subject to a reasonable restriction imposed by law in relation to contempt of court.

76. Similarly, Article 6 of the European Convention on Human Rights provides a restriction on freedom of speech guaranteed by Article 10, if the restriction is prescribed by law and not disproportionate to the aim of securing a fair trial.

77. Within our jurisdiction the scope of contempt has not been elaborately examined in the context of Article 39(2) read with Article 108 of the Constitution. Although there was occasion to examine the same by both the Divisions, namely, the case of Habibul Islam Bhuiyan reported in 51 DLR (AD) 68 and the case of Moinul Hosein reported in: LEX/BDHC/0220/2000 : 53 DLR 138. We have already indicated that Article 39 was discussed in Salimullah's case by the Appellate Division (44 DLR AD 309) without defining the limit of fair criticism which is allowable in law. However, it has been said that freedom of press is being recognized in our Constitution, a court is to suffer criticism made against it, and, only in exceptional cases of bad faith or ill motive, it will revert to law of contempt.

78. However, in Moinul Hosein's case Abdur Rashid, J: has thrown some lights on this point when he observed that the concept of contempt is undergoing constant change in all societies with the advancement of human civilization and modern development. He said "Nowadays, the courts are reluctant everywhere to use contempt power off and on as freedom of speech and expression are gaining tremendous force as fundamental rights." Then referring to Article 39 of the Constitution he observed that the right to freedom of speech and expression is guaranteed subject to the limitation as imposed by the Constitution and such limitation is also found necessary in the interest of administration of justice. He further observed that it should be remembered that what could readily be read as contemptuous in 1900 or 1912 or 1936 is not so easily read now in the context of expanding rights guaranteed as fundamental to human existence under the Constitution.

79. Now let us see what is the permissible limit of criticism. In other words, what is meant by fair comment, which is recognized in the law of contempt. The West Pakistan High Court in the case reported in 13 DLR (WP) 14 observed that the essential condition in the plea of fair criticism is that the person concerned must abstain from imputing improper motives to those taking part in the administration of justice. Moreover, if a person charged with contempt seeks to take shelter behind the legitimate criticism, the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and honest. The Pakistan Supreme Court in the case reported in 16 DLR (SC) 535 stated that the legal position is that one may accede to the proposition that criticism of the conduct of the Judges, which cannot possibly have the tendency to obstruct or interfere with the administration of justice, are not contempt of court, even though, they made libelous attacks on Judges. Thus, an attack on a Judge for conduct not connected with his judicial function will not come within the mischief of contempt of court. But one cannot stretch this to attack on Judges in their capacity as Judges for such attacks invariably also may be calculated to lower the authority of the courts over which the Judges so maligned happened to be presiding Judges, tend to interfere with due course of justice and the proper administration thereof. There are other decisions within the Pakistan jurisdiction where the provisions for freedom of speech and freedom of press has been considered in the context of contempt of court and it appears that the consensus opinion is that the press like a citizen has the right to criticise any act of a Judge in his capacity as a Judge or his judgment but subject to the reasonable restriction imposed by law, that is, the criticism must be fair, honest, innocent and must not impute any motive, incompetency, bias or scurrilous attack on the Judges or the court.

80. In the Indian Jurisdiction there is a long line of decisions wherein the scope of fair comment has been considered by the different High Courts of India including the Indian Supreme Court. But it appears that there is no clear-cut test formulated by the courts to find out whether a particular criticism can be labeled as a fair comment. But there is consensus on one point that it must not be scurrilous attack and must not impute any motive or bias in other words, must not interfere with the administration of justice.

See the case of Namboodiripad and P.N. Duba, AIR 1970(SC) 2017: (1971)1 SCR 697, AIR 1988 (SC) 1208. In Namboodiripad's case the Court had to deal with this jurisdiction in respect of Mr Namboodiripad who at the relevant time was the Chief Minister of Kerala. He had held a press conference in November 1976 and made various critical remarks relating to the judiciary which, inter alia, was described by him as "an instrument of oppression "and the Judges as " dominated by class hatred, class prejudices", "instinctively" favouring the rich against the poor. He also stated that as part of the ruling classes the judiciary "works against workers, peasants and other sections of the working classes" and " the law and the system of judiciary essentially served the exploiting classes". It was found that these remarks were reported in the newspapers and thereafter proceedings commenced in the High Court of Kerala. By a majority judgment of the High Court he was convicted for contempt of Court and fined Rs. 1000, or simple imprisonment for one month. On appeal, it was held by the Supreme Court of India that the law punishes not only acts, which do not in fact interfere with the Counts and administration of justice but also those which have the tendency, that is to say, are likely to produce a particular result. Judged from the angle of Courts and administration of justice, there was no doubt that the appellant was guilty of contempt of court. The Chief Justice observed whether the appellant misunderstood the teachings of Marx and Engles or deliberately distorted them was not to much purpose. The likely effect of his words must be seen and they clearly had the effect of lowering the prestige of Judge and court in the eyes of the people. That he did not intend any such result may be a matter for consideration in the sentence to be imposed on him but could not serve as a justification.

81. In contrast to the aforesaid observation the Indian Judiciary in the case of P.N. Dua vs P Shiv Shaanker (: MANU/SC/0362/1988 : AIR 1988 SC 1208) which involved the comments made by the then Minister for Law, Justice and Company Affairs, Shri P. Shiv Shanker, in a speech delivered in a meeting of the Bar Council of Hyderabad, which allegedly was derogatory to the dignity of the Court. Now the Court took a different stand. Taking account of the observations made by the learned Chief Justice Hidayatullah in Namboodiripad's case the Court observed that, "While respectfully accepting the ratio and the observations of the learned Chief Justice made in that decision (Namboodiripad's case) we must recognize that times and claim have changed in the last two decades. There have been tremendous erosions of many values. In this connection, it is interesting to note that little over sixty years ago, on 1st March, 1928, Justice Holmes wrote to Prof. Harold Laski.... You amaze me by saying, if I understand you that criticism of an opinion or judgment alter it has been tendered, may make a man liable for contempt I thought that notion was left for some of our middle-western States, I must try to get the book and the decision." (Holmes- Laski Letters, Vol. 1, 1916-1625, P. 1032)... In the instant case we have examined the entire speech. In the speech Shri P. Shiv Shanker has examined the class composition of the Supreme Court. His view was that the class composition of any instrument indicates its pre-disposition, its prejudices. This is inevitable.....So, therefore, in a study of accountability if class composition of the people manning the institution is analyzed we forewarn ourselves of certain inclination, it cannot be said that an expression or view or propagation of that view hampers the dignity of the courts or impairs the administration of justice."

82. The classic exposition of the right of criticism is that of Lord Atkin when he said:

> The path of criticism is a public way; the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

83. This memorable passage has been consistently quoted with approval by all the superior courts of the Sub-continent in a number of decided cases. It has been quoted with approval in a number of cases within our jurisdiction also by both the Divisions of this Court. The Indian Supreme Court in the leading case on this point, namely, Rama Dayal Markarha vs State of Madhya Pradesh,: MANU/SC/0051/1978 : AIR 1978 SC 921, 927: 1978(3) SCR 497: 1978(2) SCC 630, observed :

> Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt in fact, such fair and reasonable criticism must be encouraged because, after all, no one, much less Judges, can claim infallibility. A fair and reasonable comment would even be helpful to the Judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. The society at large is interested in the administration of public justice because in the words of Benjamin Cardozo, 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by'. Such permissible criticism would itself provide a sensible answer to sometimes ill-informed criticism of Judges as living in ivory towers. But then, the criticism has to be fair and reasonable. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that the judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. Ordinarily, the judgment itself will be the subject-matter of criticism and not the Judge. But when it is said that the Judge had a pre-disposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he has a wayward bent of mind, is attributing motives, lack of dispassionate and objective approach and analysis and pre-judging of the issues which would bring administration of justice into ridicule if not infamy. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the courts of law as courts of justice, the criticism would cease to be fair and reasonable criticism as contemplated by section 5 but would scandalize courts and substantially interfere with administration of justice.

84. Similarly, the Supreme Court in Re: Sanjiv Datta: MANU/SC/0697/1995 : (1995) 3 SCC 619 said through Sawant, J:

> The responsibility to maintain the rule of law lies on all individuals and institutions. Much more so on the three organs of the State. Our Constitution has separated and demarcated the functions of the Legislature, the Executive and the Judiciary. Each has to perform the functions entrusted to it and respect the functioning of the others. None is free from errors, and the judiciary does not claim infallibility. It is truly said that a Judge who has not committed a mistake is yet to be born. Our legal system, in fact, acknowledges the fallibility of the courts and provides for both internal and external checks to correct the errors. The law, the jurisprudence and the precedents, the open public hearings, reasoned

> judgments, appeals, revisions, references and reviews constitute the internal checks while objective correctives provide the external checks. Together, they go a long way to ensure judicial accountability. The law thus provides procedure to correct judicial errors. Abuses, attribution of motives, vituperative terrorism and defiance are no methods to correct the errors of the courts. In the discharge of their functions the courts have to be allowed to operate freely and fearlessly but for which impartial adjudication will be an impossibility. Ours is a constitutional government based on the rule of law. The Constitution entrusts the task of interpreting and administering the law to the judiciary whose view on the subject is made legally final and binding on all till it is changed by a higher court or by a permissible legislative measure. Those living and functioning under the Constitution have to accept and submit to this obligation of respecting the constitutional authority of the courts. Under a constitutional government, such final authority has to vest in some institution. Otherwise, there will be chaos. The court's verdict has to be respected not necessarily by the authority of its reason but always by reason of its authority. Any conduct designed to or suggestive of challenging this crucial balance of power devised by the Constitution is an attempt to subvert the rule of law and an invitation to anarchy.

85. However, in the Indian Jurisdiction a Division Bench of Kerala High Court in the case of Vincent Panikulangara vs Gopala Karup 1982 Cr.LJ 2094 relevant page 2099, has indicated some of the factors to be taken into consideration for deciding whether the publication is by way of fair comment or not. Subramonian Poti, Acting Chief Justice, delivering the judgment of the Bench observed:

> In these circumstances could we say that the comment is honest? It would be honest if it is based on true facts. That as we have said is not the case here. It is ex facie irresponsible. If it did come from a member of the public unconnected with the examination whose comment was motivated by public interest only it would have had a different complexion. The respondent as one who shares the responsibility for the conduct of examinations, in the University (as the Convener of the Standing Committee of the Examinations) is more or less in the position of one who was a party, he having identified himself with the case of the University.

86. Fair criticism of orders and judgments of courts by public are permitted as it may be necessary for the public to be educated on the propriety of acts of courts just as acts of Legislature or the Executive call for honest comment. Any system could improve only by periodical assessment of its performance and the court is not beyond the purview of such assessment. Public opinion does play a significant role in making any institution responsive to the need of the times. When a member of the public does honestly criticize an order or a judgment of the court he does it not to promote his own interest, but that of the general public. When a party to a litigation does it he is essentially subjective to a considerable extent and it is more in his own interest that he does it than in the public interest. Shri Eravankara Gopala Kurup identified himself with the University because he evidently feels that it was the conduct of examination by the University that was commented upon and that called for an answer from him. He was apparently trying to vindicate himself. This has a bearing on determining whether the criticism is honest. Yet another matter which is of relevance is that the respondent was not speaking when he was off guard. He was speaking deliberately and purposefully. He had a prepared statement to be fed to the press. There is no case that the newspapers rushed to him for ascertaining his reaction."

87. In the Rama Dayal's case (Supra), the Indian Supreme Court also stated that the sitting in which the offending statement is made is also to be taken into consideration and the fact that the offending statements were made in a muffasil town where there is a lower

rate of literacy was considered to be a factor against fair comment.

88. It would be profitable if we conclude this topic by quoting the following observations of Sabyasachi Mukharji, J, given in the case of PN Duba,: MANU/SC/0362/1988 : AIR 1988 SC 1208 : 1988 CrLJ 1745 :

> It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalizing remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which Courts of Justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the Judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time, we cannot be oblivions of the attempts made to decry or denigrate the judicial process, if it is seriously done. This question was examined in Rama Dayal Markarha vs State of Madhya Pradesh, : MANU/SC/0051/1978 : AIR 1978 SC 921: 1978 (3) SCR 630, where it was held that fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because, after all no one, much less Judges, can claim infallibility. Such a criticism may fairly asses that the judgment is incorrect or an error has been committed both with regard to law of established facts. But when it is said that the Judge had a pre-disposition to convict of deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused, or has a wayward, bent of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule. Criticism of the Judges would attract greater attention than others and such criticism sometimes interferes with the administration of justice and that must be Judged by the yardstick whether it brings the administration of justice into ridicule or hampers administration of justice. After all, it cannot be denied that predisposition or subtle prejudice or unconscious prejudice or what in Indian language is called 'Sanskar' are inarticulate major premises in decision making process. That element in the decision making process cannot be denied, it should be taken note of.

89. Now let us turn to the merit of the respective cases.

90. Mr Amirul Islam has emphatically argued that scandalisation has become obsolete and it cannot be treated as contempt and for this proposition he relied on the case of RV Gray. On the other hand Mr Mahmudul Islam submitted that scandalisation of the Court is still treated as contempt in all the jurisdictions. It has not become obsolete. Scandalisation of court or Judges are rare in the developed countries because of high standard of the Judges and equally, citizens are also literate and responsible. The other learned Advocates did not make any such submission that scandalisation has become obsolete.

91. Since Mr Islam has raised a serious question as to the elements/ingredients of contempt it merits consideration in view of the fact that if scandalisation of the Court or Judges do not amount to contempt, then the rule shall fall to the ground. Therefore, we must address the question first and ascertain the correct position of law.

92. There are decisions of English Courts from early times where the Courts assumed jurisdiction in taking committal proceedings against persons who were guilty of publishing any scandalous matter in respect of the Court itself. See In Re Read and Huggonson

(1742) 2 ATK 469,471. In the year 1899, Lord Morris in delivering the judgment of the Judicial Committee in Mcleod vs St. Aubyn, 1899 AC 549 observed that "committal for contempt by scandalizing the Court itself has become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them". In the next sentence his Lordship said further. "But it must be considered that in small Colonies, consisting principally of cultured population, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."

93. The observation of Lord Morris that contempt proceedings for scandalizing the Courts have become obsolete in England is not strictly speaking, is not correct for in the very next year, such proceedings were taken in R V Gray (1900) 2 QB 36. In that case there was a scandalous attack of a rather atrocious type on Darling, J who was sitting at that time in Birmingham Assizes and was trying a men named Wells who was indicted, inter alia, for selling and publishing obscene literature. In that case the publication was found to be scandalous of the court and such attack was calculated to interfere directly with proper administration of Justice. Then came the case of New Statesmen in 1928. The paper had published an article criticizing Mr Justice Avory. Proceedings were taken against the Editor for contempt of Court. See R vs New Statesmen. (1928) 2 TLR 301. The learned Advocate for the New Statesmen relied on the observation of the privy council given in Mcleod v. St. Aubyn (Supra) and submitted that scandalizing the Court itself had became obsolete but it was not accepted when the contemner was adjudged guilty of contempt. Then came the case of Devi Prashed vs King Emperor. 70 JA 216 in 1943. Lord Atkin while delivering the judgment of the Privy Council observed that cases of contempt which consist of scandalising the Court itself are fortunately rare and require to be treated with much discretion. Here it must be remembered that Lord Morris though in Mcleod vs St. Aubyn said that contempt of Court by scandalising the Court had become obsolete but in the next sentence expressed the necessity of preserving this type of contempt for the Colony. Fortunately, the said decision has never been followed either by the English Court or by the Courts of Commonwealth countries. Scandalisation of Courts as a form of contempt still exists in the legal jurisprudence as a valid concept.

94. The same is the position in India.

In perspective Publication Act. Ltd vs State of Maharashtra (:MANU/SC/0302/1968 : AIR 1971 SC 221 at P. 230 = (1969)2 SCR 779 at-P 791-2), a bench of three Judges of the Indian Supreme Court after referring to the leading cases on the subject, formulated the principles which would govern cases of this kind. They read as under:

> (1) It will not be right to say that committals for contempt for scandalizing the Court have become obsolete.
>
> (2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.
>
> (3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "Justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary man.
>
> (4) A distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of the Court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judges or whether it

is calculated to interfere with due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as contempt.

(5) Alternatively the test will be whether the wrong is done to the Judge personally or it is done to the public. To borrow from the language of Mukherjea, J (as he then was) (Brahma Prakash Sharma's case, : MANU/SC/0020/1953 : (1953) SCR 1169 =: MANU/SC/0020/1953 : AIR 1954 SC 10 the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual or prospective litigants from placing complete reliance upon the Court's administration of justice or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties

95. The Indian Supreme Court in the case reported in: MANU/SC/0051/1978 : AIR 1978 SC 921 following the aforesaid decision reiterated that prosecutions for scandalizing Court have not become obsolete.

96. In Rachapudi Subba Rao vs Advocate General, Andhra Pradesh: MANU/SC/0505/1980 : AIR 1981 SC 755=1981 (2) SCC 57= 1981 (2) SCR 320, the Indian Supreme Cour observed that "if the act complained of scandalizes the judicial officer with regard to the discharge of his judicial function, it thereby substantially interferes or tends to interfere with the due course of justice" which is a fact of the broad concept of the " administration of justice" and, as such, is punishable....."

Thus scandalous allegations against the High Court contained in the memorandum of appeal filed in the Supreme Court held patently malafide and constituted substantial interference with due course of justice (See Registrar of Orissa High Court vs Baradakanta Misra : MANU/OR/0083/1973 : AIR 1973 Ori 244 (FB).

97. The words due course of justice have a wide import. If the act complained of substantially interferes or tends to interfere with the broad stream of administration of justice that will be punishable. If an act undermines the prestige of the Court, it is certainly substantially interfering with due course of justice. Punishment is awarded in the interest of administration of justice. The impairment of the dignity and the authority of the Court is to be eschewed. The purpose of contempt proceedings is to preserve and maintain the flow of the stream of justice in its unsullied form and purity. Within Indian Jurisdiction there are other very recent judgments on the same line i.e., Doctor Saxenas Case: MANU/SC/0627/1996 : (1996) 5 SCC 216, AIR 2000 SC 68.

In Pakistan also the legal position is same. Scandalisation is still an element of contempt. Besides, both in India and in Pakistan under the Contempt of Courts Act of those countries, scandalisation of the Judge or the Court is contempt.

Within our jurisdiction the law is more or less same. Scandalisation of the Court or the Judge is still treated as a form of gross contempt.

A statement scandalizing the Judge carries with it a presumption that it has a tendency to interfere with the administration of justice. It suggests that the fountain of justice itself has become tainted. This kind of contempt has always been held to be a gross form of contempt. See Sir Edward Snelson vs Judges of the High Court of West Pakistan Lahore 16 DLR (SC) 535.

Where the printed or published or uttered matters amount to a scandalization of the Court with reference to a decided case or cases, it amounts to a clear contempt

of Court. See State vs Abdul Rashid 10 DLR 568; 9 PLR 716 = State vs SW. Lakitullah 10 DLR 309.

98. Disparaging words used against the Judges of the High Court in a letter addressed to the Chief Secretary of the province amounts to gross contempt of Court. Syed Mahsin Termizy vs State 16 DLR (SC) 735.

If a person scandalises a Judge of a superior Court, it is no good defense to say that his intention was good and he did not like to scandalise the Judge.

The test is whether the writing complained of tended to interfere with due course of justice and not what the intention was and the truth of the statement cannot be set up as defense. S. Israr vs Crown 7 DLR (FC) 19.

Litigant or his lawyers must refrain from saying or doing anything which might have the effect of scandalising the Court and when a plea of bias is raised it should be remembered that nothing should be said to scandalise the Judge as a Judge. MH Khandeker vs State 18 DLR (SC) 124.

Scandalization of Court is grossest forum of contempt.

An Advocate is guilty of contempt in making wild allegations of corruption against the trying Judge without verifying and satisfying himself that the allegations were in fact sustainable. He cannot claim privilege if not acted in a bona fide and diligent manner. The State vs Yousuf Ali Khan 21 DLR (WP) 264.

99. Filing a suit containing scandalous allegations against Judge as well as the appeal against the judgment in the suit-all constitute contempt of Court. State vs Abdul Majid : LEX/BDHC/0063/1980 : 33 DLR 220.

100. In the issue of the daily Inqilab at page 5 of the 12th June, 1986 a letter to the Editor captioned "পেশকারের পেশী" was published which contained scandalous allegations against the Judges as a class and the Bench officers of the Judges as a class which was construed as contempt because the scandalous allegations undermined the dignity and authority of the courts of law in Bangladesh and lowered down the reputation of the entire judicial system in the estimation of the public State vs MA Monir, 40 DLR 183

101. Finally, the legal position is that one may accede to the proposition that criticism of the conduct of the Judges which cannot possibly have the tendency to obstruct or interfere with administration of justice, are not contempt of Court, even though they may be libelous attacks on Judges. Thus, an attack on a Judge for conduct not connected with his judicial functions will not come within the mischief of the contempt of Court. But one cannot stretch this to attack on Judges in their public capacity, for such attacks would inevitably also be calculated to lower the authority of the Courts over which the Judges so maligned happen to be presiding and thus tend to interfere with the due course of justice and the proper administration thereof.

102. In the foregoing paragraphs, we have seen on a review of good number of cases of the superior Courts of different jurisdiction wherefrom it is seen that in the sub-continent still canalization of the court or the Judge amounts to contempt. Even in England the observation that canalization has become obsolete as given in the case of Mcleod vs St. Aubyn has not been followed in the subsequent cases. The cases which we have cited from our jurisdiction along with the Indian and Pakistani decisions show that till to-day scandalization is a serious form of contempt of Court and therefore we do not find any substance or force in the submission of Mr Islam on this point.

103. There are two other points which have been emphatically urged before us by Mr Rokanuddin Mahmud as well as by Mr Amirul Islam. Their common contention is that the Judges in the democracy like Bangladesh are answerable to the people and therefore, their action in the capacity of a Judge of this Court is not above criticism and every citizen of the state has a fundamental right to criticize any judgment delivered by a Judge of this Court. Mr Rokanuddin Mahmud further submitted that a Judge is first a citizen and then a Judge so every other citizen has right to criticize his action because primarily he is a citizen of Bangladesh. Therefore, the attempt made by 'Manabjamin' by publishing this story was aimed at to create awareness in the minds of the Judges about their Constitutional responsibility to dispense justice in accordance with law and without any fear or favor or from any interference from any high-up in the executive. Mr Amirul Islam also submitted that administration of justice and Judges are open to public criticism and public scrutiny. Judges are accountable to the society and their accountability must be Judged by their conscience and their office. The Judges are oath bound to defend, preserve and protect the Constitution and dispense justice without fear or favour. Therefore neither the speech made by Justice Naimuddin Ahmed nor the publication of the same by the 'Manabjamin' constituted any contempt in the instant case.

> To answer the contention it may be stated that the object of contempt proceedings is not to afford protection to Judges personally from imputation to which they may be exposed by the individuals but is intended to be a protection to the public whose interest would be very much affected if by the act or conduct of any party the authority of the Court is lowered and the sense of confidence which the people have in the administration of the justice by it is weakened.

104. When the Court itself is attacked, summary jurisdiction by way of contempt proceedings must be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt.

105. There are two primarily considerations which should weigh with the Court in such cases, viz, first, whether the reflection on the conduct or character of the Judge is within the limits of fair and reasonable criticism and secondly, whether it is a mere libel or defamation of the Judge or amounts to contempt of the Court. If it is a mere defamatory attack on the Judge and is not calculated to interfere with the due course of justice or proper administration of the law by such Court, it is not proper to proceed by way of contempt.

106. Where the question arises whether defamatory statement directed against a Judge is calculated to undermine the confidence of the public in the competency or integrity of the Judge or is likely to deflect the Court itself from strict and unhesitant performance of his duties, all surrounding facts and circumstances under which the statement was made and the degree of publicity that was given to it would be relevant circumstances. In the case reported in : MANU/SC/0067/1977 : (1978) 3 SCC 339, Justice Krishna Iyer observed that to avoid confusion between personal protection of a libeled Judge and prevention of obstruction of public justice and the community's confidence in that great process must be clearly kept in mind because the former is not contempt but the latter is because the attack is calculated to obstruct or destroy the judicial process. The law of contempt is to protect public confidence in the administration of justice and the offence will not be committed by attacks upon the personal reputation of individual Judges as such. In that case his Lordship further observed: "The Court should act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judge, where the attack is calculated to obstruct or destroy the judicial process. Otherwise, the Court should ignore-the dogs may bark, the caravan will press."

107. The matter have been succinctly set out by Professor Goodhart "scandalizing the

Court means any hostile criticism of the Judge as Judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander or libel."

108. Similarly, in the Australian case of Nicholls:- (1911) 12 CLR 280, 285 Griffith, CJ has said that;

> In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into the contempt in that sense amounts to contempt of Court.

109. In the matter of Special Reference From the Bahama Islands, 1893 AC 138, privy council advised, that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticized local sanitary conditions. Though couched in highly sarcastic terms, the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not contempt.

110. From a review of the aforesaid decisions it is clear that when a Judge in his personal capacity as a citizen of the State is criticized for his conduct that may amount to libel or slander and is governed by the law of defamation. If a Judge is aggrieved by any utterance or publication attacking him in his personal capacity it does not amount to contempt of Court simply because this has nothing to do with the administration of justice. Therefore a Judge as a citizen has no immunity personally from imputation to which they may be exposed as individuals. But it would be contempt if the attack on the Judge is, calculated to interfere with the course of justice or the proper administration of the law.

111. Thus we may reach the conclusion that the courts of justice in a state from the highest to the lowest are by their Constitution entrusted with functions directly connected with the administration of justice and it is the expectation and confidence of all who have or likely to have business therein that the courts perform their functions on a high level of rectitude without fear or favor, affection or ill will. And it is this, traditional confidence in the Courts that justice will be administered in them which is sought to be protected by proceedings in contempt. The objects already stated is not to vindicate the Judge personally but to protect the public against undermining of their accustomed confidence in the Judge's authority.

112. Scandalisation of the Court is a species of contempt and may take several forms. A common form is the vilification of the Judge. When proceedings in contempt are taken for such vilification the question which the court has to ask is, whether the vilification is of a Judge as a Judge or it is the vilification of the Judge as an individual. If the latter the Judge is left to his personal remedies and the Court has no power to commit for contempt. If the former the Court will proceed to exercise the jurisdiction with scrupulous care and in cases which are clear and beyond no doubt.

113. So, the law is well settled on this point. The jurisdiction is not intended to uphold the personal dignity of the Judges. That must rest on surer foundations. In the instant case it is found on fact that it is a case of vilification of a Judge as a Judge and not as an individual. Thus we do not find any substance in this submission of the learned Advocates.

114. Another point has been commonly urged by both the learned Advocates Mr Rokanuddin Mahmud and Mr Amirul Islam. The point is, that in a democracy people is the source of all power and therefore, the Judges of all ranks are answerable to the people at large and thus the people has every right to scrutinize and criticize every activity of Judges

in the performance of their duties as Judges.

115. Since question of accountability is involved in this submission we would like to address the issue in detail. There is no denying of the fact that in a modem democracy all the Judges are accountable to the people who is the repository of all powers. In a democratic polity the will of the people is reflected in the Constitution. The Judges of this Division hold constitutional post but that does not mean that they are above law. Like any other citizen a Judge of the Supreme Court is also accountable to the people of the Republic. There is consensus amongst the legal community and the people at large that the Judges are answerable to the people. Judges with public accountability of the judiciary is a must for the affective functioning of the Modem State. Some strongly hold the view that Judges are accountable to their conscience and conscience only and to none else. If you are a man of integrity and honesty you will be guided by your conscience at every step. But the question is, are the Judges always guided by their conscience or, in other words is the conscience invulnerable. The stark reality is that Judges may fail to follow the dictate of their conscience. Therefore, an instrumentality must be developed to cope with the situation and those things were behind the back of the mind of the Constituent Assembly when they framed the Constitution. The Judges of the court as holder of a constitutional post takes an oath before entering into the office to defend, protect and preserve the Constitution and to dispense justice in accordance with law without fear or favour, ill will or hatred. It is true accountability to the Constitution is, in fact, accountability to the people because the Constitution is the embodiment of the will of the people. Here also the question arises what happens if a Judge fails to live upto his expectation i.e. if fails to uphold the oath taken by him? To meet such situation the instrumentality of Supreme Judicial Council has been provided for. It must be remembered that in a democracy every power holder is in the ultimate analysis accountable to the people who are the source of all powers. A Judge of this division is holding his office on oath and a great trust is reposed in such office. A remark of Edmund Burke will implicitly clear the position. He said, "All persons possessing a portion of power ought to be strongly and lawfully impressed with an idea that they act in trust and that they are to account for the conduct in their trust."

116. The Judges are accountable for their judicial work and conduct in two different ways. So far it relates to their judicial works their judgments are the acid tests of their accountability. If any error or flaw is there it can always be challenged in the higher Court and get the error corrected. So, if a litigant is aggrieved he can move upto the Appellate Division and with the judgment of Appellate Division it reaches its finality.

117. But there is the other side of the coin. The Judges carry their office with them wherever they go and thus they are under the public gaze even for their activities outside Courthouses. It is generally said that a Judge becomes conditioned by the oath he takes and by and large it is true. But there may be cases where a Judge though holding the august seat of justice falters or fails to rise to the occasion. In other words, there may be occasional lapse or failing in the capacity or conduct of a Judge. To meet such a situation there is Article 96 of the Constitution. The Article reads:

> 96(1).....
>
> 96(2).....
>
> 96(3) There shall be a Supreme Judicial Council, in this Article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two most senior Judges.....
>
> (4) The functions of the council shall be -

(a) to prescribe a code of conduct to be observed by the Judges; and

(b) to enquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge

(5).....

118. Thus it is clear that under Article 96(4)(a), the Supreme Judicial Council is empowered and authorized to prescribe the code of conduct for the Judges of both the division of this Court. The code of conduct will regulate the conduct of a Judge both in and out of the Court. We have already indicated that with regard to the judicial pronouncements the aggrieved party can always agitate his or her grievance before the appropriate higher forum either by way of appeal or revision. But when it comes to his conduct regarding lapses or failing i.e. in other words, his behavior in and out of the Court it is the Supreme Judicial Council which is authorized to regulate and monitor his activities. The Supreme judicial Council can hold enquiry as to the physical or mental incapacity of a Judge or about his misconduct. Thus Article 96 of the Constitution has ordained the President of the Republic to act and direct the Supreme Judicial Council to enquire into misconduct or incapacity and report its finding to him whereupon he shall act accordingly. Accountability of a Judge, therefore, means accountability to the Code of conduct formulated by the Supreme Judicial Council under the Constitution. Accountability to the Code means accountability to the Constitution which in fact means accountable to the people because the Constitution is the embodiment of the will of the people.

119. In this connection it may further be mentioned that originally the power to remove a Judge of a superior Court was given to the Parliament. But by amending that article now that power has been entrusted upon the Supreme Judicial Council. This power of the Supreme Judicial Council also emanates from people under the Constitution. The Supreme Judicial Council exercises its authority and power for and on behalf of the people under the Constitution. In some countries this power has been vested with the house of nations like India. In India a Judge of the High Court or of the Supreme Court can be removed by the parliament by moving a motion for impeachment passed by three fourths of the members present. In our Constitution also so was the provision but subsequently the parliament in their wisdom thought it fit to give this power to the Supreme Judicial Council. So, it depends upon the wisdom of the Parliament to decide whether they will continue with the present provision or will revert back to the original situation. But in any case Judges will remain accountable to the people under the provision of the Constitution.

120. It appears that for the last 30 years there has been no effective functionary of the Supreme Judicial Council. The Supreme Judicial Council of late framed a Code of conduct, which came into effect on and from 7th of May, 2000. Both of us as Judges of this Court have gone through it but in our humble opinion some other points should also be included in the Code of conduct in the light of the present-day realities. The people of this country are alert and watchful of every movement of ours. The Supreme Judicial Council should constantly monitor and scrutinize the activities of each of us so that the high standard of the individual Judges is maintained. The Supreme Judicial Council should be active and agile and be on their toes in overseeing the activities of the Judges. No lapse or failing of a Judge should be spared otherwise the standard of judiciary will deteriorate at an alarming rate. Here it may not be out of place to mention that sub-article (7) of Article 96 empowers the Supreme Judicial Council to regulate its procedure. To our knowledge no such procedure has yet been prescribed by it. In all fairness a rule should be framed for the sake of transparency. We now stand at a crossroad of history and the Judges perform their duties with public gaze at a point of time when the concept of accountability is gaining strength day by day. We live in a democracy not in a Regal or Feudal State. In a

Republic the people are the repository of all powers and the people have a right to know. When the credibility of the Judges are the wane and distrust is gaining ground it would be better for all if the proceedings of the Supreme Judicial Council is conducted in public. People is the ultimate arbiter and if they have free excess to the proceedings of the Supreme Judicial Council there will remain no room for any doubt or suspicion about the transparency of the proceeding. The ideal of a democracy is that power should never become uncontrolled and that even the controlling power should not be irresponsible. Controlling power should be effective and open. If the proceeding is in open it will enable the members of the public to Judge themselves the veracity of the charges against the Judges in a volatile climate. Marshall, Chief Justice of the United States Supreme Court said, "we must never forget that the only real source of power we as Judges can tap is the respect of the people." Similarly, Lord Denning echoed, "Justice is rooted in confidence, and confidence is destroyed when the right minded go away thinking that the Judge is biased." We, therefore, as Judges cannot ignore public perception. If the proceedings is open this will enhance the prestige of the judiciary and the Judges will shine as honest, transparent, impartial and fair in the mind of the people at large for whom this institution, like others, exists.

121. In the final analysis it can be said that there is no room for entertaining the idea that the Judges are not accountable to anybody rather they are very much answerable to the people through the Constitution and, as such, they must act not only with the dictate of their conscience but also meticulously follow the law and abide by the provisions of the Constitution. But nevertheless, a Judge may be derailed, may go off the track or even may fail to follow the dictate of conscience or may even fail to live upto the oath he has taken. We have no doubt that the Judges of this Court are very learned, most competent and, above all eminent persons. But, after all, it must be remembered that the Judges are also human beings with all the failings, all the sentiments and all the prejudices which common people have. And that is why there is Article 96 of the Constitution to meet any such eventualities. The embodiment of Article 96 in the Constitution clearly shows that through the instrumentality of Supreme Judicial Council, the Judges of this Court are answerable to the people of the Republic.

122. We may, therefore, sum up the point by saying that the judiciary certainly is not immune from criticism but when that criticism is based on obvious distortion or gross mis-statement and made in a manner which is designed to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored. Action for contempt of court which is discretionary should not be frequently or lightly taken but at the same time courts should not abstain from using this weapon even when its use is needed to correct standards of behavior in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of bona fide concern for improvement. But when there appears some scheme and a design to bring about results which must damage confidence in the judicial system and demoralize Judges of the highest Court by making malicious attacks, anyone interested in maintaining the high standards of fearless, impartial and unbending justice will feel perturbed. One may be able to live in a world of logic detachment when unjustified abuses are hurled at one's self personally, but when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effect upon national honor and prestige in the comity of nations. It becomes a matter deserving consideration of all serious minded people who are interested in seeing that democracy does not flounder or pale in this country. If fearless and impartial courts of justice are the bulwarks of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks on them.

123. Recently there are two ideas being floated in the air on this point. One school of thought is that the Judges are answerable only to their conscience and conscience only,

and not to anybody else. The other view is a modified version of the same that Judges are, no doubt, answerable but they are answerable to their conscience and the law. Another school of thought is that Judges are answerable to the people for their actions as the authority of this Court now emanates from the people. They are answerable to the people at large so the people are entitled to scrutinize their activities and criticize the same. Apparently, it may appear that, in fact, there are two schools of thought on this point but on a critical analysis it appears to us that they are one and same and there is no conflict between the two. It is true that this Court derives its authority from the Constitution of the Republic and the Judges are answerable to the public. The Judges of this Court are under the legal obligation to protect, preserve and defend the Constitution and to dispense justice in accordance with law without any fear or favor, ill will or affection. Therefore, a Judge who has conscience cannot act unscrupulously but to the dictates of his conscience which would invariably lead him to act according to his oath.

124. The problem only arises as and when a Judge fails to act according to his conscience and in terms of his oath. When a Judge acts beyond the scope of law and the oath taken by him as a Judge he acts against his conscience because sometimes conscience, may fail. After all, the Judges are also human beings and as human beings they have all the failings of a human being. Thus, problem only arises when the person occupying the highest seat of justice fails to act according to his conscience and in terms of the Constitution and that is why in the ultimate analysis all the Judges of this Court are made answerable to the people who are repository of all powers in this Republic. Now, the only question that requires the answer is, how the accountability of the Judges are to be determined. We have no hesitation in our mind to say with all the force that we can command that the Judges of this Court are answerable to the people who is the repository of all powers in a democratic polity and this power of the people is exercised in our Republic through the instrumentality of Supreme Judicial Council.

125. The matter of accountability differs from country to country. The Judges of the Superior Courts in India are also answerable to the people. The framers of the Indian Constitution, in their wisdom provided that the power would be exercised by the members of the parliament as people's representative in impeaching the Judges of the superior Courts for misconduct. Thus, in India the Judges of the Superior Courts are removable from the service by the parliament through the procedure of impeachment and the parliament as representative of the people exercise that authority. In our country also we are equally answerable to the people for our action as a Judge and if a Judge of the Supreme Court acts beyond the limit of law and dignity he commits misconduct. The power to take disciplinary action against him lies with the Supreme Judicial Council. It thus appears that our Constituent Assembly while framed the Constitution, they, in their wisdom, thought it wise to give the authority to take disciplinary actions against the Judges of the Supreme Court to the Supreme Judicial Council instead of keeping the power with the parliament. It must be remembered that the authority which is exercised by the Supreme Judicial Council, is exercised as representative of the people of the country and they act for and on behalf of the people at large. Therefore, it appears to us that in reality there is no dispute as to the factor that the Judges of the Superior Court in any Republic or democratic polity are answerable to the People and the manner of exercising that authority may differ from country to country. Therefore what we would like to say is that when a Judge of this Court commits misconduct he is liable to be proceeded against by way of disciplinary action by the Supreme Judicial Council at the instance of the president of the Republic or at the instance of any other citizen of the state.

126. Therefore, this does not necessary lead to the proposition that the Judges are answerable for all their actions to each of the members of the public separately. They are answerable to the people in the sense that they are removable through the instrumentality of the people in the event to committing misconduct. In regard to judicial function they

may be criticized but within the limit of law i.e. it must be fair and innocent, comment without any malice or ill will and must not be directed to interfere with the administration of justice or to bring the judiciary in disrepute. Since the Judges are answerable to the people that does not authorize any one member of the public including the media or even electric media to impute motive or bias against a Judge.

127. Keeping in mind the aforesaid principles of law we would now like to examine the case of each of the newspapers separately on merit.

128. The gist of the allegations leveled against 'Manabjamin' has been reflected in the application itself and we have got the version of the 'Manabjamin' from their affidavit-in-opposition filed in the Court. From the facts disclosed by the 'Manabjamin' in their affidavit-in-opposition and also from the trend of submissions made by Mr Rokanuddin Mahmud, it appears that the admitted position is that the Editor of 'Manabjamin' is the writer of the story which is the subject matter of the rule. Since the main allegation is against 'Manabjamin' and from the admitted facts it appears that they are the real heroes, in all fairness their case should be considered first and in that view of the matter, we propose to take up the case of 'Manabjamin' first.

129. While discussing the case of 'Manabjamin' it has been noticed that under main heading there were two boxed news and in one of them 'Manabjamin' has reproduced an item of news published in the 'Daily Jugantor' under the heading "কী আছে ক্যাসেটে". All the newspapers including 'Manabjamin' contended that the tape conversation was first disclosed by the Jugantor in that news item which was first in point of time. The story published by 'Manabjamin' is, in fact, based on that news. Therefore, it was contended that if 'Manabjamin' has committed contempt of court that Jugantor is also guilty of contempt because they, first of all, printed and published the aforesaid news but greatly, to their surprise, they find that no contempt Rule has been issued against Jugantor which, according to them, not only amounts to discrimination but also not proper and legal. All the learned Advocates appearing for the newspapers, in one voice, raised that contention. Therefore, it casts a duty upon us to answer the point raised by them.

130. The news published in the Jugantor is reproduced below :

"একটি ক্যাসেটকে কেন্দ্র করে আদালত পাড়ায় ব্যাপক চাঞ্চল্য সৃষ্টি হয়েছে। বিষয়টির সত্যতা যাচাই করা না গেলেও এ নিয়ে জল্পনা-কল্পনার শেষ নাই।

জানা গেছে, ক্যাসেটে একজন বিচারপতির কিছু কথোপকথন রেকর্ড করা হয়েছে। তিনি টেলিফোনে একজন শীর্ষ পর্যায়ের রাজনৈতিক নেতার সঙ্গে কথোপকথনে এমন কিছু কথা বলেছেন যা রীতিমতো অবিশ্বাস্য। কথোপকথনে গত ২৪ আগষ্ট গভীর রাতে অনুষ্ঠিত একটি বৈঠকেরও উল্লেখ রয়েছে। কথোপকথন ক্যাসেটবন্দি করেছেন একজন বড়মাপের নেতা।"

131. We have read the news items between the lines and on a careful scrutiny of the same all that we find is that the Jugantor has disclosed the fact that one of the Judges of the superior Court had a telephonic conversation with a senior political leader of the country. It further reveals that they were astonished to know that and it was hard to believe that a Judge of a superior Court could talk with a senior political leader of the country and the news item further indicated that the conversation disclosed that on the night of 24th August at late night there was a meeting. We have already discussed the relevant law in details and on a perusal of the news item we are of the opinion that it does not, in any way, scandalize the Court nor does it interfere with the administration of justice. They have simply reported the fact without imputing any motive or bias against the Judge or the Court. It is a disclosure of an incident based on fact. They have neither distorted the truth nor added color to it. It is an objective report. Therefore, we are of the opinion that publication of the said news item does not amount to contempt of Court. It was an honest and faithful report of an incident nothing more. But 'Manabjamin' has traveled far beyond that and by distorting the truth and adding color to the conversation they have manufactured such a story which has shaken the confidence of the people of Bangladesh in the judiciary.

132. We have issued Rule against the 'Daily Sangbad' because while reporting about the conversation recorded in the tape they have made certain comments which prima facie denigrate the authority of the Court.

133. We have issued Rules against the Daily Ittefaq and the 'Daily Janakantha' for publishing the remarks made by Justice Naimuddin Ahmed in a seminar because those remarks prima facie appear to scandalize the judiciary. In view of the aforesaid facts and circumstances of the case at the time of issuance of the Rule we thought that no fruitful

purpose would be served by issuing a Rule against the Daily Jugantor. The case of each of the newspapers stands on a separate footing than the 'Daily Jugantor'. From our discussion aforesaid it is clear that all the four newspapers by publishing the news in question prima facie out-stepped the limit of fair comment and, as such, we issued Rule against them.

134. The Editor of 'Manabjamin' in order to draw the attention of the readers gave a box heading wherein it has been specifically mentioned, "এই ব্যতিক্রমী রিপোর্টটি ঠিক রূপকথার ভিত্তিতে রচিত নয়। সত্য ঘটনা অবলম্বনে রচিত। বোধগম্য কারণেই এভাবে পত্রস্থ করা হল।–সম্পাদক।"

We have already noted that the Editor is the writer of this report. Therefore, the undisputed version of the paper is that the story which has been depicted in this article is based on facts. And what are those facts? Facts are that the ex-president of the country is an accused in an appeal pending before the High Court Division and that influential accused came in touch with the Judges of the Division Bench wherein his appeal is pending for hearing. He managed to bribe the Judges by paying huge amount of money so that he can get an order of two years rigorous imprisonment and accordingly, after payment of the booty the judgment was prepared in that light. But this incident somehow was detected by the intelligence department of the Government whereupon the Prime Minister of the country summoned the Law Minister and asked him to do the needful so that the judgment cannot go in favor of the accused and with the intervention of the Law Minister the Judges were compelled to resile from their earlier decision and passed a verdict by reducing the sentence.

135. The crux of the article is that both the Judges of the Division Bench have been bribed by the accused and they agreed to his proposal of acquitting him by allowing the appeal but ultimately could not do so due to the intervention of the Law Minister and the basis of this article is the conversation that has been recorded while the accused was talking with the puisne Judge after the pronouncement of the verdict. We have heard the tape along with the learned Advocates of all the parties and also played the cassette thereafter in our chamber and obtained an agreed transcript of the said tape conversation, which has been signed by all the learned Advocates. From the recorded conversation it appears that the puisne Judge was previously known to the former president. He is an accused in the Janata Tower Case and it further appears that he somehow influenced the puisne Judge to get a favorable verdict in the appeal. It further appears that the puisne Judge also assured him that he will try his best to obtain a favorable order in his favor but he could not do so as ultimately, the Presiding Judge did not agree to his proposal. The accused repeatedly made queries why it happened and why the puisne Judge could not keep his word whereupon he said that, "ঐ উপরের জন্য". But nowhere in the conversation there is any mention of payment of money by the accused to the puisne Judge or of any monetary transaction made between them over the said case. From the trend of conversation it appears to us that the puisne Judge had a friendly relationship with the former President, the accused and the accused took advantage of that situation and convinced him to pass a favorable verdict in his favor. This far and no further was the conversation. There is not an iota of evidence to show that ever there had been any monetary transaction between them or through any other persons but the main theme of the article is written in such a palatable style that the entire incident was the outcome of bribery of unprece-dented amount to get

favorable order in the appeal. Everybody who will go through the report will get an impression that the Judges had been bribed by the accused but it appears that in reality there is no trace of such transaction.

136. The story has two parts,- the first part relates to the bribery and the second part relates to the intervention made by the man in authority to correct the situation. The conversation was a fairly long one. Only at one place the puisne Judge indicated that he could not do as he promised because there was pressure from the higher authority. Therefore, it appears in that part of the story that at some point of the event the authority intervened. Therefore, we posed a query to the learned Attorney-General that at least it can be said that there was some sort of interference in the matter of delivery of judgment by the authority. The learned Attorney-General candidly and frankly submitted that even if that part of the story is found to be true by the court then also 'Manabjamin' cannot avoid the liability of scandalizing this court and the Judges inasmuch as the main theme of the article is that the Judges of this court were bribed for getting a favorable verdict whereas, in fact, no such transaction was ever made. The learned Attorney-General then drew our attention to the box heading of the article which we have already quoted above from which it appears that the author who is the Editor himself, asserted that this story is based on facts. If that be so, the story of payment of bribe is also true and is based on fact. But admittedly, in the tape conversation there is no such reference at all. Therefore, to sensitize the news he has fabricated this story of bribery and thereby he has maligned the Judges and the court which amounts to grossest type of contempt. Scandalizing the court would mean hostile criticism of Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under the law of libel or slander. Yet defamatory publication concerning the Judge as a Judge brings the court or Judges into contempt, a serious impediment to justice and an inroad on the majesty of justice. Any caricature of a Judge calculated to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalizing the Judge as a Judge, in other words, imputing partiality, corruption, bias, improper motives to a Judge is scandalisation of the court and would be contempt of the court. Even imputation of lack of impartiality or fairness to a Judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemner challenges the authority of the court, he interferes with the performance of duties of Judge's office or judicial process or administration of justice or generation or production of tendency bringing the Judge or judiciary into contempt. The malicious or slanderous publication inculcates in the mind of people a general disaffection and dissatisfaction on the judicial determination and indisposes their mind to obey them. If the People's allegiance to the law is so fundamentally shaken it is the most vital and most dangerous obstruction of justice calling for urgent action. Action for contempt is not for the protection of the Judge as private individual but because they are the channels by which justice is administered to the people without fear or favour. In Halsbury's Laws of England, Fourth Edition, Volume 9, Paragraph 27, at page 21, on the topic "Scandalising the Court" it is stated that scurrilous abuse of a Judge or court or attacks on the personal character of a Judge are punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual Judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the Tribunal is undermined or impaired. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a Judge or a court. On the other hand, criticism of a Judge's conduct or of the conduct of a court, even if strongly worded, is not a contempt provided that the criticism is fair, temperate and made in good faith, and is not directed to the personal character of a Judge or to the impartiality of a Judge or court.

137. Besides, we live in a country where the rate of literacy is low and words in print generally revered which has a tremendous effect in the mind of the public. In a country like ours people are prone to believe whatever is printed in the newspapers. Admittedly this paper has a wide circulation and it appears to us that to augment its business and increase the circulation the Editor has resorted to this tactics of writing and printing distorted story regarding the Judges of this court. In this connection it must be remembered that in such a case what is material, is the nature and extent of the publication and whether or not it was likely to have an injurious affect on the minds of the public or of the judiciary itself and thereby lead to interference with the administration of justice. In this connection it may further be mentioned that fair criticism is that while criticizing the act of a Judge does not impute any ulterior motive. Thus scurrilous allegation against a Judge is beyond the permissible limit of fair criticism. The reading of the captioned news gives the impression that it is clearly intended to denigrate this court in the estimation of the people of Bangladesh. The prima facie view would be that the news has been drawn up with a designed purpose of bringing this court into contempt. It is now well settled that any publication in newspaper which is calculated or has a tendency to prejudice the public mind in favor or against the party to a cause is a contempt. It must be remembered that the legal position is that articles published in newspapers scandalizing the Judges charging them with nepotism, favoritism or any other bias are calculated to bring the court into contempt and interfere with the administration of justice. Here it must also be remembered that a story scandalizing the Judges carries with it a presumption that it has a tendency to interfere with the administration of justice. It suggests that the fountain of justice itself has become tainted. This kind of contempt has always been held to be a gross form of contempt.

138. It is now well settled that where the writing contains scandalous and unbecoming language to bring the court into disrespect and disrepute and castigates its dignity, its majesty and challenges its authority, specially when the writer has knowledge about the contempt law and working of courts of law, he commits contempt of court. The readers of this story will form an impression that Judges of this Court are corrupt and judgments can be bought at a high price. Ridiculing the performances of the Judges he writes as under:

"রাজা এরপর পরবর্তী করণীয় সম্পর্কে মনঃস্থির করলেন। তার একজন সাবেক পাতি উজির ও ঘনিষ্ঠ খয়ের খাঁকে ডেকে পাঠালেন তিনি। হুকুম তামিল হলো। পাতি উজিরকে এক কোটি স্বর্ণমুদ্রা দিয়ে পাঠানো হলো সংশ্লিষ্ট কাজীদের কাছে। শঙ্কিত রাজা জাজমেন্ট কেনাকেই উৎকৃষ্ট পন্থা ভাবলেন। যে কথা সেই কাজ। ডিল হলো, এ মামলা থেকে যেহেতু রাজা সহ সব অভিযুক্তদের বেকসুর মুক্তি দেয়া অসম্ভব, তাই কৌশলগত জাজমেন্ট তৈরিতে পক্ষদ্বয়ের মধ্যে মতৈক্য হলো।"

139. We have already indicated that the story can mainly be divided into two parts and to appreciate the point, we quote some of the relevant portions herein below:

"জনশ্রুতি ছিলো যে, কোন এক উচ্চ পদবীর রাজভক্ত সাবেক রাজা ও কাজীর আলাপচারিতা আঁড়ি পেতে যন্ত্রস্থ করেছিলো। দু কাজীর বিরুদ্ধে অভিযোগ ঃ তারা ক্ষমতাচ্যুত রাজা ও তার সাগরেদের অনুকূলে রায় লিখতে প্রায় ১ কোটি স্বর্ণমুদ্রা বকশিশ নিয়েছেন। সাবেক রাজার বিরুদ্ধে অভিযোগ ঃ তার হাতে রাজদণ্ড থাকাকালে ক্ষমতার অপব্যবহার ও জালিয়াতির মাধ্যমে বেগমের নামে বিলাসবহুল ও বহুতলবিশিষ্ট প্রাসাদ নির্মাণ। এতে রাজাসহ আসামি দেড় ডজন। নিম্ন দরবারে তারা প্রত্যেকে পেয়েছিলেন ২৫০০ দিনের কালাপানি।

পটভূমি ঃ গণরোষে গদিচ্যুত রাজা ক্ষমতায় থাকতে কতো মানুষকে অন্যায়ভাবে জেলে ঢুকিয়েছেন। ট্রাকের তলায় পিষে মানুষ হত্যা করেছেন। ক্ষমতা ছাড়ার পর তাকে কঠোর সাজা পেতে হলো। তিনি আলোচ্য মামলায় একনাগাড়ে কালাপানি কাটালেন ১০০০ দিন ও রাত্রি। তার বিরুদ্ধে আরো কয়েকগণ্ডা অভিযোগনামা ছিলো। কিন্তু হলে কি হবে। সে আজব রাজ্যে আবার রাজা রাজনীতিবিদদের সাত খুন মাফ। শ শ প্রজা বিনা দোষে জেল খাটে। বিচারের অপেক্ষায় লাখ লাখ অভিযোগনামা টেবিলে টাল হয়ে পড়ে থাকে। কাজীরা ফিরে তাকাবার ফুরসত পায় না। কিন্তু কাজীর দরবারে কাণ্ডকারখানা দেখে সাধারণ প্রজারা মাঝে মধ্যেই তাজ্জব বনে যায়। তারা দেখে রাজা ও তাদের পোষ্যরা দরবার থেকে যখন যা চায়, তা অনেক সময় ভোজভাজির মতো পূরণ হয়। .....

রাজা এরপর পরবর্তী করণীয় সম্পর্কে মনঃস্থির করলেন। তার একজন সাবেক পাতি উজির ও ঘনিষ্ঠ খয়ের খাঁকে ডেকে পাঠালেন তিনি। হুকুম তামিল হলো। পাতি উজিরকে এক কোটি স্বর্ণমুদ্রা দিয়ে পাঠানো হলো সংশ্লিষ্ট কাজীদের কাছে। শঙ্কিত রাজা জাজমেন্ট কেনাকেই উৎকৃষ্ট

পন্থা ভাবলেন। যে কথা সেই কাজ। ভেল হলো, এ মামলা থেকে যেহেতু রাজা সহ সব অভিযুক্তদের বেকসুর মুক্তি দেয়া অসম্ভব, তাই কৌশলগত জাজমেন্ট তৈরিতে পক্ষদ্বয়ের মধ্যে মতৈক্য হলো। সাবেক রাজাকে নির্বাসন দেয়া হবে ৯০০০ ঘণ্টা আর অবশিষ্টদের বেকসুর খালাস দেয়া হবে। অতি প্রাচীন সে নগরীর গুরুত্বপূর্ণ মহল পরে জানতে পারেন যে, সে মত জাজমেন্টের টাইপ করা খসড়া সাবেক রাজার কাছে পৌঁছে যায়। কিন্তু বজ্র আঁটুনি ফসকা গেরো বলে একটা কথা থাকে। গদিনাসীন রাজার গুপ্তচররাতো তৎপর ছিল। তাই তারা ক্ষমতাসীন রাজার টপ দরবারে টাইপ করা কপি পৌঁছাতেও কাল বিলম্ব করেননি। দারুণ রোষে ফেটে পড়লেন টপ দরবার। কানুন বিষয়ক উজিরকে ডাকা হলো মুহূর্তেই। হুমকি দেয়া হলো, তোমার গর্দান যাবে। এলো রূঢ় এলান, কাজীদের সামলাতে হবে। এক্ষুণি পাল্টাতে হবে দণ্ডাদেশ। মজার বিষয় হলো, খেতাব ও এনামের লোভ দেখিয়ে এই নির্দিষ্ট কাজীর দরবারটি ক্ষমতাসীনরা বশে এনছিলো বলে আগেই গুজব ছড়িয়ে পড়েছিলো। তো, টপ দরবারের নির্দেশের পর করিৎকর্মা উজির নাওয়া খাওয়া ভুলে গেছেন। গভীর রাতে রাষ্ট্রীয় পান্থশালায় ডেকে আনা হলো আলোচ্য দু কাজীকে।

কাজীরা এলেন চুপিসারে, ছদ্মবেশে। মন্ত্রণা চললো। গদিনাসীন রাজার শাহী ফরমান স্তো ত্রপাঠের গাম্ভীর্যে তাদের পাঠ করে শোনানো হলো। এতে বলা হলো, আপনাদের গোপন শলাপরামর্শের খবর আমরা জেনে গেছি। গুপ্তচররা আপনাদের ঘিরে আছে। কপট কাজীদ্বয় ভয় পেলেন। অগত্যা তারা মত পাল্টান। কিন্তু পুরোপুরি নয়। কারণ তাদের পকেটে এক কোটি স্বর্ণমুদ্রা। পরদিন নাটকীয়ভাবে অভিযোগনামা কার্য তালিকায় আসে এবং ডিক্রি ঘোষিত হয়। এতে সাবেক রাজার কালাপানিবাসের মেয়াদ প্রায় ৯০০০ ঘণ্টা থেকে বেড়ে ৫০ হাজার ঘণ্টায় পৌঁছায়। রাজ

কোষাগারে জমা দিতে বলা হয় সাড়ে পাঁচ কোটি স্বর্ণমুদ্রা। কিন্তু অবশিষ্টরা সবাই বেকসুর খালাস পান। তবে তাদের প্রত্যেককে ১০ হাজার স্বর্ণমুদ্রা জরিমানা করা হয়। এদের সবাই ছিল ধনকুবের। তাই টাকা পরিশোধ এদের জন্য কোন সমস্যাই ছিলো না। সাধারণ প্রজারা কিন্তু সাদা চোখে দেখলো, গদিনাসীনদের প্রয়োজনে গদিচ্যুত রাজা একদা বিভাবে মেহমান হয়েছিলেন, আবার তাদের প্রয়োজনে তার কালাপানি হলো এবং এর ভিত্তিতে অতি দ্রুত এক নতুন ফরমান এলো। বলা হলো, রাজা তার জীবদ্দশায় আর রাজকার্য পরিচালনায় অংশ নিতে পারবেন না। রাষ্ট্রীয় পরিষদ সভা থেকে চিরতরে বহিষ্কার করা হলো। তবে সেই সাথে খবর চাউর হয়ে গিয়েছিলো যে, কাজীদ্বয় পুরো কমিটমেন্ট রক্ষা করতে না পারায় রাতের অন্ধকারে লাখ ত্রিশেক স্বর্ণমুদ্রা সাবেক রাজার দূতের কাছে হস্তান্তর করেছিলেন। ..... কিন্তু রাজা ও তাদের প্রশাসন, বিচার ব্যবস্থা যেন সব সময়ই তাদের কায়েমি স্বার্থ রক্ষা করে আসছে।"

140. We have already indicated that in the tape conversation there is an indication of interference from the authority. Therefore, the story so far it relates to the intervention by the authority may have some basis. The admitted position is that the contempt proceeding is a quasi criminal proceeding and the contemner is entitled to get the benefit of doubt as is given to an accused in the ordinary criminal trial. Therefore, for this part of the story we do not hold the 'Manabjamin' guilty of contempt. At the very outset we have indicated that

in the instant case scandalization of court and interference with the course of justice are involved. From the quoted portion it is found that at the cost of Taka one crore the judges agreed to reduce the sentence of the former president to 9,000 hours and others will be acquitted and this was agreed upon on a payment of gratification of Taka one crore, but they could not keep their promise intact, and under pressure from the higher authority increased the sentence to 50,000 hours. Since the judges could not keep their commitment they have returned Taka 30 lac to the former president. So, this portion of story clearly points to the fact that the judges were bribed and there was an attempt to buy the judgment which is absolutely baseless and unfounded as there is no such reference in the tape conversation whatsoever. But, the readers of this story will form an impression that judges of this court are corrupt and judgment can be bought at a high price and from the quoted portion it becomes clear that he wrote the story in that way to ridicule the performance of the judges which definitely rendered the judges contemptible in the eyes of the general public by scandalizing the judges and put this court and the judges into disrespect and disrepute and thereby lowered down the image of the court in the estimation of the general public. This type of gross contempt calls for stem punishment because a journalist is supposed to uphold the cause of justice but here we find the journalists' act to the contrary of public interest and brought this court into a mockery for creating sensitized news to increase sale. This is most unfortunate and unbecoming of a journalist. They have a Code of Ethics and in a free society they owe a duty to the members of the public to bring the truth and the truth only to light and not to ridicule the highest judiciary of the country on the basis of unfounded story. However, in this connection we may quote the observations made by the Indian Supreme Court in re: Hariji Singh and another (: MANU/SC/2071/1996 : AIR 1997 SC 73) which are as regards the freedom of press and the duty which the journalists owe to verify the correctness before making any publication were highlighted as under:

> But it has to be remembered that this freedom of Press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled license if it were wholly free even from reasonable restraint it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society the rights of the Press have to be recognized with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of Press freedom must not be thrown open for wrong- doings, if a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of law. The Editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the Press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations. 'If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure or regulation and discipline'. It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.

(the underlining is ours).

141. It has been held in the case reported in 51 DLR (AD) 15 that imputation of improper motive to the judicial officers and discourteous comments made about them amounts to contempt of Court.

142. The reading of the article gives the impression that it is clearly intended to denigrate this Court in the esteem of the people of Bangladesh. The prima facie view would be that it has been drawn up with the designed purpose of bringing this Court into contempt.

143. It has been held in the case reported in PLD 1964 (WP) Lah 661, that it is ordinarily a complete defense in an action for libel that the defamatory imputation is true. But in a proceeding for contempt by publishing a libel upon the Court such a defense is not admissible. Any attempt to justify the libel is, in law, a fresh contempt.

144. The legal proposition laid down in 75 DLR (SC) 535 is that one may accede to the proposition that criticism of the conduct of the judges, which cannot possibly have the tendency to obstruct or interfere with administration of justice, are not contempt of Court, even though they may be libelous attacks on judges. Thus, an attack on a judge for conduct not connected with his judicial functions will not come within the mischief of the contempt of Court. But one cannot stretch this to attack on judges in their public capacity, for such attacks would inevitably also be calculated to lower the authority of the Courts over which the judges so maligned happen to be presiding and thus tend to interfere with the due course of justice and the proper administration thereof.

145. Here it may also be mentioned that in the issue of the Daily Inqilab at page 5 of the 12th June, 1986 a letter to the Editor captioned "পেশকারের পেশী" was published which contained scandalous allegations against the judges as a class and the Bench Officers as a class which was construed as contempt because the scandalous allegations undermined the dignity and authority of the Court of law in Bangladesh and lowered down the reputation of the entire judicial system in the estimation of the public. See 40 DLR 183.

146. It is also now well settled that a statement scandalizing the judge carries with it a presumption that it has a tendency to interfere with the administration of justice. It suggests that the foundation of justice itself has become tainted. This kind of contempt has always been held to be gross form of contempt. The other proposition of law is that where the printed or published or uttered matters amount to a scandalization of the Court with reference to a decided case or cases, it amounts to a clear contempt of Court. Moreover, if a person scandalizes a judge of a superior Court it is no good defense to say that his intention was good and he did not like to scandalize the judge. Scandalization of a Court is the grossest form of contempt. To borrow from the language of Mukharjee, J (as he then was) "the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual or prospective litigants from placing complete reliance upon the Court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. See Brahma Prakash Sharma's Case, : MANU/SC/0020/1953 : AIR 1954 SC 10 =: MANU/SC/0020/1953 : (1953) SCR 1169.

147. Unfortunately, in the present case it is noticed that neither the Printer, Publisher or the Editor and the Reporter took the necessary care in evaluating the correctness and credibility of the tape conversation on the basis of which they have published the article in question. Admittedly, this article referred to the corruptibility and credibility of the judges and these sorts of allegations are very serious in nature having great repercussion causing an embarrassment to this court. Such an irresponsible conduct and attitude on the part of

the 'Manabjamin' cannot be said to have been done in good faith or in the interest of justice but distinctly opposed to the high professional standard as even a slightest inquiry or a simple verification of the tape conversation would show that there is no talk of bribery in it. It appears that no care was taken by the contemners in publishing such a false news item and it appears that they have deliberately and intentionally published this sensitive article for drawing attention of the public at large. This by no standard can be regarded as a public service but a disservice to the public by misguiding them with false news. This sort of grossest type of contempt must be visited with punishment.

148. The question then is, what punishment is to be awarded to the contemners? It is already held that in a contempt proceeding, the motive or the mens rea is not relevant. What would be the effect of the act or conduct or imputation is the relevant question for decision. What is material is the effect or the tendency of the Act, conduct or the publication of the words, written, spoken or by signs or by visible representation or otherwise and whether it scandalizes or tends to scandalize or lowers or tends to lower the authority of the Court or prejudices or tends to prejudice or interfere or tends to interfere with the due course of any judicial proceedings or interferes or tends to interfere with or obstruct the administration of justice in any other manner. Any publication, whether by words written or spoken or by signs or by visible representation or otherwise, of any matter or the doing of any other act whatsoever is relevant and material. The Contemners did not tender any unconditional apology nor expressed any repentance rather vigorously tried to justify the publication in the name of freedom of press. Considered from the totality of the facts and circumstances, the gravest magnitude of the contumacious conduct of the contemners, we are left with no option but to convict and sentence them for committing contempt of this Court. Of the two contemners, contemner No. 1 Matiur Rahman Chowdhury took the leading part in preparing the news item publication of which scandalized the judges of this Court and lowered down the authority of the Court and brought the same into disrespect and disrepute to the public. He is the Editor and author of the item and by writing this baseless and fictitious 'মুখরোচক' story committed contempt of gravest magnitude. So, we are constrained to convict and sentence Matiur Rahman Chowdhury, the Editor and writer of this story to under go simple imprisonment for a period of one month with a fine of Taka 2000 (two thousand) payable within two months, in default, to undergo further simple imprisonment for a period of one month.

149. Contemner No. 2 Mrs. Mahbuba Chowdhury is, no doubt, a young lady. But unlike others she is a highly educated lady who is a journalist by profession. Not only that she is a newscaster of BTV. She is an accomplished lady. She attended the General Session of the United Nations as a member of the Bangladesh Delegation. She along with her husband owns and manages the paper in question. What she did, she did independently of her husband as printer and publisher of 'Manabjamin'. It is now well settled that Editor, Printer and Publisher of a newspaper must accept the fullest responsibility for everything that is published in the newspaper. So, she is also equally guilty of contempt of Court. She is a leading personality in the news media and she does not deserve to get any leniency in the matter of sentence. But we came to know that she has a boy and a daughter and if both the guardians of the family be in prison for one month the family life of the children will be disrupted and great inconvenience will be caused to the children for no fault of them. Taking into consideration the child's interest and welfare we think that a sentence for fine of Taka 2,000 (two thousand) would meet the ends of justice. She is directed to pay the fine within two months, in default, to undergo simple imprisonment for a period of two days only and therefore we convict and sentence her accordingly.

150. Now we come to the case of HM Ershad, the Ex-Army Chief and the former president of Bangladesh, who was convicted in a criminal case which is popularly known as Janata

Tower case against which he preferred an appeal before the High Court Division and that case was being heard by a Division Bench consisting of two Judges of this Division. In this connection it may be mentioned that his behavior before this court is also not laudable. Initially, he came up with the plea that he had a talk with a judge of this court but he does not remember the contents of conversation and he was not sure if the taped conversation is that which he had with the judge. Therefore we filed an application for his production before this court so that he can hear the cassette and see if it is that cassette where his conversation with a judge of this court has been recorded and he also feared that some more conversation might have been subsequently added to the tape. The application was allowed and on his production the tape was played in my chamber in his presence and in the presence of all other lawyers. On hearing the tape he agreed that it is his voice and he had that talk with the judge. Thereafter, he again filed an application for supplying him a copy of the transcript of the conversation in order to enable him to file an affidavit-in-opposition. We allowed the application and directed Mr Mahmud to give a copy of the transcript of the cassette conversation and after going through that he filed the affidavit-in-opposition.

151. The admitted position is that HM Ershad talked to a learned Judge of this Court after the judgment in appeal in Janata Tower Case was pronounced by two learned judges including the one to whom he talked. The talk was recorded in the cassette in question. From the talk recorded in the cassette there remains no doubt that HM Ershad did not talk with the learned judge only after delivery of the judgment. The recorded talk establishes beyond doubt that HM Ershad was frequently talking with the learned judge even prior to the delivery of judgment for reduction of the sentence. The principle of law is that communication with a judge for the purpose of influencing him on the subject matter of the case pending before the judge amounts to contempt of Court. See Jawand Singh vs. Om Prakash, AIR 1959 (Punj) 632. In re-Dyce Sombre (1849), 1 Mac. & G. 116 at P. 122 it has been held that private communication with judge is contempt. It has further been held that it is a grave contempt of court to communicate with, or to seek in any way to influence, a judge upon the subject of any matter which he has to decide. See also the case reported in : LEX/BDHC/0027/1976 : 28 DLR 285. HM Ershad in his affidavit was trying to explain his conduct in talking to the learned Judge after delivery of the judgment, but has offered no explanation for his conduct in talking to the learned judge prior to the delivery of the judgment. He did not even tender unqualified apology and instead tried to justify his conduct. In trying to influence the learned judge while the appeal was pending for disposal, Ershad has committed contempt of Court.

152. In the affidavit-in-opposition HM Ershad tried to justify his action and then prayed for mercy. He did not tender unqualified apology nor did he do so at the earliest opportune moment. The legal position is that an apology will be acceptable if (1) the contemner appreciated that his act was within the mischief of contempt, (2) he regretted it, (3) his regret was sincere, (4) the apology was accompanied by expression of the resolution never to repeat again and (5) the contemner made humble submission to the authority of the Court. We have already noted the different stands taken by Ershad in this matter from time to time. In the case of Shamsur Rahman vs. Tahera Nargis, 44 DLR (AD) 237 It has been observed:

> Apology is an act of contrition. If tendered it may not be necessarily accepted and the contemner purged of his contempt. When a contemner tenders apology as an act of contrition the Court must weigh that apology tendered by the contemner. If the apology is found to be a real act of contrition, no action need be taken and a word of warning may be enough but if the apology is qualified, hesitant and sought to be used as a device to escape the consequences of the contemner's action it must be rejected.

153. In the light of the aforesaid principles of law we find that the apology tendered by Ershad is no apology in the eye of law. We find that the affidavit-in-opposition filed by the contemner is inadequate in its expression of regret and remorse over the incident. In particular, we find that there is no open acknowledgment of guilt, no proper regrets and no undertaking not to commit an offence of this kind again. A court is loath to accept a mechanical offer of an unconditional apology. In the case reported in 51 DLR (AD) 235, it has been laid down that the apology must be unqualified and tendered at the earliest opportunity with an expression of open acknowledgment of the guilt and clear expression of remorse. Thus, the apology tendered by Ershad is no apology in the eye of law. It does not fulfil the requirements of law and, in fact, it is an attempt to escape the liability of contempt. We, therefore, reject the plea.

154. From the conversation of the cassette it appears that HM Ershad tried to influence the puisne judge of the Bench before which the appeal was pending and thereby tried to pervert the course of justice and, as such, the contempt Rule was issued on him on 22-11-2000 to show cause as to why he shall not be found guilty of contempt of court and punished accordingly. It is true that he was not asked to show cause specifically about his talking to the learned judge before the delivery of the judgment but nevertheless, he was asked to show cause about the talk recorded in the cassette which clearly showed that he talked to the learned judge before the delivery of the judgment and thus there was no need to ask him specifically to show cause about his talk with the learned Judge prior to delivery of judgment. From his affidavit as well as the conversation recorded in the cassette, it is clear that he talked to the learned Judge prior to the delivery of the judgment and there is no doubt that he tried his best to pervert the course of justice. Therefore, we have no hesitation to hold that HM Ershad tried his best to influence the learned judge to reduce the sentence and thereby tried to pervert the course of justice which amount to gross contempt. It is a gross contempt to communicate with a judge for the purpose of influencing him on the subject matter of a case pending before him. Among a large variety of acts and conduct which amount to contempt of court, whereby due administration of justice is obstructed, interrupted, embarrassed, or impeded, an attempt to corrupt a judge is perhaps, the most serious. It is a dangerous assault upon the integrity of the court.

155. The learned Attorney-General submitted that talking to a judge after pronouncement of judgment, though improper, does not ipso facto constitute contempt of Court as judgment having been pronounced; the question of interference with justice does not arise. But at the same time it is also true that adverse criticism upon the conduct of a judge in a case finally disposed of amounting to a personal attack of a gross kind upon his judicial character is punishable as a contempt of Court although the case is ended. See RV Grey (1900) 2 QB 36. Similarly, to charge a judge with injustice is a grievous contempt. (3 Hawk. PC b.2, c.22, s.35). In RV Almon (1765), Wilm, 243 at page 255 it was held that to accuse him of corruption might be a worse insult; but a charge of injustice is as gross as an insult as can be imagined short of that. The principle upon which commitments are made for libels upon courts is "to keep a blaze of glory around them and to deter from attempting to render them contemptible in the eyes of the people." In the case reported in : MANU/WB/0182/1951 : AIR 1952 Cal 258 it has been held that making private correspondence with a judge even after disposal of a case on merit is not only improper but is contempt. See also PLD 1961 (WP) Lah 51,: MANU/MH/0135/1940 : AIR 1941 BOM 228. So, his conduct both before and after the disposal of the appeal, in the facts and circumstances of the case, amount to gross contempt.

156. In a signed article, "The nation must ponder" published in the New Nation on March 30, 1983, Lt. General HM Ershad, the then Chief Martial Law Administrator, expressed his views on the role of the Supreme Court. He wrote.....

157. No matter what constitution is agreed on, there will always be disputes as to whether government policies are "Constitutional." Individuals, parties, businesses, parts of the bureaucracy, and the Military may feel that some policy is unconstitutional. To settle Constitutional questions only one institution is capable of doing so. That is the Supreme Court. A free independent Court is the only way to settle Constitutional issues peacefully. And before a Constitution is written all parties, the people, the bureaucracies, the parliament and the Military must agree to accept Judicial Supremacy on deciding what is and what is not constitutional.

158. This point is crucial. Yet in all the writings about democracy, the Court is often overlooked..... The reason for this is that in a democracy the Court is assumed by everyone to be Supreme. No one debates the supremacy of the Courts.

159. Nixon lost power because of a Court decision. Jeremy Thorpe, the leader of Liberal party, was brought to Court, Civil Rights of minorities or individuals are protected by the Courts.

160. It is often forgotten why a Court is important and why a Court must be independent. The reason is that all rights are rights against the state. A Court must be able to overturn unconstitutional law passed by the parliament, it must overrule the police, the bureaucrats, and the Army, the President or the Prime Minister. Only when the Court has this power can it protect the citizen from the state.

161. Moreover, the Court must protect bureaucrats against the parliament. The Court must be able to protect the Military so that it can preserve national security. The Court must protect the rights even of policemen.

162. A strong and powerful Court is essential to democracy. For only it can guarantee that disputes, which inevitably arise, can be settled according to the Constitution and according to just laws. Without a commitment to the Courts and the rule of law to settle disputes peacefully, no Constitution can exist."

163. This was the degree of appreciation of the importance and independence of the judiciary by him even when he was at the helm of the affairs of the state as CMLA. But it is seen that afterwards being a convict appellant he did not hesitate to pollute the stream of justice to secure his selfish end. A lawmaker when breaks the law, he becomes the worst law breaker. Such is the case of HM Ershad.

164. Every public office is a public trust, but a judicial office is more than that- it is a sacred trust. It is abhorrent to the concept of public justice that a judge should be influenced in making his decision by extraneous influences to corrupt him or out of feeling of personal relationship. Courts have shown scant mercy to those who have attempted to deter a presiding judge of a court from performance of his duties by attempt to influence his decision by means of private communication. What is proved against the contemner is a grave misconduct which under no circumstances can be condoned or palliated, particularly when the contemner himself was the holder of the highest post in the Republic. As the allegations have been substantiated the guilty person would richly deserve a deterrent punishment.

165. Mr Ershad is a man who started his life as a soldier and rose to the post of Army Chief and thereafter became the chief executive of the state in the Presidential form of government and he was the most powerful man in the country for long nine years as President of the Republic in a Presidential form of Government. Subsequently by public movement he was thrown out from power but even thereafter he was elected as a member of the Parliament. He is an educated person who is well conversant with the laws of the

country and the different organs of the State. A man of his standing has tried his best to pervert the course of justice when his appeal was pending before this court. Such an attempt cannot be leniently dealt with, more so when he was at the helm of the affairs of the State for long nine years and held various responsible high posts in the Republic. When a man of such standing commits contempt the offence must be visited with the highest punishment provided for by the law. We have very carefully considered the submissions made by his lawyer and the submissions of the other lawyers including the learned Attorney-General but we do not find anything on record to take a lenient view in his favor. Therefore, we find and hold him guilty of contempt of court for trying to influence a judge of this court during the pendency of his appeal and to pervert the course of justice. Taking into consideration all the relevant factors we think it is a fit case which calls for highest punishment. We thus convict him for committing contempt of this court and sentence him to imprisonment for 6(six) months and also impose a fine of Tk. 2000 (two thousand) only.

166. We have already noted the relevant principles of the law of contempt. Now let us discuss the case of each of the other contemner opposite parties. Let us first take up the case of Justice Naimuddin Ahmed. The answer to the questions put to him by the participants in the seminar has been reported in the three national dailies including the daily 'Janakantha'. We shall deal with the case of the newspapers after dealing with the case of Justice Naimuddin Ahmed.

167. In this case both the parties, namely, the learned Attorney-General as well as Mr M Amirul Islam submitted that the comments made by him in a seminar involving the judiciary was published in the aforesaid newspaper. The learned Attorney-General emphatically submitted that the comments made by Justice N. Ahmed did not exceed the limit of fair criticism, though those were little harsh. He further submitted that Justice N. Ahmed once adorned the Bench of the High Court Division with an alert mind and totally committed to do justice. He is respected as a worthy judge of the Supreme Court. He made some comments regarding the efficiency and commitment of the Subordinate judiciary. The learned Attorney-General further submitted that he, Justice Naimuddin Ahmed, referred to the rumour much talked about in the society, in respect of the cassette in question. He did not impute any motive or corruption to the judges and having once been a member of the judiciary, his lamentation was directed towards improvement in the state of affairs in the arena of justice.

168. The submission of Mr Amirul Islam is also on the same line and he also spoke in the same tune and submitted that the parameters of reasonableness is not restricted to only fair comment but also includes outspoken and rumbustious comments and therefore the comments made by Justice Naimuddin Ahmed are within the above mentioned parameters of reasonableness and thus the utterance of those comments do not amount to contempt of Court.

169. From the statements of facts submitted by Justice Naimuddin Ahmed it appears that he made extempore speech at the seminar. Therefore, he cannot recollect to say exactly and in what terms he made his comments or the statements. However, he asserted that the newspapers that have published his comments and statements, correctly perceived those and they have honestly and faithfully reproduced those in their newspapers. Therefore, as a matter of fact, it is admitted that there is no dispute about the factual aspect of the comments reported in the newspapers. Now, therefore, it calls for determination whether the statements/comments made by Justice Naimuddin Ahmed comes within the purview of the contempt of Court.

170. It would be better if we quote the relevant portion of the remarks made by Justice Naimuddin Ahmed in the seminar which runs as follows:

"ভারতে দুর্নীতির দায়ে বিচারপতিদেরও বিচার হয়। আমাদের দেশে কিছুদিন আগে বিচারপতির সহিত দণ্ডিত অপরাধীর টেলিফোনে কথাবার্তা, টাকা দিয়া কথিত রায় পাল্টাইয়া ফেলার কথিত ঘটনার খবর পত্রিকায় ছাপা হইয়াছিল। কিন্তু এত গুরুতর অভিযোগ সত্ত্বেও আদালত হইবে সুয়োমটো রুল জারি করা হয় নাই।" বিচারপতি আহমেদ বলেন, "ইহাই কি জবাবদিহিতা?" বিচারপতি নঈমুদ্দীন বলেন, "অন্য অনেক ক্ষেত্রের মত বিচারকদের মধ্য হইতে মূল্যবোধ প্রায় উঠিয়া গিয়াছে। তাহাদের কারণেই আদালতগুলিতে মামলার পাহাড় জমিয়াছে।" বিচারকদের বিরুদ্ধে কর্তব্যে অবহেলার অভিযোগ করিয়া তিনি বলেন, '৭০ সালে বিচারকের সংখ্যা ছিল ২৭০। আর এখন এক হাজার। বিচারকের সংখ্যা প্রায় ৪ গুণ বৃদ্ধি পাইলেও মামলার নিষ্পত্তি দ্রুততর হইবার পরিবর্তে মামলাজট সৃষ্টি হইতেছে।" তিনি আরও বলেন, "আইনজীবীরা বড় জোর কয়েকদিন মামলা বিলম্বিত করিতে পারেন, কিন্তু বিচারকরা তাহা পারেন অনন্তকাল। বিচারকরা '৭০ সালের মত নিষ্ঠা ও একাগ্রতার সহিত কাজ করিলে আদালতগুলিতে এত মামলা জমিত না।"

171. We have carefully gone through the statements made by Justice Naimuddin Ahmed in the seminar and it appears to us that reading the same any man of ordinary prudence in

our society will have an idea that the judges now-a-days in the subordinate judiciary are utterly inefficient, incompetent and not dedicated to the job. Their inaction or reluctance to work hard as the judges in the past did, is responsible for backlog of cases. From a plain reading of the comments one would be led to the irresistible conclusion that it is the judges who are responsible for backlog of cases and their inefficiency, incompetency and lack of commitment to their duty and their insincerity is responsible for the backlog. In this connection, it must be remembered that there is no doubt in the mind of anyone of this country about the efficiency, competency and integrity of Justice Naimuddin Ahmed as a judge, when he was a judge of the subordinate judiciary, as well as, when he was a Judge of this Division. He is, no doubt, one of the most brilliant judges that the country has ever produced after the liberation. We may further add that he immensely contributed to the judiciary. By his various thoughtful judgments he has enriched the field of judiciary. His contribution is recognized by all and as a result of that within a very short time after his retirement he was appointed as a member of the Law Reforms Commission (hereinafter called "the Commission"). He retired on 4-4-96 from the High Court Division and joined as a member of the Commission on 25-5-96. He is, even as a member of the Commission, making significant contribution in updating various obsolete enactments. He had opportunity of serving both in the subordinate judiciary as well as in this Court and ended his carrier as a brilliant judge of this Division. Therefore, he is well acquainted with the practical problems which are conjointly responsible for the backlog of cases and the quantum of pending cases has sprung up from year to year. One of the causes of huge backlog of cases is that there is chronic shortage of judicial officers in the subordinate judiciary. Besides, there is also lack of accommodation in the Mufassil Courts to house the courts. In almost every district some of the Assistant Judges not only share the chambers with his brother judges, but also share the court room with them and as a result half of the working day of those judges are lost every day due to lack of accommodation. In this connection, it may not be out of place to mention that I as a judge of this Division inspected the district judgeships of few districts and I must say with a sad tone that in the Mufassil town now a days the lawyers in general are reluctant to work or attend the same court after recess which also takes away a heavy portion of the working hours in the subordinate judiciary. It is surprising to note that although the lawyers are reluctant to conduct their cases after recess in the same Court, they have no complain to attend the Courts in the afternoon which could not sit in the morning due to shortage of accommodation and sharing of the Ejlash. I inspected the Sylhet Judgeship in the year 1999 and I found that the lawyers do not attend the courts after the recess. I made it a point to have a round in the court premises after recess and I found that the lawyers were totally absent from those courts where there was no problem of accommodation but they attended the courts which shared the Ejlash with the other judge. Same is the condition almost everywhere with microscopic exception. This also contributes for delay in disposal of cases. Again, no doubt, now a days the number of the judges have been increased, but the increase is disproportionate to the number of increases of new cases. This is another cause of stockpiling of cases. Here it may be mentioned that the number of cases to be disposed of by a judge in the subordinate judiciary is fixed by the High Court Division and almost all the judges fulfill the monthly quota. From this, it appears that they dispose the required number of cases as set by this Court. It is true that if the judges work hard and the local Bar co-operates with them, there may be scope of improvement in the matter of disposal of cases. These factors, must have been within the knowledge of Justice Naimuddin Ahmed as he served in both the judiciaries as well as he is presently a member of the Commission. But unfortunately, in his comments he has not referred to any one of these factors, which too have contributed to the back-logging of cases. While ignoring these aspects he has spoken about the deterioration of the quality of the judges and lack of dedication and devotion and these comments lead a reader to the conclusion that it is none else but the inefficient, incompetent, insincere judges alone are responsible for the stock piling of cases as he emphasized that, "If a lawyer wants to delay a case, he can

delay it for some time. If a judge wants to delay a case he can delay it for all time to come". When such an utterance is made coupled with questioning the competency and efficiency of the subordinate judiciary, it adversely affects the administration of justice and lowers down the prestige, dignity and authority of the court, more so when it is coming from no less a person than the member of the Law Commission and a retired High Court Division Judge of the Supreme Court.

172. We have already noted that in contempt the mens rea is not a relevant ingredient for committing criminal contempt. So also, intention is not relevant in finding out whether a particular statement or utterance amounts to contempt or not. It is also well settled that conduct or utterance that tends to bring administration of justice into disrespect amounts to contempt. It is the affect of contemner's action that is to be taken into consideration and not the intention inasmuch as intention to cause prejudice is not a necessary ingredient in a case of contempt. If the dignity and authority of the court is trampled and transgressed it is a contempt pure and simple and the court cannot be a silent spectator of such a state of affairs. It is also the law that it is not necessary that the words used should actually obstruct or interfere with the course of justice or the due administration thereof, but it is sufficient that they should be calculated to have that effect. As to what 'calculated' means in this context has been pointed out by the Pakistan Supreme Court in the case of Abdus Salam, Editor, Pakistan Observer and others vs The State. Their Lordships have held it to mean that the offending words should be of a nature or character, proper or likely to obstruct or interfere in that manner.

173. Remarks made by Justice Naimuddin Ahmed are not merely remarks of general character but remarks about the deterioration in the quality of the judges and their integrity and also about the manner and method of disposal of cases done by the judges in the present day time. The comments made by Justice Naimuddin Ahmed, therefore, in our opinion, lowered down the image of the judiciary in the estimation of the public in general and the statement as made against the judges and the subordinate judiciary imputing inefficiency and lack of sincerity do amount to contempt. We have already indicated that almost all the judges in the subordinate judiciary fulfill their monthly quota. It also appears to us that the comments made by Justice Naimuddin Ahmed are not only harsh but unbecoming of a judge which brought the court into disrespect and disrepute and castigates its dignity, its majesty and challenged its authority, specially when the maker has knowledge about the contempt law and working of courts of law and definitely the said remarks render the judges contemptible in the eyes of the general public. In 35 DLR (AD) 290 in paragraph No. 13 his Lordship Mr Justice Badrul Haider Chowdhury, as his Lordship then was, observed that the essence of contempt is an action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or to obstruct due administration of justice. This is the essence of the definition that has been given in the civil contempt or criminal contempt. In this connection, we must also keep in view that the essential condition for the plea of fair criticism is that the person concerned must abstain from imputing improper motives to those taking part in the administration of justice. Moreover, if a person charged with contempt seeks to take shelter behind the defense of legitimate criticism the facts forming the basis of the criticism must be accurately stated and the criticism must be fair and honest. It has been laid down by our Appellate Division in 35 DLR's case that the confidence in the courts of justice which the public possesses must in no way be tarnished, diminished or wiped out by contumacious behaviour of any person. The aforesaid principles of law lead us to the irresistible conclusion that the overall effect of the comments/statement made by Justice Naimuddin Ahmed in regard to the subordinate judiciary amounts to contempt of court as they tend to bring the subordinate judiciary into disrespect and disrepute and also has tarnished and diminished the image of the judiciary in the public eyes. In arriving at such a finding we are not oblivious of the fact that any criticism about the judicial system or the judges which

hampers the administration of justice or which erodes the faith in the objective approach of judges and bring administration of justice into ridicule must be prevented. It is true judgments can be criticised but no motive to the judges need be attributed as it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the very market place of idea criticism about the judicial system or judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. The quintessence of the contempt power is protection of the public not judicial personnel. "The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the judge but to prevent undue interference with the administration of justice". See (1887) 35 Ch.D. 449. The law of contempt is not made for the protection of judges who may be sensitive to the winds of the public opinion but for the protection of the public interest. Thus the overall effect of the comments or the statement made by Justice Naimuddin Ahmed, in our opinion, amounts to contempt of court because these tend to bring the subordinate judiciary into disrespect and disrepute. In arriving at such a decision we did not lose sight of the fact that Article 39(2) of the Constitution guarantees freedom of speech and expression as well as freedom of press but that fundamental right is also subject to law of contempt. This right is not an absolute right but is subject to reasonable restriction imposed by law including the contempt of court. A citizen, therefore, in the exercise of his freedom of speech and expression, cannot be allowed to interfere with the administration of justice or to lower the prestige or authority of the court even in the garb of criticizing judgments of the court. No doubt, freedom of speech and expression is important but more important is the effectiveness of the administration of justice, without which the right guaranteed by the Constitution will be meaningless and incapable of enjoyment. It is for this reason that the Constitution specifically provided for the power to commit for contempt of court. Article 39(2) requires that in applying the law of contempt of court a balance should be struck between the freedom of expression and the need to maintain the authority of the court. Otherwise, the law will have serious chilling effect on the freedom of expression and freedom of speech and cannot pass the test of reasonable restriction. It must be remembered that freedom of speech does not confer an unfettered right upon the citizen and does not give a license to the citizens to say anything and everything in regard to the judiciary or the judges. The criticism to be immune must not however be made in bad faith and must not attribute motive to the judges. Therefore, even after coming into force of the Constitution the fundamental right is subject to aforesaid limitation, that is, a person is at liberty to criticize the judicial system or the judges but that must be without imputing any motive or bias.

174. Before we dispose of the case of Justice Naimuddin Ahmed, it is pertinent to mention that during the course of argument the learned Attorney-General submitted that since only a show cause notice has been issued to him and if we are not satisfied with his reply and intend to proceed against him for contempt of court a further Rule has to be issued against him giving him a further chance to explain why he should not be proceeded against for contempt of court and punished accordingly. Mr Islam, however, did not make any submission on this point. We have weighed the submission made by the learned Attorney-General Mr Mahmudul Islam, but we find ourselves in difficulty to subscribe to his contention on this point. We have come across a number of cases in the Indian Jurisdiction wherein the Indian Supreme Court convicted may contemners for committing contempt of court even when only a show cause notice was issued against the contemners. Besides, we do not find any material difference between a show cause as to why a contempt proceeding should not be drawn up against him and a rule asking him to show cause why he should not be preceded against for contempt of Court and punished accordingly. In the Rule issuing order we had quoted the relevant portions of the comments made by him and asked him to show cause why contempt proceeding should not be drawn against him for

tarnishing the image of the judiciary by making sweeping remarks without disclosing the material facts. When a person is asked to show cause in respect of an allegation he places all the cards that are available to him and from the facts if it is established that the conduct amounts to contempt we do not find any stumbling block in the way of punishing the contemner without issuing a further Rule, because all the materials are already on record and the issuance of another Rule would be an idle ceremony inasmuch as in reply to the show cause one will disclose all the material facts to show as to whether he has committed any contempt or not. Therefore, it appears to us that once a show cause notice is issued and the contention of the show cause notice is well understood by the contemner there is no necessity of issuing a further show cause notice. The view taken by us gets support from a good number of reported decisions of the Indian Supreme Court. Besides, in the affidavit Justice Naimuddin Ahmed also did not pray for a further chance to explain his position in the event of rejection of his plea.

175. In our view, the comments made by Justice Naimuddin Ahmed in regard to the lower judiciary definitely amounts to contempt of court. If comments like those do not amount to contempt we wonder what else would By these one-sided remarks he lowered down the dignity and prestige of the lower judiciary and put it into grave disrespect and disrepute. A reader of the comments impromptu will jump to the conclusion that now-a-days the subordinate judiciary abounds with inefficient, incompetent, insincere, corrupt persons who lack devotion and conviction and it is the personal quality of the judges which are responsible for backlog of cases and nothing else. We have already indicated that the comments of Justice Ahmed disclosed but one side of the story. There are much more factors which contribute to the back log to which justice Ahmed turned his blind eyes. These imputations to the judges not only tarnished the image of the judiciary but also firmly shaken the faith of the people in the judiciary. We have already indicated that he was a great contributor to the judiciary as a judge and is still making his valuable contribution to the judiciary as a sitting member of the Law Commission. He is a man who has served in the lower judiciary for a pretty long time and ended his judicial career as a judge of this Division. Thereafter, he took up the prestigious position of a member of the Law Commission. Therefore, any statement made by a man of his standing tends to have tremendous effect upon the members of the public. In making the comments he has revealed truth in part but maintained absolute silence in respect of the other elements which largely contribute to the backlog of cases but these material aspects were not brought to the notice of the audience when he made the comments in the seminar. Therefore, anybody who read the news item would have an impression that the lower judiciary has lost its efficiency, competency and eagerness to work honestly and sincerely but at the time when he was a member of the subordinate judiciary the members in general maintained a high standard and this has eroded over the years. This may be partially true but the other major factors for backlog of cases have not been mentioned by him. We have already pointed out the other major factors which largely contribute to the backlog of cases but that aspect of the picture was completely omitted by him as a result of which the statements made had adverse impact upon the members of the public. Moreso, because a man of his calibre and standing made these comments. It is expected from a man of his standing that in making any comment about the judiciary or the judges he would be doubly cautious because he served in the highest judiciary and he is also a member of the Commission and any comment made by him is readily accepted by the general public as gospel truth without scrutinising the same.

176. Now we are called for to decide the basic question as to whether the comments/ remarks made by Justice Naimuddin Ahmed and published by the papers amounted to contempt of Court or, in other words, whether remarks/comments have the effect of bringing the judiciary into disrepute although we have already thrown some light on the point in the previous paragraphs.

177. Any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of Judges and brings administration of justice into ridicule must be prevented. The contempt of Court proceedings arise out of that attempt. Judgments can be criticized, the motives of the Judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains. In the free market place of ideas criticisms about the judicial system or Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice.

178. The question whether an attack is malicious or ill intention may be often difficult to determine. The language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the case taken in justly and properly analyzing the materials before the maker of it are important consideration. Moreover, in judging if it constitutes a contempt of Court or not we are concerned more with the reasonable and probable effects of what is said or written then the motives lying behind what is done. A decision on the question whether the discretion to take action for contempt of Court should be exercised in one way or the other depends on the totality of the facts and circumstances. The remarks made by justice Ahmed are certainly of a sweeping nature and can scarcely be justified. Thus the question that arises is as to whether it can be held to amount to contempt of Court. To answer the question we have to see if the remarks/ comments in any way interfere with the due administration of justice or, in other words, whether such statement is likely to give rise to an apprehension in the minds of the litigants as to the ability of the judicial officers. It must be remembered that the plea of justification or privilege are not strictly speaking available to the contemner. Thus what is material is the nature and extent of publication and whether or not it was likely to have an injurious effect on the minds of the public or of the judiciary and in view of the totality of the facts and circumstances we answer the question in the affirmative. To borrow from the language of Mukherjee J (as he then was) (Brahma Prakash Sharma's Case) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

179. Later, Hidayatullah, CJ, in RC Coper vs Union of India, observed:

> There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a Judge but because of his training and the assistance he gets from learned Counsel he is apt to avoid mistakes more than others..... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism.

180. In the case of Charen Lal Saher vs Union of India and another, : MANU/SC/0159/1987 : (1988) 3 SCC 255, the following statements were made:

> The working of the judges are cocktail based on Western Common Laws and American techniques, as such unproductive and outdated according to socio-economic conditions of the country.....

181. This Court has become a constitutional liability without having control over the illegal acts of the Government..... Thus the people, for whom the Constitution is meant have now turned down their faces against it which is a disillusionment for fear that justice is a will-o'-the wisp.

182. At another place the petitioner has stated that this Court is sleeping over the issues like Kumbhkarna.

183. It was held by the Indian Supreme Court that reading of the statements gives the impression that it is clearly intended to denigrate the Supreme Court in the esteem of the people and thus amounted to contempt.

184. We have already quoted the relevant portions of the statement/remarks made by Justice Naimuddin Ahmed. The terms used by him are more offensive and will have the inevitable effect in the minds of the people that the judiciary in Bangladesh is absolutely worthless and it has outlived its utility. Judging from that point of view also we have no hesitation to hold that the remarks of Justice Naimuddin Ahmed has brought the judiciary into disrepute and disrespect.

185. Now we are to see the likely effect of his words and, in our opinion, they clearly had the effect of lowering the prestige of judges and Courts in the eyes of people. That he did not intend any such result may be a matter for consideration in the sentence to be imposed on him but could not serve as a justification. By his comments he has drawn a very distorted and poor picture of the judiciary. It is clear that the comments made about the judges is bound to raise in the minds of the people a general dissatisfaction about the judiciary. It weakened the authority of law and law courts. The law punishes not only acts which do interfere with the Courts and administration of justice but also those which have the tendency to do so. Judged from the angle of Courts and administration of justice, there is no doubt that Justice Naimuddin Ahmed is guilty of Contempt of Court.

186. We have already noted that Justice Ahmed was a brilliant and a meritorious judge of this Court. He made immense contribution to the judiciary and is still rendering valuable service to the judiciary as a prominent member of the Law Commission. He never made any such lose comment about the judiciary in the past. Recounting his contribution to the judiciary we take a lenient view and let him off with a caution that in future he should be more careful in making any comment/ remark about the judiciary.

187. Now let us turn to the case of 'Daily Ittefaq'. Mr Mainul Hosein, the learned Advocate, himself appeared on behalf of the Editor and Mr Rokanuddin Mahmud, the learned Advocate, appeared on behalf of the Printer and Publisher of the said paper. The Rule was issued on them for publishing a news item under the caption

" টাকা দিয়া রায় পাল্টাইয়া ফেলার অভিযোগ প্রকাশিত হইলেও সুয়োমটো হয় নাই" ।..... বিচারপতি নঈমুদ্দীন ।

188. In this news item they have, in fact, published the statement made by Justice Naimuddin Ahmed in the seminar that was held in the Dhaka University. The relevant portion of the report has already been quoted.

189. We have already dealt with the case of Justice Naimuddin Ahmed and before taking up the case of different papers we have in the foregoing paragraphs laid in detail the relevant laws which are applicable to the Press and also the public at large. While dealing with the case of Justice Naimuddin Ahmed after considering the pros and cons of the statement made by him, we found him guilty of contempt of Court but we have exonerated him in consideration of his past contribution to the judiciary both as a judge and as a sitting member of the Commission.

190. For the sake of brevity, without making any repetition of the concerned principles of law suffice it to say that if anybody prints or publishes contumacious item he is also equally guilty of contempt of court. The crux of the argument advanced by Mr Mainul Hosein and Mr Rokanuddin Mahmud with regard to Ittefaq is that they have simply reproduced the statement made by Justice Naimuddin Ahmed correctly and accurately one day after 'Janakantha' had published the same when no rejoinder came from Justice Naimuddin Ahmed. They published it because it became imperative for the 'Daily Ittefaq' to keep people informed about the serious allegation concerning a vital organ of the State like the judiciary and also for maintaining faith and credibility with their readers. It is also their case that they published the said news item in good faith and belief that the dignity and integrity of the judiciary is best maintained when truth is faced professionally and public suspicion is removed through bold action. The main contention is that freedom of press and freedom of speech is guaranteed by Article 39 of the Constitution and in publishing the news they have not exceeded the limit of law.

191. We have considered these legal aspects earlier and we have also found that the remarks made by Justice Naimuddin Ahmed amounts to contempt of court. It is now well settled that anyone who publishes contumacious item is also guilty of contempt of court. Here the Ittefaq cannot get away by saying that they have objectively reproduced the statement of Justice Naimuddin Ahmed. But before publishing it they ought to have considered the legal aspect of the remarks if they do amount to contempt of court or not. Besides, before publishing these remarks which, in our opinion, amount to scandalizing the court, a duty was cast upon the Reporter, Printer, Publisher and Editor of the paper to ascertain if the remarks made were factually correct. In the instant case admittedly no attempt was made by the paper to ascertain the truthfulness or otherwise of the remarks/ statements made by Justice Naimuddin Ahmed. Therefore, they cannot say that they should be absolved of their liability simply because they have accurately reproduced the remarks of Justice Naimuddin Ahmed. In not making further query to ascertain the truthfulness of the facts as stated in the statements this paper has acted in an irresponsible way.

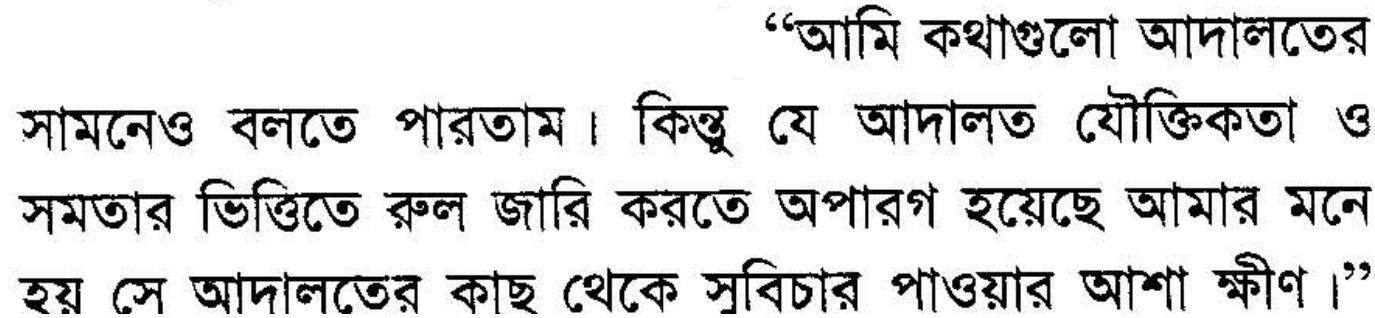
192. But it is equally true that the 'Daily Ittefaq' is one of the oldest papers in Bangladesh and it has the largest circulation in the country. Its readers are from all classes and strata of society. It has been a catalyst for changes and reforms as well as political development in our country. It played historical role during the war of liberation and it always played a pro-people role. In the past for upholding the rights of the public and for publishing the news regarding ill designed actions of the then Government its publication was stopped several times by various Governments. Yet it remained undaunted to uphold the cause of justice, liberty and freedom. During the war of liberation the then Pakistan occupation army burnt down the press and office of the 'Daily Ittefaq' and closed it down totally. Before that in 1960 during the Ayub regime it was also closed down. The 'Daily Ittefaq' played pivotal role in all the democratic movements for overthrow of autocratic regimes in the country at all times. Taking these things into consideration we also take a lenient view in their case and let them off with a caution that in future they should be careful in

publishing any news item regarding the activities of the judiciary, particularly keeping in mind the legal provisions applicable thereto.

193. Now let us advert to the case of newspaper the 'Daily Janakantha' (hereinafter called the 'Janakantha'). 'Janakantha' and Ittefaq stand at par in terms of the Rules issued upon them as they have printed and published the remarks of Justice Naimuddin Ahmed. Since we have exonerated both Justice Naimuddin Ahmed and the 'Daily Ittefaq', now it calls for determination if the same attitude can be adopted in their case also. Here we would like to observe that the observation given by us in respect of Ittefaq equally applies 'Janakantha'. But the case of 'Janakantha' stands on a different footing in that on 8-11-2000 Rule was issued on them along with other papers to show cause why contempt proceeding shall not be drawn against them but they did not appear before this Court on the returnable date though the notice was duly served upon them. Then on 15-11-2000 a contempt Rule was issued upon the Chief Editor, Editor, Printer, Publisher, Owner and Diplomatic Reporter of 'Janakantha' and 22-11-2000 was fixed for personal appearance but on that day they instead of appearing in person before the Court the Editor of 'Janakantha' published a statement in his paper under the caption


"আমি আদালত অবমাননা করিনি।
আদালতের কাছে আমার কৈফিয়ত।"

However, we have the occasion to go through that news item and we had decided to give a further chance to him to appear on 3-12-2000 stating that they can say whatever they want in their affidavit. Thereafter they appeared before this Court on 3-12-2000. In this connection it may be stated that except 'Janakantha' the other three papers duly responded to the notice of this Court and in due course submitted their affidavits stating their stands and it is only the 'Janakantha' which in its wisdom decided not to appear before the court and made a public statement stating that it has not committed any contempt of Court and decided not to appear before the Court and further stated,


"আমি কথাগুলো আদালতের সামনেও বলতে পারতাম। কিন্তু যে আদালত যৌক্তিকতা ও সমতার ভিত্তিতে রুল জারি করতে অপারগ হয়েছে আমার মনে হয় সে আদালতের কাছ থেকে সুবিচার পাওয়ার আশা ক্ষীণ।"

The stand taken by 'Janakantha' in the aforesaid statement itself amounts to contempt. It is now well settled that all publications which are calculated to or have the tendency to either excite propensity against parties or other litigants while it is pending or to interfere with the due course of justice, will constitute contempt. The reasons for this is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists, namely, to administer justice duly, impartially and with reference solely to the facts judicially before him but instead of placing their case before the Court they raised a parallel war against this Court, which is also unfortunate and unwarranted, inasmuch as they could easily say the aforesaid things before this Court. Here it may be stated that although in the statement published on 22nd November 2000 they have raised an allegation of bias and incompetency and discrimination against this

Bench, nevertheless, subsequently they appeared before the Court and did not at any stage of the hearing submit that this Bench is biased or that they have any apprehension in their minds that they will not get justice from us.

194. In Vidyasagara (1963 AC 589) the Privy Council dismissed the appeal on the ground that to say that an impartial enquiry could not be held before the court, was clearly to suggest that court was prejudicial to such an extent that it could not remain impartial. It was further observed that the inference of design on the part of the court is clearly the product of an over anxious and over wrought mind. The conclusion drawn and the doubts as to impartiality expressed were based on self induced apprehension, for which the respondent's anxiety was the sole cause.

195. Here it may further be mentioned that the legal position is that there is no difference in principle between a comment on a question of fact and expression of an opinion on a question of law, for a court even when dealing with a question of fact is expected not to be influenced by facts which may have come to its knowledge otherwise than from the evidence adduced in the case. Therefore, if an expression of opinion on a question of fact pending decision in a court can amount to a contempt there is no reason why an expression of opinion on a question of law in similar circumstances should not be capable of producing a like pernicious tendency.

196. Journalists should remember that all publications, which are calculated to have the tendency to either excite prejudice against parties or their litigation while it is pending or to interfere with the due course of justice will constitute contempt. The reason for this is "because their tendency and, sometimes, their object is to deprive the court of the power of doing that which is the end for which it exists, namely, to administer justice duly, impartially and with reference solely to the facts judicially before it. It is now well settled that a person is guilty of contempt of court if, in respect of pending proceeding, he publishes a writing in which he forecasts the probable judgment of the court and makes the comment that law and justice would be defeated by such judgment. Thus the Editor, printer, publisher of the 'Janakantha' has clearly committed contempt of court by its conduct and writing.

197. 'Janakantha', like other two newspapers, are not of Pakistan days. They have emerged after the independence of Bangladesh. From their affidavit-in-opposition it appears that they have also brought many misdeeds committed by different quarters to light taking great risk and their role all through is pro-people and by their investigative journalism they have not only served the cause of justice but they have served the nation at large by upholding people's right, freedom of expression and liberty. Details of their such kind of activities have been enumerated in the affidavit-in-opposition which remains uncontrovertible. Therefore, it can be said that they have also immensely contributed to the cause of people and to the cause of justice although on very few occasions they took very obstinate stand and showed some recalcitrance in appearing before the Court. It is now well settled that power of contempt is very sparingly used by the court in the case of extreme necessity otherwise there is a long tradition in all Superior Courts that they take magnanimous attitude towards the contemners in general except in outrageous cases. In this connection it may further be mentioned that they have filed their affidavit-in-opposition against the show cause issued on 8-11-2000 but did not submit any affidavit-in-opposition against the contempt Rule issued on 15-11-2000 and that itself renders them to be convicted for contempt of court but we have taken a lenient view on this count because of the fact that they in their affidavit-in- opposition to the show cause dated 8-11-2000 have placed their case in detail. Therefore, we have also ignored this technical aspect in the interest of justice and we let them off with a caution that in future in publishing any news item, comments or remarks about the judiciary they should check and recheck the truthfulness or otherwise of the factual aspect of the same and being sure of the same

should publish it because this institution is also a public institution and owes its existence to the public.

198. Now finally, we come to the case of the Daily Sangbad. We have issued the rule on Daily Sangbad for publishing a news item, "সেই ক্যাসেটটি রাষ্ট্রপতি ও প্রধান বিচারপতির দপ্তরে" The relevant portion may be quoted below:

".....অন্য পত্রিকায় রূপকথা নামে যে কথোপকথন ছাপা হয়েছে তার প্রায় পুরোটাই ঐ ক্যাসেট থেকে নেয়া। শুধু স্থান কাল পাত্র বদল হয়েছে।

.....ক্যাসেটে একজন বিচারপতির সাথে দেশের একটি রাজনৈতিক দলের শীর্ষ নেতার এমন কথাবার্তা রয়েছে যা নিজ কানে শুনলে ও বিশ্বাস করা কঠিন।"

199. As the legal position has already been sufficiently laid down in the foregoing paragraphs we need not repeat the same. The stand of Sangbad is that they are one of the most responsible newspapers of the country and firm believer of the independence of judiciary, rule of law and administration of justice from interference by the Government and that the captioned report contained no remark or comments about the Court or the judge or the judiciary. We have quoted the relevant portion of the news item. If anybody reads the story published in the 'Manabjamin' it will inevitably lead the reader to the conclusion that judges of this court take bribes and the Government interferes with the administration of justice. We have read the captioned news several times with deep attention and if it is read in conjunction with the story of 'Manabjamin' a reader with a responsible frame of mind is sure to develop an aversion for the judges and diffidence about the impartiality and integrity of the learned Judges of the Supreme Court. From the captioned report it appears that the reporter heard the tape conversation but the tape conversation did not reflect the facts which have been stated in the story of 'Manabjamin'. Here also the Sangbad, like the other two newspapers, acted negligently in publishing the news without verifying the truthfulness of the story and the overall effect of the news led the readers to the irresistible conclusion that the story depicted in the 'Manabjamin' is true and correct but, as a matter of fact, we have found that it is far from truth. Therefore, Sangbad also falls in the same category with the two other newspapers, namely, Ittefaq and 'Janakantha' as this news item has definitely created an impression in the minds of the readers of the newspapers that what has been written in the 'Manabjamin' is true in toto and thereby this publication also, in our opinion exceeds the limits of freedom of press as enshrined in Article 39(2)(b) of the Constitution but like the Ittefaq this paper is also one of the oldest vernacular daily newspapers of Bangladesh which in the past persistently fought for the cause of justice, liberty and freedom of speech. Like Ittefaq they also rendered immense service to the cause of teeming millions and upheld justice, cause of people and withstood many onslaughts during the autocrat regime in the past but has

never given in. It always played a pro-people role in the Pakistani days. It is also one of the national dailies which is highly respected and well regarded newspaper of the country and like Ittefaq played a pivotal role in the liberation movement of the country and suffered much in the hands of the autocratic rulers of the Pakistan time. The literate section of the population is the reader of this paper. It is rated as a paper of intellectual and progressive section of the people. All the newspapers should bear in mind that they owe a duty to their readers to inform the truth. They can discharge that obligation if they check and recheck before publishing it. All the three news papers are guilty of not doing that. They seized the opportunity to publish it on the basis of the article of 'Manabjamin'. From the news item it appears that the reporter heard the tape conversation and, as such, it was his duty to reveal the truth but without doing that they have published the news in such a way that a wrong massage in conveyed to the readers. A responsible paper should not act in such a way which may damage the image of the judiciary. To err is human. People expect much from Sangbad as it enjoys a reputation in the community as a responsible newspaper. However, at least this time they have been found to have acted negligently. But taking into consideration the past and present contribution of the paper we also take a very lenient view in their case and let them off with a caution as given in the case of 'Daily Ittefaq' and the 'Janakantha'.

200. Mr Amirul Islam and Ms. Tania Amir during the course of argument emphasized that in the matter of appointment of judges and/or confirmation of the judges the opinion of the Chief Justice must have primacy but they did not elaborate theirs submissions with reference to any decision of the superior courts. It further appears that in arguing this point they have not made any submissions as to the original provision contained in the Constitution and its position after 4th Amendment. Since we have decided to touch all the relevant points we have, in our humble way, studied the law on this point.

201. The controversy as to the import of the word "after consultation" with the Chief Justice, inter alia, came up for consideration in the case of SP Gupta: MANU/SC/0080/1981 : AIR 1982 SC 149 and finally, in the case of Supreme Court Advocates-on-Record Association and another vs. Union of India: MANU/SC/0073/1994 : AIR 1994 SC 268.

202. To appreciate the true import of the expression and its constitutional implication it would be profitable for us if we trace the development of constitutional provision on this point in the Sub-continent.

203. It may be pertinent to observe that first statute on the subject enforced in British India was the Indian High Courts Act, 1861, which envisaged the establishment of a High Court of judicature at Fort William in Bengal and High Courts at the Presidencies of Madras and Bombay. The Chief Justice and Judges were to be appointed by the Crown and they were to hold their office during pleasure of the Crown. This position continued under the Indian High Court Act, 1911, though some other Courts were established in the meanwhile. Whereas under the Government of India Act, 1935, the appointment of Judges of the superior Courts remained a matter of pleasure of the Crown but the Judges were given security of tenure up to the age of superannuation mentioned therein. The procedure obtaining before the Independence of this Subcontinent was that Governor of a Province acting in an individual capacity after consulting the Chief Justice of the High Court concerned used to make his recommendations direct to the Governor General and in turn he used to advise the King through the Secretary of State of India. On the basis of the above advice the appointments were used to be made by the Crown. The above position continued in India till the Home Ministry issued a memo dated 4-11-1947 providing the procedure for appointment of High Court Judges, under which the Chief Minister of a State acting in consultation with the Home Minister of the State concerned was to send his recommendations to the Home Minister in the Centre. When the above memo was

circulated, inter alia, among the High Courts of India, the then Chief Justice of Madras, Sir Frederick Gentle, put forward this as one of the reasons for resigning from his post. Sir Archibald Nye, Governor of Madras, also protested. Both were of the view that the above appointment procedure would lead to political jobbery and would affect the independence of judiciary. To consider the above memo, a Conference of Chief Justices of High Courts of India was held on 26-3-1948. As a result of the above conference, a number of recommendations were made which, inter alia, included a suggestion that "every Judge of the High Court should be appointed by the President by a warrant under his hand and seal on the recommendation of Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India". The above suggestions were not accepted by the Government. However, the framers of Indian Constitution, while framing it provided that the appointments in the Supreme Court are to be made after consultation by the President with the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts in the States as he may deem necessary and of the High Courts after consultation with the Chief Justice of the High Court concerned and the Chief Justice of India besides consulting the Governor concerned.

204. In Pakistan, the provisions of sub-section (2) of section 220 of the Government of India Act, 1935, by virtue of Adoption Order, 1947, were followed till the framing of 1956 Constitution, it may be observed that in 1956 and 1962 Constitutions as well as 1972 Interim Constitution and the present Constitution of 1973, the relevant Articles envisage the appointment of the Supreme Court Judges by the President after consultation with the Chief Justice of Pakistan, whereas for the High Courts after consultation with the Chief Justice of Pakistan, with the Governor concerned and with the Chief Justice of the High Court concerned.

205. In India the controversy arose, inter alia, on the question, as to whether the opinion of the Indian Chief Justice has primacy over the opinion of other Constitutional functionaries, inter alia, in the case of SP Gupta : MANU/SC/0080/1981 : AIR 1982 SC 149. The majority consisting of Bhagwati, Desai, SMF Ali and Venkataramiah, JJ held against the primacy though they were of the view that the consultation contemplated by the Constitution must be full and effective and by convention the views of the concerned Chief Justice and Chief Justice of India should also always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the above Constitutional authorities. Desai, J in his opinion, opined that independence of judiciary under the Constitution has to be interpreted within the framework and parameters of the Constitution and that there are various provisions in the Constitution which indicate that the Constitution has not provided something "hands off" attitude. PN Bhagwati, J while concurring with the opinion of SMF Ali, J, opined "that clause(1) of Article 217 provides that the appointment of a High Court judge shall be made after consultation with all the three Constitutional functionaries without assigning superiority to the opinion of one over that of another. He further opined that it is true that the Chief Justice of India is the head of the Indian Judiciary and may be figuratively pater familias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important Constitutional functionary and it is not possible to say so far as the consultation process is concerned, in any way, less important than the Chief Justice of India". The other questions as to the right of Additional Judges and the validity of transfer of certain High Court Judges were also considered. At this stage, it is not necessary to refer the same.

206. It seems that a Bench comprising Ranganath Misra, CJ, MN Venkatachaliah and MM Punshhi, JJ. in the case of Subhesh Sharma, Petitioner vs. Union of India, Respondent and Supreme Court Advocates on Record Association and another Petitioners vs. Union of India (through its Secretary, Ministry of law and Justice), Respondent, and Firdaus Taleyarkhan Petitioner vs. Union of India and another Respondents (: MANU/SC/0643/1990 : AIR 1991 SC 631) was of the view that the majority opinion in the case of SP Gupta (Supra) not only

seriously detracts from and denudes the primacy of the position implicit under the Constitutional scheme, of the Chief Justice of India, in the consultative process but also whittles down the very significance of "consultation" as required to be understood in the Constitutional scheme and context. They were, therefore, of the view that the matter required reconsideration. They recommended the constitution of a larger Bench to re-consider the view taken in SP Gupta's case on two points as under:

> **44.** Judicial Review is a part of the basic Constitutional structure and one of the basic features of the essential Indian Constitutional policy. This essential Constitutional doctrine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. On the contrary what is necessary is an interpretation sustaining the strength and vitality of judicial Review.
>
> **46.** The correctness of the opinion of the majority in SP Gupta s case (: MANU/SC/0080/1981 : AIR 1982 SC 149), relating to the state is on importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger Bench.
>
> As a result of the above reference made by the aforesaid Judges, the aforementioned points came up for consideration before a larger Bench consisting of nine Judges which resulted in the above judgment in the case, of Supreme Court Advocates-on-Record Association and another Petitioner vs Union of India Respondent. In the said case elaborate arguments were advanced by the lawyers of standing /repute for and against the question of primacy. The majority of the Judges comprising seven Judge held, inter alia, that the Chief Justice of India's opinion has primacy in the matter of appointments of the High Court and Supreme Court Judges.

207. JS Verma, J, who wrote his opinion for himself and also on behalf of his four learned brethren, namely, Yogeshwar Dayal, GN Ray, AS Anand and SP Bharucha, JJ recorded, inter alia, the following reasons for the majority for holding that the Chief Justice of India's opinion has primacy:

> **474.** It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court was introduced because of the realization that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge, and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is that in the choice of a candidate suitable for appointment the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word consultation instead of concurrence was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India

as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Act.

475. The primary aim must be to reach an agreed decision taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. However, if conflicting opinions emerge at the end of the process, then only the question of giving primacy to the opinion of any of the consultees arises. For reasons indicated earlier, primacy to the executive is negatived by the historical change and the nature of functions required to be performed by each. The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.

208. This is not surprising if we remember that even in the United Kingdom where similar judicial appointments are in the absolute discretion of the executive, these appointments are made by convention on the advice of the Prime Minister after consultation with the Lord Chancellor, who himself consults with senior members of the judiciary before making his choice or consulting with the Prime Minister and the Prime Minister would depart from the recommendations of the Lord Chancellor only in the most exceptional case.

209. It was held that the question of primacy of the role of the Chief Justice of India has to be examined not merely with reference to the fact that an appointment is an executive act, or with reference only to the comparative constitutional status of the different consultees involved in the process, but with reference also to the constitutional purpose sought to be achieved by these provisions, and the manner in which that purpose can be best achieved.

210. Providing for the rule of the judiciary as well as the executive in the integrated process of appointment merely indicates, that it is a participatory consultative process, and the purpose is best served if at the end of an effective consultative process between all the consultees the decision is reached by consensus, and no question arises of giving primacy to any consultee. Primarily, it is the indication which is given by the constitutional provisions, and the constitutional purpose would be best served if the decision is made by consensus without the need of giving primacy to any one of the consultees on account of any difference remaining between them. The question of primacy of the opinion of any one of the constitutional functionaries qua the others would arise only if the resultant of the consultative process is not one opinion reached by consensus.

211. The constitutional purpose to be served by these provisions is to select the best from amongst those available for appointment as Judges of the superior judiciary, after consultation with those functionaries who are best suited to make the selection. It is obvious that only those persons, should be considered fit for appointment as judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless Judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behavior, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge. The initial appointment of Judges in the Supreme Court is made from the Bar and the subordinate judiciary. The arena of performance of those men are the Courts. It is, therefore, obvious that the maximum opportunity for adjudging their ability and traits is in the Courts and, therefore, the Judges are best suited to assess their true worth and fitness for appointment as Judges. This is obviously the reason for introducing the requirement of consultation with the Chief Justice in the matter of

appointment of all Judges, even the personal traits of the members of the Bar and the Judges are quite often fully known to the Chief Justice and other judges of the Court who get such information from various sources. There may, however, be some personal trait of an individual lawyer or Judge, which may be better known to the executive and may be unknown to the Chief Justice which may be relevant for assessing his potentiality to become a good Judge. It is for this reason, that the executive is also one of the consultees in the process of appointment. The object of selecting the best men to constitute the superior judiciary is achieved by requiring consultation with not only the judiciary but also the executive to ensure that every relevant particular about the candidate is known and duly weighed as a result of effective consultation between all the consultees before the appointment is made. It is the role assigned to the judiciary and the executive in the process of appointment of Judges which is the true index for deciding the question of primacy between them, in case of any difference in their opinion. The answer which best subserves this constitutional purpose would be the correct answer.

212. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Indian Constitution, and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary symbolized by the view of the Chief Justice which ought to be given greater significance or primacy in the matter of appointments, in other words, the view of the judiciary expressed in the consultative process as truly reflective of the opinion of the judiciary. It may be recalled that in India the final opinion expressed by the CJ, is not merely his individual opinion but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function.

213. Here it may further be mentioned that in that case the Government lawyer argued that the Executive is accountable to the people in the matter of appointment of Judges of the Superior Courts. Therefore, they should have the final say in the matter of appointment of the Judges. This contention of the Learned Counsel for the Executive, was repelled by J.S Verma, J, as under:

> The majority view in SP Gupta case to the effect that the executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the Legislature on account of the restriction imposed by Articles 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual Judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the Courts, have to face the consequence of any unsuitable appointment which gives rise to criticism leveled by the ever vigilant Bar. That controversy is raised primarily in the Courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the Courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior

> Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us, that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India.

214. The same question came up in Pakistan also for judicial consideration. In the case of Sharaf Faridi and 3 others vs. Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404, which related to the enforcement of Article 175 of the Constitution as to the separation of Judiciary from Executive and which was decided by a Bench comprising the Chief Justice and six Judges, the question of appointment of Judges of the superior Courts came up for discussion with reference to the words "after consultation" and in this regard the following observations were made by Ajmal Miah, J.

> As regards the appointments of the Judges to the superior Courts, it was vehemently urged by Mr Sharaf Faridi that the appointments should be solely made on the recommendations of the Chief Justice of Pakistan and the Chief Justice of the High Court concerned and that there should not be any say in the above matter of the Executive. It was also submitted by him that since under Articles 188, 182, the appointments of the Chief Justice of Pakistan and the Judges of the Supreme Court are to be made by the President and so also of the Chief Justice and the Judges of the High Courts under Articles 193 and 196 of the Constitution, the advice of the Prime Minister contemplated in Article 48 is not required and that such advice will militate against the concept of the separation and independence of the judiciary. Reliance was placed on an unreported judgment, dated 21-12-1988 given by a Division Bench of the Lahore High Court in Petition No 810 of 1988 holding that the appointment of 11 Additional Judges to the said High Court without advice of the Prime Minister was legal, in this regard, it may be stated that the above Articles 177, 188, 193 and 196 of the Constitution are in their original form except as to the appointment of an Acting Chief Justice of the High Court. In my view, it is not necessary to examine the above question any further in the instant case. However, it will suffice to observe that the consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court concerned by the President should be meaningful as observed in the above-cited Indian Supreme Court cases.

215. It may be recalled that this Sub-Continent was ruled by the British until before the partition in 1947. The system of governance was provided in the Government of India Act, 1935. Under section 8(2) of the Indian Independence Act, 1947 both the dominions i.e. India and Pakistan, were allowed to be governed as nearly as may be in accordance with the Government of India Act, 1935 until their respective Constituent Assemblies framed the Constitutions. Thus, both the countries inherited more or less the same type of problems and difficulties in their judicial systems with which we are now concerned. Both the countries have made provision in their respective Constitutions under which the judicial systems are set up and governed and methodology is provided for appointment of judges. The pivotal point in both the judicial systems in the process of appointment is the word "Consultation". In the Indian jurisdiction in the famous case of Supreme Court Advocates-on-Record Association vs Union of India, consultation has been categorically defined giving primacy to the opinion of the Chief Justice of India. In the Pakistani Constitution of 1973 by which Pakistan is now governed, in the Chapter relating to the judiciary and in the process of appointment the same word "Consultation" is used and what is the true import of the word "Consultation" came up for consideration by the Pakistan Supreme Court in the case of Al-Jehad Trust vs. Federation of Pakistan reported in 1996 PLD SC 324. In that case the Pakistan Supreme Court after considering the relevant provisions of the Constitution of Pakistan and India and the background of the legal system of both the

countries and the leading decisions on the point, in fact, concurred with the majority view of the famous case reported in : MANU/SC/0073/1994 : AIR 1994 SC 268.

216. In that case it was observed by Ajmal Miah, J, that-

> "The object of providing consultation, inter alia, in Articles 177 and 193 of the Constitution of Pakistan (1973) for the appointment of Judges in the Supreme Court and in the High Courts was to accord constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post-independence period, in order to ensure that competent and capable people of known integrity should be inducted in the superior judiciary which has been assigned very difficult and delicate task of acting as watchdogs for ensuring that all the functionaries of the State act within the limits delineated by the Constitution and also to eliminate political considerations. The power of appointment of Judges in the superior Courts had direct nexus with the independence of judiciary. Since the Chief Justice of the High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship, their recommendations have been consistently accepted during pre-partition days as well as post-partition period in India and Pakistan. The words "after consultation" referred to, inter alia, in Articles 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for judgeship in the superior Courts, whereas the Governor of a Province and the Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/ conduct. No one of the above consultees/ functionaries is less important or inferior to the other. All are important in their respective spheres. The Chief Justice of Pakistan, being pater familias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely, his views deserve due deference. The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the judgeship of a superior Court keeping in view the object enshrined in the preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by Islam to ensure independence of Judiciary.

217. It was further observed that -

> The views of none of consultees can be rejected arbitrarily in a fanciful manner. The views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wished to disagree with their views, it has to record strong reasons which will be justiciable. A person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a judge of a High Court or by the Chief Justice of Pakistan for the judgeship of the Supreme Court cannot be appointed as it will not be a proper exercise of power to appoint under Articles 177 and 193 of the Constitution.

218. Consultative process is mandatory and without it no appointment/confirmation can be made. It must follow that in absence of consultation as contemplated and interpreted the appointment/ confirmation of a judge in the superior Court shall be invalid. This view is in consonance with the well established conventions, Islamic concept of Urf and the

proper exercise of power".

219. In the case of Al-Jahid Trust (PLD 1996 SC 324) it has been held by Pakistan Supreme Court that appointment of a judge has to be transparent so that the litigant public and people at large have faith in the independence of judiciary. Appointment of a judge and the mode and manner in which he is appointed has close nexus with the independence of judiciary and cannot be separated from each other. It has further been held that the words "after consultation" employed in Articles 177 and 193 of the Constitution of Pakistan connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play and involving participatory consultative process between the consultees and also with the executive. It was further held that Constitutional conventions can be pressed into service while construing a provision of the Constitution. The Pakistan Supreme Court also observed that the object of providing consultation in Articles 177 and 193 for the appointment of judges in the Supreme Court and in the High Courts was to accord constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post-independence period, in order to ensure that competent and capable people of known integrity should be inducted in the superior judiciary which has been assigned very difficult and delicate task of acting as watch dogs for ensuring that all the functionaries of the State act within the limits delimited by the Constitution and also to eliminate all political considerations.

220. Finally, it was observed by the Pakistan Supreme Court that the views of none of the consultees can be rejected arbitrarily in a fanciful manner. The views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the executive wished to disagree with their views, it has to record strong reasons which will be justiciable. Person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a Judge of a High Court or by the Chief Justice of Pakistan for the judgeship of the Supreme Court cannot be appointed as it will not be a proper exercise of power to appoint under Articles 177 and 193 of the Constitution.

> Constitutional process is mandatory and without it no appointment /confirmation can be made. It must follow that in absence of consultation as contemplated and interpreted the appointment/confirmation of a judge in the superior Court shall be invalid.

221. So far we have examined the position in the context of Indian Constitution and the Pakistani Constitution. Now let us see what is the position within our own jurisdiction. In our original Constitution the constitutional provision was that in the matter of appointment of a judge in either of the Divisions of the Supreme Court it had to be made in consultation with the Chief Justice of Bangladesh. But after the Fourth Amendment the provision so far it relates to the consultation with the Chief Justice in the matter of appointment of a judge of this Court was done away and the notifications which have been issued after the Fourth Amendment do not reflect that judges of this Court were appointed in consultation with the Chief Justice of Bangladesh but it is revealed that even after the Fourth Amendment the judges were appointed in consultation with the Chief Justice of Bangladesh even during the Martial Law regime though the matter of consultation was not reflected in the notification. This state continued until February 1994. On second of February 1994 nine judges were appointed in this Division but giving a go by to the convention. This time the appointment was made without any consultation with the then Chief Justice. After the publication of the notification it came to the notice of the learned Chief Justice that the said notification was issued appointing nine judges of this Division without any prior consultation with him. This caused great anger and commotion in the

mind of the learned Chief Justice. On 3rd of November, the Annual Conference of the Bar Council was held and the Chief Justice was the chief guest of the conference. While delivering his speech in inaugurating the conference the learned Chief Justice brought to the notice of the members of the Bar that nine judges were appointed by the President (the Executive) without any consultation with him and the Chief Justice is "Mr Nobody" in the matter of appointment of judges of this Court. At the disclosure of this fact by the learned Chief Justice the matter was taken up by the Bar, united like a rock, and rose to the occasion and launched a movement for cancellation of the appointment of said nine judges. Even after the completion of the conference the matter was pursued by the senior and prominent members of the Supreme Court Bar and hectic negotiation went on for two consecutive days in the matter between the Government, on the one hand, and the learned Chief Justice on the other and after a series of discussions ultimately, a compromise was arrived at and two of the names were dropped from the original notification and they were replaced by Mr Md. Hamidul Haque and Mr M.M Ruhul Amin as their Lordships then were. After working out the compromise the earlier notification was withdrawn and a fresh notification was issued on 9th of February 1994 and in that notification for the first time after the Fourth Amendment it was mentioned that the aforesaid appointment of the judges in this Division was made by the President in consultation with the Chief Justice. Here it may further be mentioned that the earlier notification dated 2nd of February 1994 gave rise to a constitutional deadlock, inasmuch as a movement was started by the legal community against the original appointment and that situation aggravated to such an extent that it went beyond the control of the Executive as on 3rd of February, a Full Court Meeting consisting of all the judges of both the Divisions of this Court unanimously resolved authorizing the Chief Justice not to administer oath to the newly appointed judges and this united stand taken by the judges also made way for negotiation by the Executive with the judiciary in making the appointment and ultimately, the appointment of nine judges were made in consultation with the Chief Justice and incidentally, my name appeared in both the notifications. Thus I became a part of judicial history of Bangladesh. Be that as it may, prior to that notification of 9th February 1994 the notification published under Article 95(1) of the Constitution did not reflect the factum as to whether the judges were appointed in consultation with the Chief Justice or not. It was submitted by Mr M Amirul Islam, the learned Advocate, that even after the Fourth Amendment all the appointments of the judges were made in consultation with the Chief Justice because he is in a position to express correct and authentic opinion about the conduct, character and capability of a candidate. But when a departure was made by the Executive in appointing nine judges in February 1994 the move was resisted boldly by the then Chief Justice Mr Justice Shahabuddin Ahmed as his Lordship then was. Therefore, it appears that even after the Fourth Amendment although the provision of consultancy was deleted from the Constitution, nevertheless, the Chief Justice played the pivotal role in the appointment of judges of the Supreme Court. In this connection, it may not be out of place to mention that during the British Rule High Courts were established pursuant to High Courts Judicature, Act 1861 and Charters. Finally, came the Government of India Act, 1935 and the judges of the Federal Court of India and the judges of the High Court of different states were appointed under the Government of India Act, 1935 and this provision continued in the Sub-Continent even after partition until the newly created states had their own Constitution. The appointment of Federal Court Judges and the Judges of the High Courts were made under sections 200 and 220 respectively of the Government of India Act, 1935. The appointments were in the absolute discretion of the Crown. In other words, the Executive by itself, with no provision at all for consultation with the Chief Justice of India or with the judiciary in any other manner, was the authority to make appointments to the superior judiciary. But there are, however, contemporaneous evidence to show that under the Government of India Act, 1935 the said appointments were invariably made with the concurrence of the Chief Justice of India. It further appears that an attempt was made at the end of the colonial rule to appoint the judges without consultation with the Chief

Justice and that attempt was resisted and protested by the Chief Justice and the Governor of the Province thus in the colonial days when the people of this part of the world were British subjects without any fundamental rights even then the judiciary upheld its independence by ensuring that a judge of the superior court cannot be appointed without consultation with the Chief Justice. So is the case in England, mother of common law. In United Kingdom, the Lord Chancellor, who is a cabinet member, ranks second in the cabinet, is the head of the judiciary. He advises on all appointments to the judicial office from the rank of Justice of Peace to the higher offices of the English judiciary. The appointments to the Court of Appeal and the House of Lords and the offices of Lord Chief Justice, Master of the Rolls and President of the Family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Lord Chancellor presides over the House of Lords besides being member of the Cabinet and Head of the judiciary. He combines in his position three-fold functions of Executive, Legislative and judiciary. In England the power to select and appoint judges vests in the Executive. Nevertheless, these appointments are made by convention on the advice of the Prime Minister after consultation with Lord Chancellor who himself consults with senior members of the judiciary before making his choice. The Lord Chancellor, Lord Mackay, speaking on 'The Role of the Judge in a Democracy' said:

> One of the most important responsibilities of a Lord Chancellor in our democracy is for judicial appointment. It is my duty to ensure that neither political bias, nor personal favoritism nor animosity play a part in the appointment of judges and that they are selected regardless sex, ethnic origin or religion on the basis of their fitness to carry out the solemn responsibility of judicial office. I look for those with integrity, professional, ability, experience, standing, sound temperament and good health. To achieve this I consult widely and regularly with the judges Law Lords and other members of legal profession. I naturally attach particular importance to the opinion of Division of the High Court Judges therefore, have an important role in judicial appointments, albeit informally rather than prescribed by Statue.

222. Thus, there is a long line of convention in this Sub-Continent in the matter of appointment of a judge in the superior court.

223. Let us now see what is the position in Bangladesh. Original Article 95 provided that a judge of this Court was required to be appointed in consultation with the Chief Justice. But that provision was deleted by the Fourth Amendment of the Constitution. But we have already noticed that even after the 4th Amendment, the judges of this Court were appointed in consultation with the Chief Justice. However, an attempt was made in 1994 by the Executive to deviate from the convention but it was ably resided by the Bench and the Bar unitedly. As a positive result henceforth the factum of consultancy is reflected in the notification from 9th of February, 1994 till today.

224. Now a question naturally crops up as to whether there is any constitutional obligation on the part of the Executive to consult the Chief Justice in appointing any judge of this Court and if the answer is in the affirmative, then the necessary question, which will stare at us would be what is the status of the consultation. In other words, is it an effective consultation or a mere formality?

225. If we trace the judicial history of the Sub-Continent it appears that right from the colonial days when there was no Constitution, the judges of the superior courts were appointed in consultation with the Chief Justice in exercise of regal authority. Even after the enactment of the Government of India Act, 1919 or 1935 or the Constitution of the newly created states the judges had always been appointed in consultation with the Chief Justice. In Bangladesh after the Fourth Amendment on and from 9th February 1994 in the

notification it has been started that the appointments are made in consultation with the chief Justice. Now let us see what is the status of this consultancy in Bangladesh in the absence of any such provision in the Constitution. Before we embark on a discussion on the point it would be profitable if we trace the history of independence of judiciary.

226. The concept of separation of powers is a well-known fundamental political maxim which many modern democracies have adopted. Our Constitution has not strictly adhered to that doctrine but it does provide for distribution of powers to ensure that one organ of the government does not intrude on the constitutional powers of other organs. This is evident from Part V, Part VI or VII of the Constitution. There is and can be no dispute that the distribution of powers concept assumes the existence of a judicial system free from external as well as internal pressures. Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of laws. Since the Courts are entrusted with the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant or indifferent State agencies. Therefore, the need for an independent and impartial judiciary manned by persons of sterling quality and character, undenting courage and determination and resolute impartiality and independence would dispense justice without fear or favor, ill-will or affection. Justice without fear or favor, ill-will or affection, is the cardinal creed of our Constitution and a solemn assurance of every Judge to the people of this great country. There can be no two opinions at the Bar that an independent and impartial judiciary is the most essential characteristic of a free society. Even though on the question that our judiciary should be independent of the executive and the legislature there is no divergence of views at the Bar, there was some difference of opinion on the actual content of the concept. Hence a brief look into the historical background of the development of this concept in our country.

227. It is well known that the concept of judicial independence in this country owes its origin to the development of this concept in England. In England for centuries the monarch was the repository of all powers and the courts set up by him were accountable to none except him, he being an integral part of the system of administration of justice. This was a purely executive arrangement. However, during the 17th century things began to change following a clash between the Monarch and the Parliament, each vying for supremacy. In this tussle for supremacy both sought cover under law which brought the judicial into sharp focus since it alone was competent to demarcate the functional boundaries between the privileges of the Crown and those of the Parliament. It is this situation which gave birth to the doctrine of judicial independence. Both the Crown and the Parliament realized the significance and the value of an independent judiciary. Yet the English Parliament was not prepared to loosen its grip over the judiciary and it fell to the lot of Chief Justice Coke to assert the functional freedom of the judiciary. When Parliament realized that the Crown was able to assert because of the pleasure doctrine, it enacted the Settlement Act of 1700 whereby security of tenure was provided by making it subject to good behavior and removal upon address by both Houses of Parliament Judges' salaries were to be ascertained and established. Thus the judiciary in England became independent of the Crown as well as the Parliament. But the situation was different in British colonies. Even though the English judiciary secured independence, neither the Crown nor the Parliament was prepared to concede it to the colonies. In 1759 when the Pennsylvania Assembly enacted a law requiring an address of the Assembly for removal of a Judge, the Privy Council disapproved of the measure as an attempt to make the judiciary dependent by the Colonial Assembly. Since the British Parliament was supreme and could enact a law concerning colonies which would not be subject to court scrutiny, the unrepresented American colonists suspected British intentions. Hence when they attained freedom they favored total separation of all the three branches of Government so that each would

operate as a check on the exercise of power by the other. The American concept of judicial independence, therefore, differs somewhat from the British concept. Our founding fathers were aware of these developments and, as we shall presently show, they steered a middle course.

228. In India, after the advent of the British, the judicial system underwent changes. The Courts set up by the East India Company were exclusively executive. Thereafter a new judicial system comprising three types of courts came to be introduced in the Presidency towns of Bombay, Calcutta and Madras. The courts so constituted were replaced by the establishment of Supreme Courts in the said three Presidency towns. The Chief Justice and other Judges held office during the pleasure of the Crown although their salaries were ascertained. On the enactment of the High Courts Act, 1861, these courts were replaced in 1862 by High Courts. Under the Government of India Acts, 1919 and 1935 the power of appointment was exclusively with the Crown, but under the latter Act the age of superannuation was fixed at 60 years subject to the Crown's power to remove a Judge for misbehavior or mental or physical infirmity on the report of the Judicial Committee of the Privy Council. Thus Judges enjoyed independence from the executive but continued to serve under the Crown's pleasure. However, on account of the British culture of judicial independence, the Judges of the High Court functioned without any executive interference or fear of interference. The Federal Court later strengthened this great tradition of judicial independence. The purpose of setting out this abridged historical background is to point out how the pendulum swung from total executive control to near total judicial independence except for the limited scope of the pleasure doctrine. Our founding fathers were aware of these developments in England, America and British India when they undertook the task of drafting the Constitution for sovereign Bangladesh.

229. Independence of judiciary is the sine qua non of modem democracy. So long as the judiciary remains truly distinct from the Legislature and the Executive, the general power of the people will never be endangered. Montesquieu in his book "Spirit of Laws" observed "There is no liberty, if the power of judiciary be not separated from the legislative and the Executive powers". The framers of our constitution also made it known in an emphatic voice that separation of judiciary from Executive which is the lifeline of independent judiciary is a basic feature of our Constitution. Thus, to safeguard the will of the people as enshrined in the Constitution it is necessary to keep the judiciary absolutely distinct from both the legislature and the Executive and this is what the framers of our Constitution have done. It must be remembered that in recent times with the expanded horizons of the judicial review the concept of judicial independence has acquired a new dimension. The Supreme Court of Canada in "The Queen vs. Beauregard, (1987) LRC 180 propounded the broader concept of independent judiciary as under:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them. No outsider-be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

230. Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon shetreet:

> The judiciary has developed from a dispute resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community....

As stated by Le Dain, J in Valente vs. The Queen (1985) 2 SCR 673 at pp 685, 687:

> (Judicial independence) connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

Dickson, CJ who spoke for the Court, further observed as under:

> The role of the Courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.

231. It is not the security of tenure provided to an individual Judge which alone is the source of independence of judiciary but there must be an independent judiciary as an institution because the judiciary in Bangladesh has to act as an impartial arbiter to resolve disputes between the Governments and the private individual as well as between the Government inter se. Further, it has also to protect the fundamental rights of the individuals guaranteed under Part III of the Constitution. It is the prime need of the time that not only the independence of an individual Judge is to be secured but the independence of judiciary as an institution has also to be achieved. Therefore, the necessary corollary is that can there be an independent judiciary when the power of appointment of judges vests in the Executive? To say in the affirmative, would be illogical. The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher Judiciary. In modem time the Executive is the largest single litigant before this Court and, in this view of the matter, the Judiciary being the mediator between the people and the Executive - the matter of appointment cannot be left to the authority of the Executive. We have earlier indicated that the constitutional conventions are of great importance in interpreting the provision of the Constitution inasmuch as the missing links are supplied by the conventions.

232. It is now well settled that there is no distinction between the "Constitutional Law" and an established "Constitutional Convention" and both are binding in the field of their operation. Once it is established that a particular convention exists and is operating then the convention becomes a part of the "Constitutional Law" of the land and can be enforced in the like manner. It is, no doubt, correct that the existence of a particular convention is to be established by evidence on the basis of historical event and expert factual submissions. But once it is established that a particular convention exists and the constitutional functionaries are following the same as binding then there is no justification to deny such a convention the status of law. Therefore, it calls for determination as to whether the consultation which is carried on by the Executive with the Chief Justice has any force of law, that is, whether the recommendation of the Chief Justice has any primacy. To examine this aspect of the law, let us examine the position in the context of Bangladesh. Conventions are found in all established Constitutions and soon developed even in the newest. Two sets of principles must be remembered to make up the rules of constitutional law. One set of rules is contained in the written constitution of a country and the other set is referred to as the 'convention of the Constitution.' Conventions are a means of bringing about constitutional development without formal changes in the law. KC Where in his book "The Statute of Westminster and Dominion Status" (Fourth Edition) defines the conventions as under:

> The definition of conventions may thus be amplified by saying that their purpose is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied.

233. The conventions grow up around and upon principles of written Constitutions. Necessary conventional rules spring up to regulate the working of the various parts of constitution and their relation to each other.

Sir W Ivor Jennings, in his hook "Law and the Constitution" (Fifth Edition) refers to the constitutional conventions in the following words:

> Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow.

234. These rules Mill referred to as "the unwritten maxims of the Constitution." Twenty years later Dicey called them "the conventions of the Constitution", while Anson referred to them as "the custom of the Constitution". The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas. A Constitution does not work itself, it has to be worked by men. It is an instrument of national cooperation and the spirit of co-operation, is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that co-operation. Also, the effects of a Constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate.

235. The conventions enable a rigid legal framework-laws tend to be rigid-to be kept up with changing social needs and changing political ideas. The conventions enable the men, who govern, to work the machines. Dicey in his book "Introduction to the Study of the Law of the Constitution" refers to the conventions in the following words:

> They are multifarious, differing as it might, at first sight appear, from each other not only in importance but in general character and scope. They will be found, however, on careful examination, to possess one common quality or property, they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised; and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the Constitution.

236. The written Constitutions cannot provide for every eventuality. Constitutional institutions are often created by the provisions which are generally worded. Such provisions are interpreted with the help of conventions which grow by the passage of time. Conventions are vital insofar as they fill up the gaps in the Constitution itself, help solve problems of interpretation, and allow for the future development of the constitutional framework. Whatever the nature of the Constitution, a great deal may be left unsaid in legal rules allowing enormous discretion to the constitutional functionaries. Conventions regulate the exercise of that discretion. A power which, juridical, is conferred upon a person or body of persons may be transferred, guided, or channelized by the operation of the conventional rule. KC Wheare in his book 'Modern Constitution' (1967 edition)

elaborates such a rule as under :

> What often happens is that powers granted in a Constitution are indeed exercised but that, while they are in law exercised by those to whom they are granted, they are in practice exercised by some other person or body of persons. Convention, in short, transfers powers granted in a Constitution from one person to another.

237. KC Wheare in his book "Modern Constitution" gives at least two sources of conventions. A course of conduct may be persisted in over a long period of time and gradually attain first persuasive and then obligatory force. According to him, a convention may arise much more quickly than this. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule is immediately binding and it is a convention. Sir Ivor Jennings puts it as under:

> The laws provide only a framework; those who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow, and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed.

238. Thus, every act by a constitutional authority is a precedent in the sense of an example which may or may not be followed in subsequent similar cases but a series of precedents all pointing in the same direction is very good evidence of a convention.

239. The requirements for establishing the existence of a convention have been succinctly laid down by Sir W Ivor Jennings in 'The Law and the Constitution', 5th Edition (1959) as under:

> We have to ask ourselves three questions: first, what are the precedents, secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule ? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

240. Here we may refer to the decision of the Supreme Court of Canada in Re Amendment of the Constitution of Canada (1981) 125 DLR (3rd) 1. The Court following the tests laid down by Sir Ivor Jennings found as a fact that the convention existed. It also held that the proposed legislation infringed the convention. The Court even went to the extent of concluding that infringing the established convention would be unconstitutional.

241. There is abundant authority to show that the Courts have recognized the existence of conventions and have relied upon them as an aid to statutory interpretation. In Reyder vs Foley (1906) 4 CLR 422, the High Court of Australia held that as a conventional practice it was the minister who was acting on behalf of the government. Similarly, in Commercial Cable Company vs. Government of Newfoundland, (1916) 2 AC 610, the Judicial Committee of Privy Council interpreted the word "government" to mean as minister in charge on the basis of an established convention. In British Coal Corporation vs. The King (1935) AC 500, the Judicial Committee of Privy Council noticed the convention that His Majesty in Council was bound to give effect to the report of the Judicial Committee. In this connection we may also refer to Robinson vs. Minister of Town and Country Planning, (1947) KB 702, Liversidge vs. Anderson, (1942) AC 206, Copyright Owners Reproduction Society Limited vs. EMI (Australia) Pvt. Limited, (1958) 100 CLR 597, Adegbenro vs. Akintola, (1963) AC 614, Attorney-General vs. Jonathan Cape Limited (Crossman Diaries Case) (1976) QB 752, R. V. Secretary of State for Home Department, Ex p. Hosenball,

(1977) 1 WLR 766 and Re Amendment of the Constitution of Canada (1981) 123 DLR (3rd) 1.

242. A Review of all the aforesaid authorities lead us to the irresistible conclusion that there is no distinction between the ''Constitutional law" and an established "Constitutional convention" and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the "Constitutional law" of the land and can be enforced in the like manner.

243. The Constitution of Bangladesh has borrowed the British form of Government, making the cabinet collectively responsible to the Parliament. The machinery of government is eventually on the British pattern and the whole collection of British constitutional conventions has either been incorporated in the constitution or are being followed as unwritten constitutional conventions.

244. Now let us proceed to see whether an established constitutional convention can be read in Articles 95(1) and 98 of our Constitution to the effect that in the matter of appointment of judges of this Court the opinion of the Judiciary expressed through the Chief Justice of Bangladesh is primal and binding upon the Executive. To answer the question we may apply the three tests laid down by Sir Ivor Jennings. The first test is 'What are the precedents?' Under the Government of India Act, 1935 which remained operative till the constitution was framed in the then Pakistan, all appointments of judges to the Federal Court and the High Courts were made with the concurrence of Chief Justice of Pakistan and that convention continued till today though there is no provision of consultation after the Fourth Amendment. The second test is, 'Did the actors in the precedents believe that they were bound by a rule?' We have found, as a matter of fact, that the recommendation of the Judiciary in the matter of appointment of judges of this Court has always been adhered to by the Executive since 1861 till the framing of the Constitution of Pakistan. Therefore, we have no hesitation in holding that the second test laid down by Sir Ivor Jennings is also justified. "Is there a reason for the rule?" is the third test. There are two primary reasons in support of the conventions that the primacy rests with the judiciary. But before discussing the point elaborately it would be profitable if we discuss the history of English Judiciary in this respect as our present legal system is borrowed from the English common law and our Constitution is also largely based on the principle of British Constitution. Both of us were in England at the time of the liberation war and both of us remember that Dr Kamal Hossain, though holding Ministry of Foreign Affairs, twice visited England to consult two very eminent British Constitutional experts of the Oxford University and he made it public in a public meeting in London where both of us were personally present. There is no doubt that concept of judicial independence in our country owes its origin to the development of this concept in England.

245. In India, after the advent of the British, the judicial system underwent changes. The Courts set up by the East India Company were exclusively executive. Thereafter, a new judicial system comprising three types of courts came to be introduced in the Presidency towns of Bombay, Calcutta and Madras. The courts so constituted were replaced by the establishment of Supreme Courts in the said three Presidency towns. The Chief Justice and other Judges held office during the pleasure of the Crown although their salaries were ascertained. On the enactment of the High Courts Act, 1861, these courts were replaced in 1862 by High Courts. Under the Government of India Acts, 1919 and 1935 the power of appointment was exclusively with the Crown, but under the latter Act the age of superannuation was fixed at 60 years subject to the Crown's power to remove a Judge for misbehavior or mental or physical infirmity on the report of the Judicial Committee of the Privy Council. Thus Judges enjoyed independence from the executive but continued to serve under the Crown's pleasure. However, on account of the British culture of judicial

independence, the Judges of the High Court functioned without any executive interference or fear of interference. The Federal Court later strengthened this great tradition of judicial independence. The purpose of setting out this abridged historical background is to point out how the pendulum swung from total executive control to near total judicial independence except for the limited scope of the pleasure doctrine.

246. There is no dispute that the independence of judiciary is one of the fundamental characteristics of the Constitution. The concept of independence of judiciary cannot be ensured unless the exclusion of the final say of the Executive in the matter of appointment of judges is done away and that is the only way to maintain the independence of judiciary. The second and more important reasons for giving weight to the opinion of the judiciary is that the appointments are made to the superior judiciary and to find out the suitable persons for such appointments the expertise for that purpose is only available with the judiciary. The persons to be selected for appointments as judges of this Court are mainly those who are practicing before this Court and are known to the judges of this Court. The Executive can have no knowledge about their legal acumen and suitability for appointment to the high judicial office. In the process of consultation the expertise is only with the judiciary. The 'consultation', therefore, is between a layman (the Executive) and a specialist (the judiciary). It goes without saying that the advice of the specialist has a binding effect. It must be remembered that the process of consulting the Judiciary is to enable the appointments to be made of persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed, then the said purpose would be defeated if the appointing authority is left free to take its "own final" decision by ignoring the advice of the judiciary. Therefore, we are of the firm conviction that in the matter of appointment of judges of the High Court Division of this Court a prior consultation with the Full Court is a must and their opinion must have a primacy and be binding on the Executive. Otherwise not only the independence of the judiciary which is one of the basic features of the Constitution will be destroyed but spineless, pliant and submissive persons would be appointed by the Executive on extraneous grounds which would not be conducive to justice.

247. Since we are of the opinion that the opinion of the judiciary in the matter of appointment of judges of this Court should have primacy we would like to enlighten this feature. To appoint the most appropriate person, as judge of this Court there is no other way without concurrence with the opinion of the Chief Justice. Naturally, a question may arise as to whether the "Chief Justice" denotes a persona designates, for the judiciary. Without hesitation we would like to say that here the connotation of the Chief Justice is the superior judiciary. Therefore, as and when a necessity arises for appointment of judges of either of the Divisions it is the Chief justice who would initiate the proceedings or sometimes the Chief Justice may be requested by the Executive to initiate the proceedings for the appointment of judges of this Court as and when occasion arises. It must be remembered that unlike India or Pakistan the High Court Division is not subordinate to the Appellate Division. It is a part of the Supreme Court and both the Divisions are headed by the Chief Justice of Bangladesh. The lawyers who practice in the High Court Division cannot appear and plead before the Appellate Division without having a good length of practice and on his enrolment as an Advocate of the Appellate Division he can appear before the Appellate Division. In view of that aspect it is the judges of the High Court Division who are more acquainted with the large number of lawyers who frequently appear before them and they are in a position to judge the capability and ability of a person who appears before them as an Advocate. Moreover, only small fraction of the lawyers of the Supreme Court appear before the Appellate Division and they generally are of better reputation and standing and many of them will decline an offer for appointment as a judge of this Division. Therefore, in order to have comprehensive evaluation of the prospective candidates the most appropriate process, to suggest the names of the prospective judges,

would be only to convene a Full Court Meeting of all the Judges of the Supreme Court with the agenda that in the Full Court Meeting the judges will select/suggest the names of prospective judges after evaluating about the competency, capability and suitability of the prospective judges of the High Court Division. In the meeting those names which would be proposed unanimously would be recommended by the Chief Justice for appointment as judges but if in a particular case it appears that there is no unanimity among the judges for the required number of judges to be appointed then the meeting should be adjourned for one month so that the judges may get a breathing time and examine the pros and cons of the persons about whom unanimity could not be achieved. In the adjourned Full Court Meeting if it appears that even then judges fail to agree unanimously about the rest of the candidates then the names which have been recommended by at least 70% of the judges present should be accepted for recommending their names. In this situation in recommending the names the Chief Justice will first mention those names, which have been unanimously approved, and then recommend the other names indicating that they have been recommended by 70% or more of the judges present in the meeting. Once in this way a recommendation is made by the Chief Justice as pater familias of the judiciary, it becomes binding on the Executive, but if for some reason the Executive authority finds reason to raise objection they must place the facts and figure before the Chief Justice in writing and then the matter would again be referred to the Full Court and the Full Court after reconsidering the objection raised by the Executive if withdraws the recommendation, that is fine. But, if after reconsideration of the objection the Full Court observes that still in their opinion recommended is the right person to be appointed as a judge of this Court in that case there would be no alternative before the Executive but to appoint the recommended as a judge. There may be causes or it may not be possible on the part of the judges of this Court to know about the antecedents of the recommended and the Government is in a better position to ascertain the antecedents and integrity of a prospective judge. So, if the Executive places materials showing that a recommended is not a man of integrity and/or of bad antecedent then naturally the Full Court will accept the objection and withdraw the recommendation. There would be no problem. Therefore, the consultation with the judiciary is not only mandatory but the Executive is bound by the advice given in the process of consultation by the Chief Justice on the recommendation of the Full Court and we do not find any reason to take a different view from the one that has been taken consistently by the superior courts in India and Pakistan. We are of the opinion that in the matter of appointment of judges of the superior Courts the final word cannot be given in the hands of an individual howsoever high he is placed in the constitutional hierarchy. Collective wisdom of the consultees is the sine qua non for such appointment. We personally have no doubt that the Chief Justice is a very prominent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have and therefore we think that the matter should not be left in the hands of the learned Chief Justice alone and a better result would be derived if the opinion is formed in the matter of appointment of judges in the Full Court Meeting of the Supreme Court. This aspect of the matter has been unfortunately, ignored within our jurisdiction. I am in this Division for about six years and until now I have never been consulted by any one of the Chief Justices in the matter of appointment of judges of this Division and I know none who has been consulted by the Chief Justice in this regard. Our former Chief Justice and the Ex-President of the Republic Mr Justice Shahabuddin Ahmed suggested in a speech delivered in the installation ceremony of the office-bearers of the Dhaka Bar that like other Common wealth countries a committee may be formed headed by the Chief Justice for recommending names for appointment of judges of the Supreme Court. He suggested that in the committee there should be representative of the Bangladesh Bar Council, the Supreme Court Bar, the Attorney-General, Senior Judges of the Appellate Division and the High Court Division and also the Law Minister of the Republic. But we think that the procedure suggested by us above would provide a better opportunity for selecting the best possible candidates for appointment of judges in this

Court on merit without any political or other bias. We firmly believe that in the interest of justice and to maintain the dignity, authority and prestige of this institution and to maintain the high standard of the judges the recommendation should be processed through the Full Court.

248. Unfortunately, we have no systematic set of criteria to evaluate or rate the desirable qualities of selections to the Judgeship of this Division. But it can be said that only those who know what criteria they should adopt in assessing merit can alone evaluate meaningfully a candidate's merit and select the prospective candidate. In weighing and evaluating the qualifications of the prospective candidates the sponsoring authority has to assess their merit by useful non-bromidic guidelines it could devise based on its long standing experience both on the Bar and the Bench. That authority, in Bangladesh, could only be the Full Court of the High Court Division because those who practice in the Appellate Division and lawyers of outstanding capability will refuse an offer if it is made to them. Besides, only prominent lawyers of the country appear in the Appellate Division but the vast majority of the lawyers practice in the High Court Division and, as such, the judges of this Division are in a better position to come across the promising lawyers. Thus, it is judges of the High Court Division headed by the Chief Justice of Bangladesh who alone can speak of a candidate's professional attainments, his learning ability and his legal experience though the executive can speak of the other qualities, such as, affiliation, personal integrity, antecedents and background of the candidate. Sir Winston Churchill once observed in the House of Commons that "Perhaps only those who have led the life of a judge can know the lonely responsibility which rests upon him." The recipe could best be evaluated only by the Full Court.

249. That the procedure, which we have suggested for recommending the names of the prospective judges, gets better support from the fact that in the matter of enrolment of Advocates for practicing in the Appellate Division, the opinion of all the Judges of this Division is obtained for determining the competency of the advocates. This clearly indicates that the learned Chief Justice and the other learned Judges of the Appellate Division do not know much about many of the Advocates who practice in this Division. It is the Judges of this Division who have the better opportunity and scope to evaluate the competency, ability and capability of the prospective candidates.

250. In this connection, one should not lose sight of the important fact that appointment to the judgeship of this Court cannot be equated with the appointment to the executive or other services. In the case of All India Judges 'Association vs. Union of India (1993) 4 JT (SC) 618 the following observations were made:

> The judicial service is not service in the sense of 'employment.' The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State-power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the Judges and the administrative executive. In some democracies like the USA,

members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged.

251. In conclusion we would like to say our social needs dictate:

Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the resolution of the Full Court being the highest judicial opinion, has a right of primacy, if not supremacy to be accorded, affairs concerning the highest judiciary. It is a right step in the right direction and that step alone will ensure optimum benefits to the society by ensuring rule of law.

252. The judiciary may be the weakest among the constitutional functionaries, for the simple reason that it is not possessed of long sword or the long purse and if the opinion of the executive is to prevail over the opinion of this Court concerning judiciary then the independent judiciary which is a power of strength for all particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer. It must be remembered that the State in the present day has become the major litigant and the superior courts have become centers for turbulent controversies, some of which with a flavor of political repercussion, and the courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant, be justified in enjoying absolute authority in nominating and appointing its arbitrators? The answer would be in the negative. The executive cannot be allowed to enjoy the absolute primacy in the matter of appointment of judges as its 'royal privilege'. If such a process is allowed to continue, the independence of judiciary will never be attained. It must also be remembered that a person appointed not on merit but because of favoritism or other ulterior considerations can hardly command real and spontaneous respect from the Bar. Judges being the central figures where administration of justice is concerned there can be no doubt that great care must be taken in the choice of personnel for judgeship. The method of judicial appointments has a great deal of bearing on the quality of the judiciary and its composition. The method of appointment must ensure that the most qualified candidate secures appointment.

253. In this connection we would like further to add that:

(1) In selecting judges, the family background must be taken into consideration. Mere academic fitness and brilliance is not enough. Cultural background goes a long way to refine a man.

(2) In considering the suitability of the judge, the question of age should also be kept in mind. Experience makes a man perfect: There is no alternative to maturity. Generally, a judge should not be appointed below the age of fifty unless he or she is of exceptional caliber.

(3) In our Constitution, there is no bar in reappointing a judge on contract basis on retirement in a judicial or quasi-judicial office. But we think that to keep the

highest judiciary above any shadow of suspicion and to maintain the impartiality and independence of judiciary this provision should be repealed and any reappointment after retirement should be prohibited otherwise a tendency may grow in the minds of the judges before retirement to lean towards the government to get their favor which will jeopardize administration of justice and the pliant, submissive and spineless judges will queue before the government with folded hands for getting reappointment. If the provision of reappointment is done away at least there will be no possibility of hankering after the government for favor, which will help maintain the dignity, authority and prestige of the highest seat of justice. Men are by nature selfish and judges are also human beings with all the failings. To keep them above broad the relevant provision as contained in Article 99 of the Constitution should be abolished. The repeal of this provision will also in some way take the judiciary out of the grip of the Executive.

254. The convention of consultancy has been adopted to select the best from amongst those available for appointment as judges of the superior Court. It is obvious that only those persons should be considered fit for appointment as judges of this Court who combine the attributes essential for making an able, independent and fearless judge. It is needless to say that several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behavior, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a judge. The appointment of judges in this Division is made from the Bar and the subordinate judiciary. The arena of performance of those men are the Courts. It is, therefore, crystal clear that the maximum opportunity for adjudging their ability and traits is in the Courts and thus the judges are best suited to assess their true worth and fitness for appointment as judges. Even the personal traits of the members of the Bar and the judges of the subordinate judiciary are quite often fully known to the judges of this Court who got such information from various sources. There may, however, be some personal trait of an individual lawyer or judge which may be better known to the executive and may not be to the judges of this Court and which may be relevant for assessing his potentiality to become a good judge. It is only in such a case the executive should bring it to the notice of this Court for reconsideration of the case and in an appropriate case the Full Court will certainly revise their earlier decision. But only on this count the primacy of the recommendation of this Court cannot be denied.

255. We are of the view that the opinion sought by way of consultation should be the opinion of the entire body of High Court Division as embodied in Article 109 of the Constitution, which vests control over subordinate Courts in the High Court Division. In order to have a pragmatic approach to the matter relating to appointments of judges to this Division it would be a healthy practice as a matter of prudence that the Chief Justice give his opinion on convening the Full Court whose opinion would be significant in adjudging the suitability of the candidate. The opinion so expressed through a resolution of the Full Court will reflect the opinion of the judiciary and attain its primacy. There are various reasons for having the opinion of the judiciary primacy because the consultation is for appointment in the judiciary and the consultation during the process in which an advice is sought by the executive cannot be easily brushed aside on an empty formality or a futile exercise or a mere casual one attached with no sanctity. Thus the consultation must be full and effective. A necessary corollary of this is that the Government cannot ignore the opinion of the judiciary and select and appoint on its own evaluation of the merit of the candidate and it cannot be a reasonable logical conclusion.

256. Mr M. Amirul Islam, the learned Advocate, in the course of his argument suggested that to ensure the independence of the judiciary and to maintain high standard of the judges of this Court there should be brought about a change in the matter of appointment of judges of this Court. He suggested that to keep the matter of appointment outside the

parameter of political bias and also for recruiting the best talents a committee should be formed headed by the Chief Justice and consisting of two senior most judges of the Appellate Division, three senior most judges of the High Court Division, the Attorney-General, representative of the Bar Council, the President of the Supreme Court Bar and some representatives from the Non-Government Organization and the civil society so that in the matter of appointment of judges of this Court the opinion of the cross section of the people are reflected.

257. We have earlier pointed out that former (Chief Justice, his Lordship Mr Justice Shahabuddin Ahmed as his Lordship then was, also suggested for the formation of a committee headed by the Chief Justice for appointment of judges of the High Court Division.

258. We have carefully considered the pros and cons of the aforesaid proposals. We think that it would not be practicable and wise to accept the suggestion put forward by Mr M Amirul Islam inasmuch as now-a-days the atmosphere outside the Court is highly politically charged. Therefore, if the representatives of the civil society and the Non-Government Organization are given authority to say in the matter of appointment of judges of this Division that may be highly influenced by the extraneous considerations and the purpose of the appointment of the best talent would be practically frustrated. We have also very keenly considered the proposal once suggested by our former Chief Justice Mr Justice Shahabuddin Ahmed as his Lordship then was. With due respect, in our humble way, we think that the procedure which we have suggested in the foregoing paragraphs would provide a better method of recruiting the best possible and suitable persons as judges of this Court.

259. The constitutional provision provide that the Executive authority of the State are to formally appoint the judges of this Court. Therefore, in the matter of appointment of the judges and to maintain the dignity, authority and high standard of the highest judiciary a duty is also enjoined upon the Executive as peoples' representatives to choose the best persons as judges which is an important organ of the State. Without a strong judiciary the democratic rights as enshrined by the Constitution itself will be meaningless. Thus it is the solemn duty of the Executive to rise above political bias and to choose the best possible talent as a judge of this Court, for the Court is the last resort of the members of the public against all sorts of illegalities. Therefore, the constitutional scheme demands of the Executive to rise above all parochial consideration, party interest and political bias. If it is done then this institution will grow as a shining star in the future up to the expectation of all. In this connection it may not be out of place to mention that in England all the appointments in the judicial posts are made practically by the Lord Chancellor who is the second man in the Cabinet and ranks after the Prime Minister. He presides over the sessions of the House of Lords; he can sit as a judge in the judicial sessions of the House of Lords and as a member of the Cabinet he represents the majority party in the Parliament. Thus, the appointment of Lord Chancellor is the political choice made by the majority members of the Parliament. But if we review the judicial history of England we shall hardly find an instance where incompetent person was chosen as a judge on political consideration by the Lord Chancellor in any of the judicial posts. Always in recommending the name for appointment of a judge the Lord Chancellor almost invariably acts without any political bias and therefore always the competent and capable persons are appointed in the judicial posts. But in a developing country or in an immature democracy it is difficult to expect such a high standard of judgment from the Executive. Be that as it may, since the judiciary is one of the three organs of the State the Executive must try their best to rise above self interest and parochial consideration and with open mind must choose a person who is best to man the post.

260. In the matter of appointment of the judges of this Court a duty is enjoined upon the

lawyers as members of the Bar. Chapter III of the Canons of Professional Conduct and Etiquette of the Bar Council in Article 7 provides that it is the duty of the Advocates to endeavor to prevent political considerations from outweighing judicial fitness in the appointment and selection of judges. They should protest earnestly and actively against the appointment or selection of persons who are unsuitable in the Bench and thus should strive to have selected thereto only those willing to forego other employments whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of Advocates for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves. Therefore, Article 7 clearly casts an obligation upon the members of the Bar to resist any attempt to appoint a person as a judge on political consideration and this duty was conferred upon the members of the Bar to safeguard, protect and defend the constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. Professor Laskey, the renowned British scholar in his Book "The politics" said, "Eternal vigilance is the guarantee of democracy." The democracy cannot flourish or survive fruitfully if the people are not conscious about their rights. So is the case with the members of the Bar. If the Bar is dormant, indolent and be in moribund condition, then they will not only fail to survive effectively but also ruin the judiciary. A good Bench depends on a rich Bar. If the Bar is not rich the Bench cannot flourish in their judicial pronouncement. So is the case in the matter of appointment. If any appointment to judicial post is made on political consideration other than the judicial fitness of the candidate then the dignity, authority and prestige of this institution is bound to degenerate and will ultimately ruin the institution itself and it will lose its impartiality which is sine qua non for adjudication in judicial matters. Therefore, to maintain the high standard of this institution the members of the Bar must always be united like a rock to safeguard this institution from the clutches of the Executive as they did in February, 1994.

261. In this connection, we would also like to emphasize on yet another important aspect of our social life. In Bangladesh all are free. All of us are free citizens of a free state. As a free citizen of the country a great constitutional responsibility is bestowed upon all the citizens to safeguard, protect and preserve the Constitution and the Constitution could best be safeguarded and preserved if man of high quality and unquestionable integrity is appointed as judges of this Court. Like the lawyers equally the citizens also have their Constitutional responsibility to ensure the maintenance of the Constitutional norms in the matter of appointment of judges of this Court. If at any point of time any attempt is made to appoint a person as a judge of this Court on political consideration outweighing the judicial qualifications, members of the public at large and the Civil society in particular in collaboration with everybody must be united like a solid rock and launch a movement to undo the attempt in order to maintain the purity of this institution and to uphold the public authority which is exercised by this Court as representative of the people. The members of the public cannot and should not turn their blind eyes and shrug off their constitutional responsibility in the matter rather they must rise to the occasion and be above all political bias and in the greater interest of the nation must join hands with others to resist any unholy attempt to pollute and/or to ruin the highest judiciary which is the repository of the public.

262. In the course of argument the question of piling up of cases in the judiciary also came up for consideration. We have addressed the question so far it relates to the subordinate judiciary while discussed the case of Justice Naimuddin Ahmed. Now we would like to say a few words about this Court. True it is that the volume of undisposed of cases rises day by day. There are many reasons for this. Without discussing the causes it can be said with certainty that there is still scope to minimize the stockpile by always appointing able and capable persons as judges both in the higher as well as in the lower

judiciary. Even with the existing set-up we can improve our performance to a great extent with some judicial initiative of our own and not at the advice of those experts who are not even acquainted with our system. There is a Bengali Proverb - "পেটে দিলে পীটে সয়।" If you want to get quality service you must not only appoint man of quality but there must also be corresponding incentive for them. Still today the judges are not provided with full logistic support that they need. Side by side the working condition of the judges must also be up graded. They must be provided with adequate facilities and privileges beside raising the level of salary. The concerned organ of the State should give their attention to this aspect of the case and make earnest endeavor. You can't demand too much from one unless you also address one's problems.

263. To overcome the problem of backlog of cases and also for speedy disposal of cases we may adopt the alternative dispute resolution (ADR) mechanism. It may be recalled that in this part of the world the oldest dispute settlement system was village salish, though by now salish system has degenerated people in the countryside still resort to it to get speedy and easy result. There is a crying need to reform and revitalize the system. Thus new ADR will no doubt accelerate the disposal of cases in Civil side. But the position of Criminal side is still worse. It needs all round reforms to which the government and other organs of the state should give their attention.

264. A professional prosecutor cadre, a separate investigation cadre well trained in modern detective methods and provided with modern tools for crime investigation is indispensable for proper and quicker investigation. The need for well-trained full time magistrates/criminal judges, for eliminating/reforming cognizance phase when accused in custody languish in overcrowded jail for years without trial, and other reforms in the criminal justice system need to be studied under a comprehensive plan. Concerted action should follow based on the report of such a comprehensive study. Isolated patchwork interventions will not yield the desired result of sustainable improvement in the criminal justice system.

265. In this connection, we would also like to say some words about the long vacation of the Court. In the sub-continent there is a cry to curtail the long vacation of the superior Courts. The attempt was made publicity in India and Pakistan to curb the privilege by reducing the vacation but in both the countries the attempt has been resisted. In our country though there is no public murmur about the vacation of this Court yet while his Lordship Mr Justice Shahabuddin Ahmed, CJ was the President, he privately mooted the idea to the judges and the lawyers but it did not gain ground. Nevertheless, the idea is floating in the air and the vacation has a relation with the disposal of cases. The nature of the works done by the judges of this Court, no doubt, warrants long vacation otherwise the level of efficiency will drastically fall. Similarly, the backlog of cases is also a national problem. A balance can be struck between the two if we introduce a new system of vacation in the Supreme Court. Instead of going into a long vacation at a particular point of time each year, we may keep the Court open throughout the year with certain number of judges and may allow the other judges to enjoy their vacation in rotation by mutual arrangement. At the beginning of the year the learned Chief Justice may sit with all the judges in a Full Court to make the chart who will go on holiday on what part of the year. Thus all the judges will have the opportunity of enjoying their vacation with flexibility/adjustability and, at the same time, the Court will remain open all the year round and the normal judicial work will never hamper and the judges will also not be burdened with vacation duty. We have floated the idea for consideration to all concerned.

266. In this connection we would also like to throw light on another point. The Chief Justice is the pater familias of the judiciary and he is the head of the highest judiciary of

the country. The day-to-day administration of this institution is in the hands of the learned Chief Justice. Besides, various other constitutional obligations are also on him and, amongst them, he is authorized by the Constitution to administer oath of office to the newly appointed judges. Therefore, by virtue of the authority of the post held by the Chief Justice he can go a long way in asserting his personal influence in streamlining any irregularity that might be attempted to be committed by the Executive organ of the State. To strengthen the hands of the learned Chief Justice in the matter of appointment of the judges we have already suggested that the consultation with the Chief Justice must not be an empty formality but must be effective consultation and how the process of consultancy can be effective and assertive on the Executive, we have, in our humble way, put forward our suggestion for consideration of the appropriate authority. We are now passing through a critical juncture in our history where often attacks are made on the judiciary by various quarters and that can be repelled by quality of our works. But a person would not be able to deliver a high quality judgment if he himself is incompetent, inefficient and deficient in law. Therefore, in the interest of maintaining the highest standard of the highest judiciary an extra duty is cast upon the learned Chief Justice to try his best to get the best possible persons appointed as judges of this Court. Here we may profitably remember the name of late Chief Justice SM Murshed who, while holding the post of Chief Justice of the then Dacca High Court, recommended a judge of the then Dacca High Court for appointment as a judge of the Supreme Court of Pakistan but the President did not accept his recommendation and by flouting his recommendation another judge of the Lahore High Court was appointed in the Supreme Court of Pakistan and in protest thereof the learned Chief Justice resigned from his post as Chief Justice of High Court of East Pakistan and this is a shining example in our judicial history which encourages the judges to act boldly and honestly without fear or favor in the matter of dispensation of justice. Late Murshed. CJ, did not care for his post but for the authority and dignity of the office and, as a matter of principle, resigned from the post as his recommendee was the most suitable person for appointment in the Supreme Court. The glory of our judicial history was further enhanced by Mr Justice Shahabuddin Ahmed, the former Chief Justice of Bangladesh in 1994. On that occasion in derogation of the constitutional convention the Executive appointed nine judges in this Division without consulting the Chief Justice and he thought that this was not only a personal insult to the Chief Justice but thereby the authority of the highest judiciary was also undermined. Thus, he placed the matter before the Annual Conference of the Bar Council when the Bar unitedly took up the issue and the learned Chief Justice in his way also withstood the onslaught of the Executive in the matter of appointment of judges. After the publication of the Gazette Notification the learned Chief Justice called a Full Court Meeting where he placed the matter and disclosed that in making the appointment the Executive totally ignored the learned Chief Justice. Therefore, the Full Court unanimously resolved that the learned Chief Justice would not administer oath to the newly appointed judges whereupon the Government were compelled to consult the learned Chief Justice and in consultation with the learned Chief Justice a new notification was published wherein earlier two names were dropped. If at that critical juncture this firm stand was not taken by the learned Chief Justice this institution would have been ruined once and for all and it would have become a puppet in the hands of the Executive but under the leadership of the learned Chief Justice this Court weathered through that storm and saved this institution. If the spirits as demonstrated by late Chief Justice Mr SM Murshed and the former Chief Justice Mr Shahabuddin Ahmed is remembered by us all as judges we shall never fail to take a firm stand in the hour of crisis and will be able to uphold the dignity and authority of this institution.

267. In concluding this chapter, we must remember that the judges are all mortals with all the human frailties and that only a few know in this world the truth behind the following statement:

> Were I not to follow the straight road for its straightness, I would follow it for having found by experience that in the end it is commonly the happiest and the most useful track.

It is true that the judges of both the Divisions of this Court hold their tenure not at the pleasure of the President but till the attainment of the prescribed age of retirement; that their removal is possible only by the Supreme Judicial Council after following the prescribed procedure; that their salaries, allowances and pension are paid from the consolidated fund of the State; that they have the power to punish a person for contempt of Court and they are protected by other provisions of law which are intended to make them feel and to remain independent of any external agency and this goal could best be achieved by complete separation of the judiciary from the Executive. These, as far they go, are necessary for ensuring the independence of the judiciary. But if the judiciary should be really independent something more is necessary and that we have to seek in the judge himself not outside. A judge should be independent of himself. A judge is a human being who has a bundle of passions and prejudices, likes and dislikes, affection and ill will, hatred and contempt and recklessness. In order to be successful judge these elements should be curbed and kept under restraint and that is possible only by education, training, continued practice and cultivation of a sense of humanity and dedication to duty. These curbs can neither be bought in the market nor be injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go the independence of the judiciary would be fully achieved and will not suffer. But with all these measures being there still a judge may not be independent. It is the inner strength of judges alone that can save the judiciary. The life of a judge does not really call for great acts of self-sacrifice but it does insist upon small acts of self-denial almost every day. It is difficult to achieve it but every judge should at least endeavor to set his eyes on that goal because by inculcating those qualities not only the independence of the judiciary will be established on a firm footing, the authority of the judiciary will also be well established. Judges must remember if they do not maintain their dignity and authority no amount of law or legislation can protect them and maintain their dignity. It is the judges who by their quality and impartiality will command the respect of the members of the public. If a judge cannot act as a judge he will not be respected by the members of the public. Therefore, it is the judges who alone can ensure the dignity and authority of this august institution and by their own qualities. We must remember that freedom is what freedom does, but justice fails when judges quails. Pliant, submissive or spineless man should never aspire to become a judge of this Court. If such a person is imposed upon this institution its dignity and authority is bound to tarnish rather than flourish. On the other hand, if a man of quality, integrity and honesty is appointed as judge of this Court it is bound to enhance not only the quality of the judgment but also ensure proper justice and maintain the authority and prestige of this Court. If the judges act like judges and maintain their high standard, dignity and integrity no one can tarnish the image of this Court and the dog may bark, the caravan will pass. We must remember that if judges decay, the contempt power will not save them and also the other side of the coin is, that judges, like Caesar's wife, must be above suspicion.

268. In the history of the then Dhaka High Court for the first time the integrity and dignity of two judges of this Court was under challenge by a litigant, namely, Mr Noman, the officiating Executive Engineer of the then DIT now RAJUK. There was serious allegation against two of the judges of this Court including the then Chief Justice of Dhaka High Court. That incident led to a contempt proceeding which is reported in : LEX/HEPK/0101/1964 : 16 DLR 393. The allegation was that while a case of Mr Nomar was pending before the Division Bench presided over by the learned Chief Justice he (the Chief Justice) was allotted a plot at Gulshan and the learned Chief Justice was found moving in a car with the Chairman of the DIT in the Gulshan area and it was also alleged

that the puisne judge was also given a plot at Gulshan. A suo motu contempt rule was issued. At the trial Mr Noman along with his two learned Advocates were found guilty of contempt of Court and punished as the said allegations were not totally based on facts. This incident took place in 1964 and thereafter there was no allegation whatsoever against any of the judges of this Court until 1993 when another unhappy incident took place at Jessore between a Senior Judge of this Division and a Deputy Attorney-General of the Jessore Bench. In this case also a suo motn rule was issued against the learned Deputy Attorney-General and he was punished for committing contempt of Court. He appealed against that conviction and the Appellate Division found that the learned Deputy Attorney-General concerned did not commit any contempt of Court and he was acquitted from the charges. Thereafter till today the integrity and honesty of none of the judges were challenged until the present case and in this case also we have found, as a matter of fact, that some of the contemners are guilty of contempt of Court but we have already observed that the conduct of puisne judge was most unbecoming as he was in communication with the main accused of Janata Tower Case when the appeal was being heard by them. We have punished the Editor, Reporter and Publisher of 'Manabjamin' because by publishing a false story of bribe they have put this institution in great disrepute but, at the same time, we would like to put on record that we shudder to note that a judge of this Court could enter into a dialogue with the main accused whose criminal appeal was pending before that judge. From this incident it is clear that we, the judges of this Court, have utterly failed to take a lesson from the history and the past incidents rather we have become desperate or prone to indulge in activities which are most undignified and unbecoming of a judge of this august Court. In spite of these two previous occasions the judges of this Court by and large were respected by the people at large in spite of the fact that previously there were two incidents which tarnished the majesty of this Court and dignity of judges but final nail in the coffin has been put by the present incident and now the authority, dignity, prestige and integrity of the judges are at stake. This incident clearly demonstrate that either we have become callous and/or incompetent to maintain the dignity and authority of this Court or the personal standard of some of the judges has gone to such a low ebb that they are unable to maintain the prestige of this highest seat of justice. Now it is high time for us, the judges of this Court, to self analyse ourselves and to wake up from deep sleep and be on our toes to prepare ourselves in the best possible way and to make ourselves the best person to hold the position that we are occupying now. At the very outset we have said that the contempt of Court procedure is not to protect the judges but to maintain the authority of the people. But we as judges would not be able to command respect of the people unless we can make ourselves worthy of this institution. The authority, prestige and dignity of this institution largely depends upon the individual quality of the judges. Therefore, we the judges, must make an earnest endeavor to enhance our legal quality and behave in such a way that litigant public can never come up with an allegation of bias or call in question the integrity of the judges. The judges of this Court are still now in the high esteem of the people but we shall not be able to maintain the same unless we make an earnest effort to maintain the purity of this institution by upgrading our individual quality of our head and heart. We must not behave in a way either in the Court or outside so that it can give rise to any suspicion in the right thinking man of the society. If we be unable to maintain our own dignity and authority, no amount of legislation can protect us from the criticism of public at large and the litigant in particular. It must be remembered that we are under the public gaze and as judges in a Republic we exercise the authority for and on behalf of the people under constitutional frame. Therefore, the sacred duty which has been entrusted upon us by appointing us judges of this institution we must try to achieve that goal by our hard work, devotion, sincerity and honesty. It is better for a judge to die before an allegation concerning his integrity is raised. When we are entrusted with the work of dispensation of justice we should not make any scope to the people to make our conduct or behavior either in Court or outside a public issue. If we cannot live up to our oath the people will lose confidence

in this institution and the judiciary as a whole will be ruined once and for all. Here we would like to reiterate that although Chancellor Bismarck said that the greatest teaching of history is that people do not learn from the history yet let us prove it to be false when it comes to the judges of this Court. No doubt there has been stray cases of laches on the part of a very few judges of this Court. Thus, in this critical juncture of the judicial history we must rise to the occasion and take a vow that we shall leave no stone unturned to improve our personal quality to a higher level and to maintain our honesty so that we can command respect of the people at large. Fazle Munim, CJ observed, in respect of the incident of 1983, that "the entire matter, from the beginning to end, before it reached this Court is most embarrassing. I wish it had not happened at all" and Mr Badrul Haider Chowdhury, J, termed it as an unfortunate case. We would like to reiterate those views in respect of the present case as well. We, therefore, must inculcate the virtues, which would make us great judges and must refrain from those activities, which may jeopardise the prestige of this Court. When we take the oath to preserve, protect and defend the Constitution it becomes not only our constitutional and legal obligation but also our moral obligation to be above all suspicions and rumor. We should jealously guard this position day in and day out, and inside the Court and outside the Court and we shall have to do that to keep the authority and dignity of this institution. To cherish this gold we would, in our humble way, expect that the judges of this Court, present and future, will do their best to follow the norms of behavior which we, in our humble way, suggested hereinafter because an erring judge and an erring contemnor are both danger to the pristine purity of the seat of justice. Let us take a vow to fulfill the aspirations of the people and live up to their expectation and be honest to our conscience and the oath that we have taken. We must remember that respect is to be commanded not demanded and we shall command the respect of the people at large, and the litigant people in particular, by delivering quality judgments and by our impartial and unbiased behavior and conduct both in and outside the Court.

269. In India, it appears that the Constituent Assembly at the time of passing the Constitution thought it wise that the Form of Oath should be rephrased to impose further obligation on them in discharge of their duties. Under the Constitution a Judge is required to take oath "that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favor, affection or ill will and that I will uphold the Constitution and the laws". Thus, it indicates that the members of the Constituent Assembly by and large thought that unless such responsibility is cast upon them the standard may fall in future and that's why in the Form of Oath they added these obligations which were not there earlier. Likewise, our Constituent Assembly at the time of framing the 1956 and 1962 Constitution, also did not have the same degree of confidence in the judges of our country and it was more so after the liberation. The inclusion of the additional words and sentences in the Form of Oath as a substitution for "the best of my ability, knowledge and judgment" clearly indicates that stronger oath was demanded of the judges reminding them that they must discharge their duty not only according to law but also do right to all manner of people according to law. Thus judges in Bangladesh are bound by the terms of their oath to be a man of firm conviction, with quality of head and heart to withstand any eventuality in the discharge of his duty.

270. The irony of fate is that the judiciary in British India enjoyed greater independence than now. We fought against the Imperial British and also against West Pakistan to liberate the country from colonial rules and ultimately established a sovereign People's Republic of Bangladesh. It hurts us to note that the judiciary of this country enjoyed greater independence and freedom during the Colonial Rule. In British India judges were appointed under the Letters Patent by the Crown and under the Government of India Act, 1915 and 1935 by the Governor-General and the Governor of the province for the Federal Court and the High Courts. During the British period always judges of the Supreme Courts

were appointed by the Executive in consultation with the Chief Justice and as a matter of practice the recommendation of the Chief Justice were honored. But after the 1935 Act an attempt was made by the Government to appoint judges without prior consultation with the Chief Justice. But that unholy attempt was nipped in the bud not by a violent political movement of the people or at the agitation or anguish of the Bar but by the judges themselves, many of whom were English. We feel sorry to write that the judiciary in British India had more independence than it has today in a People's Republic. It is we the judges, by our undaunted faith in the independence of judiciary and by our impartial and fearless conduct, can restore the dignity and authority the institution. Nothing else can do it. We must remember that "spineless judges", pliant and submissive judges cannot and would not be able to protect the glowing image of the highest judiciary. One must become independent and impartial to uphold the values and must not succumb to inside or outside pressure.

271. Under the Government of India Act, 1935, a person on being appointed a judge of the superior Court were required to take an oath of office. In the oath first, the appointed judge had to express his allegiance to the Crown and then took the oath that, "I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

272. The said Act after partition continued in Pakistan until the 1956 Constitution was framed by the Constituent Assembly in 1956. But after the partition of India in Pakistan certain changes were introduced in the form of oath of the judges and a new form of Governor's oath was added. The form of judicial oath or Affirmation then read:

> [I, AB, having been appointed Chief Justice (or a judge) of the Court do solemnly swear (or affirm) that I will bear true faith and allegiance to the Constitution of Pakistan as by law established and that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.]

A new form of Governor's Oath or Affirmation was added to the Act in 1953 which read as follows:

> [I, AB, do solemnly swear (or affirm) that in the office of Governor of the Province of.....I will be faithful and bear true allegiance to the Constitution of Pakistan as by law established, and that I will do right to all manner of people after the laws and usages of Pakistan without fear or favor, affection or ill-will]

273. A plain reading of the Form of Oath which was in force until the 1956 Constitution came into force conclusively shows that neither at the colonial times nor after partition it was in the imagination and/or contemplation of the people that the judges may dispense justice with ill will or affection or with fear or favor. That's why these words were missing from their oath, more so never the judges' office was considered as political one. Such was the high expectation of the people from the judges that they will never fail to rise to the occasion and will dispense justice in accordance with law to the best of their ability, legal knowledge and judicial judgment. The judges were in such a high esteem. But in case of a Governor these following words were added in the oath "that I will do right to all manner of people after the laws and usages of Pakistan without fear or favor, affection or ill-will", because the office of the Governor is a political one. Politicians are generally appointed to the office and they have their political commitment to the people. So, in discharge of their duty they may deviate from the paths of law and usages out of political consideration. To keep them on the track the said magic words were added to their oath to remind that after appointment as a Governor it is his legal obligation to treat all people alike and not to be prompted by partisan spirit.

274. After partition of India there was erosion of values but no new values were created. Keeping the said changes in mind the Constituent Assembly thought it wise to incorporate the aforesaid words in the oath of the judges. That clearly indicates that people were losing faith in the judges and in their qualities. This was a warning to judges. We the judges must accept the challenge boldly and face it with courage and fortitude. By our devotion to work, high quality of head and heart. We must fulfill the aspiration of the people for whose benefit this institute exists. The Supreme Court is not a mere building of bricks and concrete but a symbol of power and dignity and it is we who can protect it from the onslaught of evil forces of the society. Therefore, it is high time for us to rise to the occasion and inculcate the qualities of great judges to save the institution from complete ruination and destruction. The task is, no doubt, difficult but it is not impossible. It depends on our earnestness. We must remember we are the judges of the Supreme Court in a People's Republic and we must not disappoint the people for whose benefit we work. We must bear in mind that judicial error or misconduct of a judge will jeopardize citizens' right and liberty. For maintaining judicial independence a judge must remain impartial, transparent, free from any corrupt influences, direct or indirect, because more than anyone else a judge is a responsible and respected person in the society. A judiciary cannot remain oblivious of and non - responsive to the legitimate expectations of the people.

275. This state of affairs continued until the first Constitution was framed by the Constituent Assembly in 1956. Here we find a significant change in the form of oath hitherto followed. We have already noticed that after partition of India there were some minor amendments in the Government of India Act, 1935. By GGO 22 of 1947, the fourth schedule was substituted for the original Forms and of necessity added the expressions "that I will bear true faith and allegiance to the Constitution of Pakistan as by law established" but the other portion of the form was retained as it is which ran "that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment." That means that till the framing of the Constitution, the members of the Constituent Assembly had complete faith and confidence in the judges that once a person is appointed a judge of the Superior court he will be above all bias, political or financial, and dispense justice to the litigant public strictly in accordance with law maintaining the already set up high standard and norms of justice. But unfortunately, it appears that as time went on the Constituent Assembly lost faith in the judges at least to some extent as on few occasions judges were appointed on political consideration departing from the norms set up by the Colonial Rulers. It seems to us that at such behavior of the Executive, the Constituent Assembly got alert and to protect the interest of the common people they now for the first time incorporated in the form of oath "without fear or favor, affection or ill-will" to remind the judge on his assumption of office that he is to dispense justice not only in accordance with law but also without any bias or fear. The said words are also retained in the form of oath of our Constitution for a country which was brought into existence by a liberation war.

276. Today judges come from cross section of the people having different social and family backgrounds. When we assume office as judge of this august institution we must remember that a great responsibility is thrust upon our shoulders to carry on. Mere words of mouth will not be enough to uphold the dignity and authority of this institution unless we prove ourselves worthy of the position and regain the confidence of the people and we can do that only by discharging our duties faithfully and diligently to the best of our ability, i.e. we must commit ourselves to deliver proper justice to the people keeping ourselves uncontroverted and above all suspicions, real or baseless. There is no doubt that this Court is the last resort and if its authority is eroded and tarnished there will remain nothing to uphold the rule of law, a fundamental feature of our Constitution. We must remember this Court is not only the guardian of the Constitution but it exists to guide all other organs of the State and the people at large to keep them on right track and this can

only be done by appointing men of dignity, integrity, honesty and knowledge and capability as judge of this Court. We live in a Republic where we have parliamentary form of Government which means that the parliament controls the government. The majority party in parliament forms government and therefore a heavy duty is cast upon the parliament to see and monitor as the controlling authority of the Government that no person unworthy of the post is ever appointed as a judge of this Court. If the parliament fails to tighten their grip upon the Executive in this regard and fails to rise above partisan interest and political biasness, it would be hard and difficult on the part of the judges of this Court to keep the image of this Court untarnished. A coherent and combined, serious and honest endeavor of all concerned can save this institution. We are using these words of caution for all concerned so that we can awake from our deep sleep and live upto the expectation of the people. We must bear in mind that people are rewarded for their works and not for their hollow sweet words. It is the actions which are counted and rewarded. We must be sincere in our action and hundred percent honest and clear in our thought and we must be above board. If we can do that, not only we shall restore our position but also be able to protect and preserve the Constitution as well as this institution which is our constitutional as well as legal obligation and our commitment to the people. It is never too late to start and let us take a vow to start afresh shrugging of all laziness and commit ourselves to "do or die".

277. On an analysis of the Form of Oath, it appears that until the framing of the Constitution of Pakistan the members of the Constituent Assembly had faith in the ability, knowledge and judgment of the persons who were chosen as judges from time to time and for that reason even after partition they retained the words "ability, knowledge and judgment" in the Form though the original form of oath was substituted by GGO 22 of 1947. But it appears that by 1956 when the Constituent Assembly passed the Constitution of Pakistan, there has been a substantial shift from that stand. Because, over the years, it was experienced that judges sometimes fail to rise to the occasion. To safeguard the interest of the people and to remind the judges of their great and noble responsibility a significant change was introduced in the Form of oath and for the first time faith in the ability, knowledge and judgment of the judges became shaky and to restore confidence and to fortify the position the magic words of "without fear and favor" and "affection and ill-will" was added to those words to remind the judges that once they are appointed as judges they would be required to discharge their duties without fear or favor and affection or ill-will.

278. Since 1956 up till 16th December, 1971 there had been many upheavals in our national life and we fought a liberation war and got independent and sovereign Bangladesh on 16th of December, 1971. Within one year the Constitution was enacted. In our Form of oath yet another significant change was brought about. It appears that the experience of Pakistani rule and the liberation war prompted the Constituent Assembly not to rely on human sagacity alone. So, they departed from the earlier concept and adopted a new and revolutionary concept to ensure equality of law and rule of law. This time they have given a go-bye to the concept of "ability, knowledge and judgment" of a judge and replaced the same by imposing a duty upon them to discharge the duties of their office "according to law". Besides, it was also entrusted upon them to "do right to all manner of people according to law, without fear or favor, affection or ill-will". After liberation we had two Martial Law Regimes and both the regimes introduced significant changes in the Constitution by amending it through Martial Law Regulation. But both the regimes kept the form of oath of judges intact.

279. A review of the changes brought about in the Form of oath unmistakably indicate that there has been erosion in the faith of the judges of this Court and the people's representative had been more and more cautious and alert to protect and safeguard the interest of the people so far it relates to judiciary. The judges of today must consciously

remember it and discharge their duty honestly and faithfully for the benefit of all.

280. Now we would like to make some observations about the duties and responsibilities of the judges at large and particularly about the judges of this court. We would like to start by quoting from the speech of Justice Venkatramiah. He said, "The judiciary in India has deteriorated in its standards because such judges are appointed, as are willing to be "influenced" by lavish parties and whisky bottles."

281. Now we would like to turn our eyes to some other aspects, which are also essential and material for maintaining the authority, dignity and prestige of the Court. In the course of hearing of these Rule several other questions of great importance touching the administration of justice came up for discussion. During the hearing many useful remarks came to be made both on the side of the Bar and on the side of the Bench. All these exercises were done with a view to emphasising the importance of the independence of judiciary and upholding the dignity, prestige and authority of the judiciary, which are fundamental to Republican Constitution.

282. The integrity of the Judges of this Court first came under fire in Noman's case. See: LEX/SCPK/0021/1964 : 16 DLR 392 and 16 DLR (SC) 124. In that case the then Dhaka High Court was scandalized along with two of its Judges by assigning motives to the Judges and attacking their integrity and impartiality. We need not enter into the facts of that case. Suffice it to say that in our judicial history that is the first case where undesirable and unjudge-like conduct of judges of this Court were brought on record to impeach the integrity of the said Judges. Supreme Court upheld the conviction for contempt of Court but expressed their indignation as to the behavior of the Judges.

283. It seems that case was not sufficient to stir up the minds of the Judges of this Court and they did not take a lesson from that. After a long spell of time another unfortunate incident took place in between a Judge of this Court and a learned Deputy Attorney-General which is the case of Moazzem Hossain vs State 35 DLR (AD) 291. But unfortunately, the matter did not end there. We, the Judges of this Court, were not sufficiently conscious of our position nor did we try to protect the sanctity of the highest seat of justice. Had we taken sufficient lesson from history the present incident would not have taken place and a Judge would not allow, under any circumstances, an accused to talk to him while the case is pending before him even if he had been previously known to him. This reminds us of the saying of the German Chancellor Otto Von Bismarck. He had once said that the only thing we learn from history is that nobody learns from the past. We, the Judges are no exception to this. We fall in the same category of the common people.

284. The aforesaid two cases along with the present case have made as think twice about ourselves (the Judges).

285. The method of removal of a Judge is independent of accountability of an individual Judge. The idea of accountability of a Judge has nothing to do with his removal from office. Judicial accountability means accountability to the Code of Conduct formulated under the Constitution. The public perception of a Judge is very important as Marshal, Chief Justice of the United States Supreme Court said, "We must never forget that the only real source of power we as judges can tap is the respect of the people." It is undeniable that the Courts are acting for the people who have reposed confidence in them. That is why Lord Denning said, "Justice is rooted in confidence, and confidence is destroyed when the right-minded go away thinking that the Judge is biased. "We as Judges cannot ignore public perception. In a country, the judiciary may be highly incorruptible, and in another society, the judiciary may be corruptible, As a matter of fact, if the public wrongly believes that the judiciary is corrupt, the reasons for that mistaken belief need to be identified and

remedied. And who other than the judiciary itself should address this problem and endeavor to achieve higher, levels of public confidence? The Geneva-based Centre for the independence of Judges and lawyers found that in 48 countries covered in its annual reports in 1999 judicial corruption was pervasive in 30 countries. Facts like these draw our attentions to the necessity of adherence of the judiciary to a Code of Conduct. In addition to this, Judges must undertake remedial action to rectify themselves by being honest, transparent, predictable, impartial and fair in their judicial conduct. The accountability of the higher judiciary is of prime importance as because the Judges of the constitutional Court have taken Oath to defend, protect and preserve the Constitution of Bangladesh. Constitution is, after all, an embodiment of the will of the people and, as such, accountability to the Constitution is, in fact, accountability to the people.

286. We feel obliged to say something about the duties and responsibilities of the judges of this court because whenever a contempt proceeding comes before this court on account of scandalizing the judge or the Court quality and character of the judge comes to the picture.

287. We are made to realize that we are all mortals with all the human frailties and that only a few know in this world the truth behind the following statement: "Were I not to follow the straight road for its straightness, I would follow it for having found by experience that in the end it is commonly the happiest and the most useful track." It is true that the Judges of both the divisions of the Supreme Court hold their tenure not at the pleasure of the President but till they attain the prescribed age of retirement; that their removal is possible only by the Supreme Judicial Council after following the prescribed procedure; that their salaries and allowances and pension are charged on the consolidated funds of the State; that they have the power to punish a person for contempt of Court and they are protected by other provisions of law which are intended to make them feel and to remain independent of any external agency and this goal could best be achieved by complete separation of the judiciary from the executive. These as far as they go, are necessary for ensuring the independence of the judiciary, But if the judiciary should be really independent something more is necessary and that we have to seek in the Judge himself and not outside. A Judge should be independent of himself. A Judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and ill-will, hatred and contempt and fear and recklessness. In order to be a successful Judge these elements should be curbed and kept under restraint and that is possible only by education, training, continual practice and cultivation of a sense of humanity and dedication to duty. These curbs can neither be bought in the market nor injected into human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of the judiciary could be fully achieved and will not suffer. But with all these measures being there still a Judge may not be independent. It is the inner strength of Judges alone that can save the judiciary The life of a Judge does not really call for great acts of self-sacrifice; but it does insist upon small acts of self-denial almost every day. It is difficult to attain it but every Judge should at best endeavor to set his eyes on that goal.

288. Gajendrakar, CJ in Special Reference No. 1 of 1964 (: MANU/SC/0048/1964 : AIR 1965 SC 745 at page 791) observed as follows:

> We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint,

dignity and decorum which they observe in their judicial conduct.

289. It has been said that if Judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion. See AIR 1974 SC 710 at 735 page 90.

290. There is no denying of the fact that there has been erosion of faith in the dignity of the Court and in the majesty of law and for that we the Judges are also responsible to some extent. The erosion of faith in the dignity of the Court and in the majesty of law has been caused not so such by the scandalizing remarks made by the politicians or journalists but the inability of the Courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils, which court of justice is incompetent to deal with due to many factors. So, justice cries for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the Judges and lawyers should make about themselves. We must turn the search light inward. At the same time we cannot be oblivious of the attempts made to decay or denigrate the judicial process, if is seriously done.

291. The courts of justice in a country from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the Courts perform all their functions on a high level of rectitude without fear or favor, affection or ill-will.

> Socrates counseled Judges to hear courteously, answer wisely, consider soberly and to decide impartially. These judicial virtues are all aspects of judicial diligence. It is appropriate to add to Socrates' list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

292. While Judges should exhibit diligence in the performance of their judicial duties, their ability to do so will depend upon the burden of work, the adequacy of resources including staff, technical assistance and time for research, deliberation, writing and other judicial duties apart from sitting in Court. As long ago as Magna Carta, it was recognized that Judges should have a good knowledge of the law. This knowledge extends not only to substantive and procedural law but to the real life impact of law. As one scholar put it, law is not just what it says; law is what it does. Sustained efforts to maintain and enhance the knowledge, skills and attitudes necessary for effective judging are important elements of judicial diligence. At the same time if should be remembered that judges should have sufficient vacation and leisure time to permit the maintenance of physical and mental wellness and reasonable opportunities to enhance the skill and knowledge necessary for effective judging.

293. Gerald Gall in his "The Canadian Legal System" wrote:

> We expect our Judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfill this standard of public expectation.

This is what is exactly expected of the Judges in our country too.

294. In order to maintain high standard of knowledge and the dignity and authority of the judiciary and to meet the high expectation of the people at large, we humbly suggest the following steps as guideline.

295. An independent and honorable judiciary is indispensable to justice in any society. A Judge should participate in establishing, maintaining and enforcing high standards of conduct and should personally observe those standards so that the integrity and independence of the judiciary may be preserved. Deference to the judgments and rulings of Courts depends upon public confidence in the integrity and independence of Judges. The integrity and independence of Judges depend in turn upon their acting without fear or favor. Public confidence in the impartiality of the judiciary is maintained by the adherence of each Judge to this responsibility.

296. Public confidence in the judiciary is eroded by irresponsible or improper conduct by Judges. A Judge must avoid all impropriety and appearance of impropriety. A Judge must therefore accept restriction that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a Judge because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by Judges that is harmful although not specifically mentioned above. Actual improprieties include violations of law, Court rules or other specified provisions. The test for appearance of impropriety is whether the conduct would create in reasonable minds with knowledge of all relevant circumstances that a reasonable inquiry would disclose a perception that the Judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

297. A Judge should not accept appointment to a Governmental Committee, Commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice unless appointment of a Judge is required by Act of Parliament. A Judge should not, in any event, accept such an appointment if the Judge's Governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality or independence of the judiciary. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making. In Valuate vs The Queen (1985) 25 CR. 673 at 687), Ledain, J. noted that the judicial independence involves both individual and institutional relationships; the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the Court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and the legislative branches of Government.

298. Thus, it must be remembered that an independent judiciary is the right of every citizen. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence without external pressure or influence and without fear of interference from anyone because judges have the duty to uphold and defend judicial independence not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.

299. It was Lord Hardwicke who said in 1742:

> There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters (The St. James' Evening Post Case (1742)2 Atkins 469 at 472).

300. Such is the responsibility cast upon the Judges throughout the globe. But discharge of this sacred duty is looked upon differently in different societies. We can illustrate it with reference to an English case. In Attorney-General vs Butterworth (1963) CA 696 a witness's evidence was disliked by some members of a committee and they were

determined to punish him for it. The Attorney- General brought an action for contempt of Court. The trial Court held it was not a contempt. The Attorney-General appealed to the Court of Appeal. The case was argued for three days. On the first day the learned Attorney-General argued for the whole day. But on the next day the Attorney-General in the morning asked to be excused for an hour or two. The Attorney-General became the Lord Chancellor on that day. So, on the first day he was arguing before the Court of Appeal as Attorney-General and the next day he was Lord Chancellor-above all the Judges. The Court of appeal decided in favor of the Attorney-General actually on the merit of his argument and not because he had become Lord Chancellor. If such things happen in our country good number of people will hold the impression that the judgment went in his favor because he became an influential member of the cabinet holding the portfolio of judiciary. Judges in the underdeveloped country like ours work in such a volatile atmosphere where people often tend to jump to wrong conclusion. Therefore, all the Judges of the superior Court and the subordinate judiciary must jealously guard the office they hold day in and day out and must not indulge in any activity or behave in a way which may have adverse effect upon his activities as Judge. We must make every endeavor to be above all sorts of suspicion and gossip. To safeguard the position we may suggest to follow the self-restrained path of social isolation. We as Judges should do the following to keep the confidence of the public in the judiciary.

(1) If any member of a family is in the legal procession, he or she, howsoever close may be, should not be allowed to live under the same roof with the Judge;

(2) Judges should voluntarily refrain from attending any social function or gathering except those organized by close relatives or best of the friends;

(3) Except very close relatives none should be allowed to visit the residence of a Judge nor the Judge should visit distant relatives.

(4) Now a days the different NGOs at random invite all the Judges in their programs and other meetings at five star hotels or other posh areas irrespective of the fact whether there is any legal issue or not and the experience shows that quite a large number of Judges attend such gatherings which, in our opinion, is not conducive to justice and also beneath the dignity of a Judge and, as such, they should refrain from attending such functions;

(5) It is a trend now a days for the Judges to attend various discussion meetings as participant speaker and they give out their personal views on legal or other points and as such no sitting Judge should be allowed to attend or participate in any such meetings without the prior permission of the learned Chief Justice.

(6) All Judges should maintain a safe distance from the members of the Bar so that no such incident as happened in the case reported in : LEX/BDHC/0064/1998 : 51 DLR 257 is repeated.

(7) No Judge should use his office for his personal gain or to seek favor for others;

(8) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son- in-law or daughter in law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(9) No member of his family who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(10) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

(11) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(12) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

(13) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned.

(14) A Judge shall not speculate in shares, stocks or the like.

(15) A Judge shall not engage directly or indirectly in trade or business, either by himself or in association with any other person but publication of legal treatise or any activity in the nature of a hobby should not be construed as trade or business.

(16) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund.

(17) A Judge should not convey or permit others to convey the impression that they are in a special position to influence him.

(18) A Judge should dispose of promptly the business of the Court and should insist that all concerned co-operate with him to that end.

(19) A Judge should disqualify himself in proceeding with a case where he has a personal bias or prejudice concerning a party or personal knowledge of facts, in dispute.

(20) A Judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.

(21) A Judge should not serve as the executor, administrator, trustee, guardian or other fiduciary except for the estate, trust, or person of a member of his family and that only if such service will not interfere with the proper performance of his judicial duties.

(22) Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the justice delivery system.

(23) A Judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety. In addition, Judges observing high standards of conduct personally should also encourage and support their judicial colleagues to do the same as questionable conduct by one Judge reflects on the judiciary as a whole.

(24) On appointment a Judge of the Court should be apprised of by the learned Chief Justice as to what be should do as a Judge in his daily life besides judicial duties.

(25) Our experience at the Bench shows that frequently various sorts of invitations are sent by post and the letters are received by the dispatch section and sent to the respective Judges. This practice should immediately be stopped and a criteria as indicated above should be adopted and a person should be deputed to examine

the invitation cards and see if it fulfills the criteria and then only the cards should be sent to the respective Judges.

(26) Nowadays it has become a fashion for the rich and affluent junior members of the Bar having no practice or little practice, to invite the Judges in their wedding ceremonies but the Judges in the interest of justice should avoid such invitations otherwise the ordinary members of the Bar will think that the rich have easy excess to the judges.

(27) Of late it has also become fashion to invite the Judges to attend opening ceremony of chamber and to invite them to dinner on that occasion. This sort of invitation must be refused otherwise it will have adverse affect on the impartiality of the Judges as, for example, as may as two former Chief Justices along with a former Justice of the Appellate Division attended such a function and it was flashed out in the newspaper. What will be the reaction in the minds of the common people and the litigants in particular? They will legitimately have the first impression that the learned member has close relation with judges and if they engage him it may be easy for them to get a favorable Order. Should we pave the way for creating such an idea! Once a Justice, always a Justice. Thus, we would humbly suggest that both former and sitting Judges should be selective in accepting any kind of invitation, mores when it relates to the opening of a chamber of a new member of the Bar at a commercial area. We must remember that atmosphere outside the Court room is highly charged and volatile.

(28) A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary. He would therefore, be undermining these values if he allowed his family, social or other relationships, to influence his judicial conduct and judgment, if he lent the privilege of his office to advance the private interest of others.

(29) There is no rule or guideline as to the kinds of residence that can be used by a Judge of this Court. As a result many Judges are found to lead a community life living in flats or sharing floor in community residential quarter. This practice should be stopped. As soon as a Judge is appointed be should be provided with individual residential quarter by the government or may be allowed to reside in his own house if that is an independent one. This should be done for two reasons; (1) leading a community life is beneath the dignity of a Judge and (2) it will expose him to the members of the public. People will have easy excess to him which is bound to tarnish the image and in such situation a Judge may even be sold behind his back.

(30) We live in a democracy. The judges as citizens may have their own political faith and conviction but they must jealously guard their office and make all out endeavor not to reflect their faith or the political conviction in their judgments. They must deliver their judgments only in accordance with law without any fear or favor, ill will or affection, for they are under the oath to do so. It must be remembered that "freedom is what freedom does and justice fails when judges quail".

(31) A Judge should abstain from comment about a pending or impending proceeding in any Court and should require similar abstention on the part of Court personnel subject to his direction and control.

(32) As temperate conduct of judicial proceedings is essential to the fair

administration of justice, a judge should prohibit broadcasting, televising, recording of or photographing in the Court room and areas immediately adjacent thereto during sessions of Court or recess between sessions in order to prevent the distortion or dramatization of the proceedings by such recording or reproduction.

(33) A Judge should require his staff and other Court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(34) A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including but not limited to the instances where;

(a) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter or the judge or such lawyer has been a material witness in the matter;

(b) he knows that he individually or as a judiciary or his spouse or minor child residing in his household has a financial or any other interest that could substantially be affected by the outcome of the proceeding;

(c) he or his spouse or a person related to either of them or the spouse of such person;

(i) is a party to the proceedings or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceedings;

(iii) is known by the judge to have an interest which could be substantially affected by the outcome of the proceedings;

(iv) is to the judge's knowledge likely to be a material witness in the proceedings.

(35) A Judge should inform himself about his personal and fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(36) Every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

(37) Justice must not merely be done but it must also be seen to be done. The behavior and conduct of members of the higher judiciary must reaffirm the peoples faith in the impartiality of the judiciary. Thus, any act of a judge of this Court whether in official or personal capacity which erodes the credibility of this perception has to be avoided.

(38) Close association of a judge with individual members of the Bar particularly those who practice in the same Court must be avoided.

(39) A Judge should carry out his duties with appropriate consideration for all persons for example, parties, witnesses, Court personnel and judicial colleagues without discrimination.

(40) A Judge should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, ethnic background or disability.

(41) The Constitution enshrines a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination and we as judges must strive to achieve that end.

(42) Judges should not be influential by attitudes based on stereotype, or prejudice. They should therefore make every effort to recognize, demonstrate sensitivity to and correct such attitudes.

(43) Judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge.

(44) A Judge should strive to ensure that his conduct, both in and out of Court, maintains and enhances confidence in his impartiality and that of judiciary.

(45) More than a knowledge of law, a judge has necessity to possess and maintain those virtues that go to fit in with the high dignity of his office.

(46) In all cases the prestige and dignity of Courts as well as the course of justice must be preserved from all interference.

(47) The judges must be beyond all controversy and maintain high degree of integrity and honesty and must be a man of unquestionable character.

(48) After Liberation, many of the judges of this Court reside in private houses and flats where there is no arrangement for safety and security. Besides, it exposes the judges to the members of the public who have easy excess to a judge. This kind of situation is not desirable. This makes the position of the judges vulnerable. A person on being elevated to the Bench should forthwith be provided with government accommodation so that right after his elevation to the Bench he can lead a secluded life. In a developing country like ours, judges should maintain a distance from all. In this regard we may follow the example of Mr Justice Shahabuddin Ahmed, Chief Justice as his Lordship then was and during the terms of office as a judge of this Court and the Chief Justice of Bangladesh he never allowed even his close relatives to visit his residence. He maintained a high degree of seclusion and that is ideal for our society. A judge should keep himself above all suspicion.

(49) The judiciary must guard itself against all chances of the party politics creeping into the holy precincts of the citadel of justice least it ultimately, fall victim to politics. So, the judges have to take an extra precaution in this respect.

(50) A Judge with conscience is not necessarily above-board and, as such, he must meticulously follow the Code of Conduct and judicial ethics.

301. The measures we have suggested represents a concise set of principles addressing the many difficult ethical issues that confront Judges as they work and live in their communities. It also provides, in our opinion, a sound basis to prompt a more complete understanding of the role of the Judge in society and of the ethical dilemmas they so often encounter. They are principles of reason to be applied in light of all the relevant circumstances and consistently with the requirements of Judicial independence and the law. A Judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear

of interference from anyone. Judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial Judges. A suggestion of this nature can never be viewed as the "final word" on such an important and complex subject.

302. In this matter we issued Rules against three other national dailies besides 'Manabjamin'. At this the journalists seems to have reacted as a community. They held a meeting of the Editors and came up with a joint public statement, part of which is quoted below :

"সম্প্রতি দেশের ৪টি লব্ধপ্রতিষ্ঠিত সংবাদপত্র মানবজমিন, সংবাদ. ইত্তেফাক ও জনকণ্ঠের প্রতি সুপ্রীম কোর্টে বিভাগের এক ডিভিশন বেঞ্চ কর্তৃক আদালত অবমাননার অভিযোগ ও কারণ দর্শাও নোটিশ জারি হওয়ায় আমার উদ্বিগ্ন। যে কথিত ঘটনাটিকে কেন্দ্র করে এর সূত্রপাত সেটি খুবই গুরুত্বর। তাকে উপেক্ষা করে কিংবা বিনা তদন্তে ধামাচাপা দেয়া বলে প্রতীয়মান হতে পারে এমন কিছু করা বিচার বিভাগের ভাবমূর্তি রক্ষায় সহায়ক হবে না বলেই আমাদের বিশ্বাস। যে দৈনিক পত্রিকাগুলো বিষয়টিকে নানা পর্যায়ে ও নানাভাবে রিপোর্ট করেছে, আমরা বিশ্বাস করি, বিচার বিভাগের ভাবমূর্তি ক্ষুন্ন করা নয়, বরং রাষ্ট্র ও বিচার বিভাগের উচ্চতম কর্তৃপক্ষের গোচরে এনে যথাবিহীত তদন্ত ও প্রতিকারের পথ উন্মুক্ত বা প্রশস্ত করাই ছির তাদের উদ্দেশ্য। জনগণের জানার অধিকার রক্ষার প্রতি অঙ্গীকারাবদ্ধ হিসেবে সংবাদপত্র এক্ষেত্রে তাদের দায়িত্ব পালন করেছে মাত্র।"

303. The statement quoted above gives the impression that there was a feeling among the journalists that this Court by issuing the contempt Rule was trying to curb the right of the journalists to tell the public the truth and that this Court is taking the journalists to task and trying to silence their voice as there is amidst the controversy a Judge of this Court.

Their thinking is not right. This Court is not against them and what the journalist have perceived is not correct. The Judges of this Court are oath bound to impart justice to all people, whatever be their color or creed, according to law, without fear or favor, affection or ill-will. Regrettably the Editors, without, appraising themselves of the law of contempt, have taken an erroneous stand against this Court and the Judges which is most unfortunate. The aforementioned statement is the product of misconception of law. Here it may not be out of place to mention that if a Judge of this Court becomes disqualified or commits misconduct, the President may cause an enquiry into the conduct complained of by the Supreme Judicial Council, if the President gets the information from the Supreme Judicial Council or from other source. If a judge of this Court commits misconduct, action can be taken against him under Article 96 of the Constitution. If anybody believes that a Judge has committed misconduct and he has sufficient materials before him to substantiate the allegation then it becomes his obligation to bring it to the notice, either of the Supreme Judicial Council or the President and place the materials before them. It would then be the constitutional obligation of the Supreme Judicial Council and of the President to proceed against the delinquent Judge. The issuing of the rules do not have any bearing upon the provisions of Article 96 of the Constitution. If the Editors were of the opinion that a disciplinary action ought to have been taken against the Judge who, in their opinion, is involved in the incident, they could have resorted to procedures laid down in Article 96. We, the judges, are bound by our oath and conscience to do justice and we are not here to throw a blanket over the sin of a brother judge, if he has committed one, to keep it away from public gaze. The thinking of the editors that by issuing the Rule this Court is shielding a judge is far from the truth.

304. This is, perhaps, the first contempt case where a large number of National Dailies have found themselves as parties. These are-'The Daily Ittefaq', 'The Sangbad', 'The Janakantha' and the tabloid 'Manabjamin'. A lawyer and a journalist share one thing in common between them. They know or at least ought to know something of everything. Theoretically, they should undertake a detailed study of the topic with which they are required to deal. Alas! in practice it does not always happen. They do not always have the time or the patience to make themselves fully acquainted with a subject before they write on it. It does not appear that the authors of the articles and news items, which are the subject matters of these contempt proceedings have acquainted themselves with contempt law or the modus operandi of the Courts.

305. The journalists form part of the intelligentsia of the society. Their profession demands of them a high degree of proficiency and competence. By dint of their merit and competency they find themselves at higher plane than the ordinary citizen of the country. It is their professional responsibility to inform the people about the truth and all sorts of incidents that takes place here and abroad. They are under the obligation of publishing news items even at the cost of their lives and very often they do so. It is their sacred duty to publish correct news about the happenings around us. As a member of the media they are in a position from which they can influence the people. The media, both the press and the electronics, have easy access to the members of the general public. They can easily reach the doors of the common people. They are in an advantageous position, from where they can mould the public opinion from time to time on various issues. So their calling demands of them that they perform their duties honestly, sincerely and to the best of their ability and with due diligence. The readers at large expect that they, the journalists, do publish news items and articles based on facts and on truth only. In the modem society the journalists bear a heavy responsibility and this responsibility can be discharged properly only with total commitment and devotion. Without these it is impossible to meet the expectation of the people. Unfortunate though it may be it is a fact that in our country, like many other professionals of other professions, the journalists too sacrifice their objectivity and neutrality and allow their articles to be tainted with impurity and personal

equation and, as such, they may now and then fail to discharge their duties faithfully and honestly though they bear the heavy moral responsibility to publish true news, rising above their non-professional commitment and political bias. From news items published in different newspapers on a day, it becomes apparent that the journalists often cannot rise above self interest and/or party interest. As a result, the news published by them suffer from lack of objectivity and fail to base their reporting on correct materials. The losers are the readers, who cannot get the correct news. This is highly unfortunate and unwarranted. We can illustrate the situation by an example. If we go through five newspapers of the same date we invariably find that the same news has been differently focused by each one of them and in the process very often the truth has been distorted and lost its color and the distortion is to such an extent that the truth goes into oblivion. Ours is a poor country where average people cannot buy more than one newspaper and the net result is that they are deprived of the opportunity of getting the correct news by reading any of the national dailies. This is not desirable on the part of the journalists, who claim to be intelligentsias and undoubtedly they belong to the class of intelligentsia and they are the vanguard of the intelligentsia and, as such, they should always bear in mind that people expect much from them and it is their professional responsibility to meet the expectation of the people by discharging their duties honestly, faithfully and to the best of their capability. Unfortunately, it is noticed that very often in our country the journalists fail to publish correct news for various reasons best known to them. Besides, very often the journalists exaggerate an incident and to make it palatable and to sensitize the news they deviate from the actual incident and by adding various colors they serve the news to their readers which becomes baseless and suffers from lack of objectivity. Therefore, we would like the journalists community to give their deep attention to this aspect of their profession, for it is the journalists who claim that every citizen has the right to know the truth and we would add to it that 'yes, every citizen has the right to know the truth but the truth and truth only and not the distorted facts or half truth. But unfortunately, if we read any one of the newspapers we would get but a partial picture of the incident which is most unfortunate feature of our journalism.

306. While dealing with this case we have noted with dismay that if a judgment or an order of a case is to the liking of a journalist he goes out of the way to praise it without caring to satisfy himself if the judgment is correct or in accordance with law. Likewise, if any judgment or order is not to his liking he becomes so critical of it, again without caring if the judgment and order is in accordance with law, often his criticism steps out of bound of permissible criticism and transcends into the realm of hostility. This cannot be said to be a healthy journalism. We have stated earlier in this judgment and now we reiterate here that a Court of law or a Judge is not above the law and their judgments and orders are not immune from criticism. Any person can criticize any judgment of any Court and it is their basic right. However, when they criticize a judgment they should remember that they must be fully acquainted with the concerned law and it must be reflected in their criticism, else the adverse remark or the criticism will not serve the cause of justice. Rather, it may affect the justice delivery system and jeopardize justice, which is not desired by anybody. Therefore, we would like to tell the journalists that whenever they report anything in respect of a Court proceeding or criticize a judgment of a Court, they should well acquaint themselves with the relevant law. If they fail to do so they will not be promoting the cause of justice. The journalists are the vanguard of the society. They are the elite and the responsible section of the community. So they must commit themselves fully to discharge their duties with utmost devotion. If they do so they will enhance the cause of justice.

307. The citizens of a free State, and in particular the litigant public, must not be deprived of justice and justice must be administered in accordance with law. It is the bounded duty of the responsible journalists to see that justice is dispensed with in accordance with law and without fear or favor, and without ill will or affection. The journalists must see that

the judges live up to the oath they have taken at the time of assuming the office. It is also the professional duty of the journalist which involves unpleasant criticism of Judges, Judiciary and the system itself. As Conscious-Keeper of the people they must bear the responsibility with high degree of commitment and devotion. But, at the same time, it must be remembered by the journalists that when they criticize the judiciary or a judge they must be careful that they do not do so unnecessarily so that the judiciary or the judges are held in ridicule and their image is damaged. They, the journalists, can always criticize the judges but at the same time they must remember that their criticism must be objective and based on true facts. Falsity must not find any place in their news or in their criticism of a judgment or a judge. The responsible journalists must remember that the judges cannot and should not reach the people, but they, the journalists, have easy access to the general members of the public. The judges' position is unique. They must maintain their impartiality in their dispensation of justice and dignity in their behavior, day in and day out, in court and outside the court, at home or outside the home. In such situation if any person advance adverse comments against the judge without any rhyme or reason or on the basis of false information then the poor judge will have no way to refute the same. They must take sufficient care and caution before criticizing the judiciary or the judges because the Court or the judges cannot readily talk to the press for giving a reply. As a result the people may get a wrong impression about the judiciary or the judges. A criticism, which is not based on true fact, is not desirable. Any wrong or unfounded criticism of the judiciary or of the judges will cut at the root of the justice delivery system and the judiciary and the judges will be harassed for no fault of theirs. The journalists should bear it in mind and a responsible journalist is aware that it is the Court of law and not newspaper or its readers who have to try an issue, which the courts of law are empowered to determine. Here it may further be mentioned that some people believe that attempts to hold trials of everything and everybody by publication in newspapers must include those directed against the highest Court of Justice in this country and its pronouncement. There is no such law prevalent in any country but nevertheless, if this is done in a reasonable manner, which presupposes that accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, we would be the last person to consider it objectionable even if some criticism offered is erroneous.

308. John Stuart Mill, in his essay on "Liberty", pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the 'dialectical' process of a struggle with wrong ones which exposes errors. Milton, in his "Areopagities" (1644) said:

> Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?

... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensing's to make her victorious; those are the shifts and defenses that error makes against her power...

309. Political philosophers and historians have taught us that intellectual advances made by our civilization would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told an adversary in arguments: 'I do not agree with a word you say, but I will defend to the death your right to say it." Champions of human freedom of thought and expression throughout the ages, have realized that intellectual paralysis creeps over a society which denies, in however subtle a form, due freedom of though and expression to its members."

310. Here we would like to quote: (: MANU/SC/0062/1976 : AIR 1976 SC 1207).

> It would be a sad day for the supremacy of the Constitution and for the Rule of Law, which it implies, if malicious or ill-informed persons, filled with the irrationality involved in the spirit of what Dean Pound called "lynching" or misguided zest or vindictiveness, acting in a manner freed from the restraints of law or reason, were allowed to take upon themselves the task of passing judgments on actions of others, particularly of Judges performing judicial functions, that would certainly sound the death knell of what Dean Roscoe Pound calls "judicial justice" and the Rule of Law. The supremacy of the Constitution can only be maintained when there is a spirit of law abidingness and discipline amongst citizens so that principles of law can be applied scientifically to facts by Courts of Justice, which are the custodians of what has been described by political philosophers as the abiding or continuing 'Real Will' of the whole nation embodied in the Constitution as contrasted with the will or wishes of some or majority of citizens for the time being expressed in legislatures or elsewhere. Judges, who have taken oaths of allegiance to the Constitution, are bound to uphold it conscientiously "without fear or favor, affection or ill will". They have to give their honest judgments without caring for popular approval or disapproval.

311. We are conscious of the fact that we, the judges, are not above the law or criticism nor are the journalists any more privileged. However, any criticism advanced against us or the judiciary should be based on facts and truth. No one should be actuated by malice or bias to denigrate the authority of this Court or to destroy the image of impartiality or competency of the judges. To remind the journalists of our vulnerable position we would quote the famous passage of Lord Denning,

> Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy.

312. Hitherto in dealing with the main issue involved in these Rules we have discussed various aspects of the law of contempt of Court. Now at the final stage we would like to give our own observation on the growth, development and modem trend of law of contempt.

313. The origin of the law of contempt is quite ancient. Even under Islamic Law, Qazis used to have power to punish the contemners. In India as well as in Western countries, the King used to be considered as the fountain of justice and he had legislative, administrative and judicial powers. Even when a Judge used to decide a dispute between two citizens, he was considered as the mouthpiece of the King and the judicial pronouncements were considered as the utterance of the sovereign, the contempt was of the king and not of the Court.

314. Tracing the history reveals that the origin of the concept of power of contempt of Court is embedded in the notion that "courts or assemblies (sabhas) ought to be protected from being scandalized." Kautilaya lays down that, "any person who insults the King, betrays the King's Council, makes evil attempt against the King.... shall have his tongue cut off." (Sharma Shastri's translation of Kautilaya's Arthashastra 5th Edition, page 219)

315. The foundations of the modem law of contempt were laid in the 18th century, the same period which saw the beginnings of the rise of the press. The first case in which the publisher of a prejudicial article was held guilty of contempt occurred in 1720 (Pool vs

Sacheverel, (1720) IP Wms 675), and was followed by the well-known St. James Evening Post case in 1742 (2 Atk 469) and Almon's case in 1765 (Wilm 23; 97 ER 94).

316. That with the passage of time and on account of development of the democratic governments as well as the concept of separation of powers among the three organs of the State (technically called the trichotomy of power), the concept of 'power of contempt of court' has undergone gradual transformation. In India, the High Courts which were established under the Letters Patent, were given the power to punish a contemner. Article 108 of the Constitution of Bangladesh declares the Supreme Court to be a court of record and vests it with the power of contempt to the following effect:

> 108. Supreme Court as court of record: The Supreme Court shall be a court of record and shall have all the powers of such a court including the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

317. As court of record both divisions of the Supreme Court have inherent summary power to punish for contempt of themselves. "To commit someone for contempt of court and punish him for it, if found guilty, is the inherent power of a court of record. The Supreme Court of Bangladesh is such a Court. The power is, no doubt, extraordinary." [Moazzem Hossain vs State, 35 DLR (AD) 290, at 295, paragraph 3].

318. That with the development of democratic governments the notion of 'power of contempt of court' embedded in the Regal moorings that "the King is the fountain of Justice and he delegates the power to the judges...arraignment of the justice of the judges is arraigning the King's Justice" (Rex vs Almon, Wilmot's Notes 243 (Wilmot Ed. 1802) as cited in Fox: Contempt of Court, 1927) and that "when a Judge used to decide a dispute between two citizens, he was considered as the mouthpiece of the King and the judicial pronouncements were considered as the utterances of the sovereign, the contempt was of the king and not of the Court", has undergone legal transformation.

319. The shift in the legal philosophy has brought about a change in the concept of 'power of contempt of court' in almost all the jurisdictions and the Courts are now leaning in favour of freedom of speech rather than limiting it. In the Indian Jurisdiction in 1970 in the case of EN Sankaran Namboodiripad vs T N arayanan Nambiar, AIR 1970 (SC) 2015 = (1971) 1 SCR 697 the Supreme Court was influenced by the traditional concept.

320. In Namboodiripad's case the court had to deal with this jurisdiction in respect of Mr Namboodripad who at the relevant time was the Chief Minister of Kerala. He had a press conference in which he made various critical remarks relating to the judiciary which, inter alia, was described by him as "an instrument of oppression" and the Judges as "dominated by class hatred, class prejudices", "instinctively" favouring the rich against the poor. He also stated that as part of the ruling classes the judiciary "works against workers, peasants and other sections of the working classes" and "the law and the system of judiciary essentially served the exploiting classes." It was found that these remarks were reported in the newspapers and thereafter proceedings commenced in the High Court of Kerala. By a majority judgment of the High Court the Chief Minister was convicted for contempt of court and fined Rs. 1000, or simple imprisonment for one month. On appeal also the conviction was upheld by the Indian Supreme Court and held that the likely effect of his words must be seen and they clearly had the effect of lowering the prestige of judges and the Courts in the eyes of the people

321. Thus, in this case, the Indian Judiciary followed the traditional concept of contempt of Court. Then came the case of Barada Kant a Misra reported in (1974) 1 SCC 734 when the Indian Supreme Court shifted from the traditional concept of contempt of Court and in

that case it was observed by Justice Krishna Iyer to the following effect:

> May be, we are nearer the republican justification suggested in the American system. In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempt against these courts, the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government.
>
> This shift in legal philosophy will broaden the base of the citizens' right to criticise and render the judicial power more socially valid. We are not subjects of a King but citizens of a republic and a 'blanket ban through the contempt power, stifling criticism of a strategic institution, namely, administration of Justice, thus forbidding the right to argue for reform of the judicial process and to comment on the performance of the judicial personnel through outspoken or marginally excessive criticism of the instrumentality of law and justice, may be a tall order. For, change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic government. The judicial instrument is no exception.

322. The said liberalization of the concept of contempt was extended by the Indian Supreme Court in the case reported in : MANU/SC/0067/1977 : (1978) 3 SCC 339 in Re S Mulgaokar wherein the Indian Supreme Court took a lenient view in respect of publication of an article in the newspaper although the same was based on incorrect materials and let them off with certain observations.

323. The same question came up for consideration before the Indian Supreme Court in the case of P.N. Dua. The Indian Supreme Court further shifted from the traditional concept and upheld the right of freedom of speech rather than curbing it. In that case the proceeding was initiated centering the speech delivered by the Union Minister for Law, Justice and Company Affairs, wherein he stated-

> (a) The Supreme Court composed of the elements from the elite class had their unconcealed sympathy for the haves i.e. the Zamindars. As a result, they interpreted the word 'compensation' in Article 31 contrary to the spirit and the intendment of the Constitution and ruled that compensation must represent the price which a willing seller is prepared to accept from a willing buyer. The entire programme of Zamindari abolition suffered a setback. The Constitution had to be amended by the 1st, 14th and 17th Amendments to remove this oligarchic approach of the Supreme Court with little or no help. Ultimately, this rigid reactionary and traditional outlook of property, led to the abolition of property as a fundamental right.

324. He, inter alia, further observed:

> (b) Holmes Alexander in his column entitled '9 Men of Terror Squad' made a frontal attack on the functions of the US Supreme Court. It makes an interesting reading:
>
> > Now can you tell what that black-robed elites are going to do next. Spring more criminals, abolish more protections. Throw down more ultras.

> Rewrite more laws. Chew more clauses out of the Constitution. May be as a former Vice-President once said, the American people are too dumb to understand, but I would bet that the outcropping of evidence at the top in testimony before the US Senate says something about the swelling concern among the people themselves.

325. Should we not ask how true Holmes Alexander was in the Indian context."

The Minister further stated,

> (c) Twenty years of valuable time was lost in this confrontation presented by the Judiciary in introducing and implementing basic agrarian reforms for removal of poverty-what is the ultimate result. Meanwhile even the political will seems to have given way and the resultant effect is the improper and ineffective implementation of the land reform laws by the executive and the Judiciary supplementing and complementing each other.

It was further stated by him:

> (d) The Maharajas and the Rajas were anachronistic in independent India. They had to be removed and yet the conservative element in the ruling party gave them privy purses. When the privy purses were abolished, the Supreme Court, contrary to the whole national upsurge, held in favor of the Maharajas.
>
> (e) Madhadhipatis like Keshavananda and Zamindars like Golaknath evoked a sympathetic cord nowhere in the whole country except the Supreme Court of India. And the bank magnates, the representatives of the elitist culture of this country ably supported by industrialists, the beneficiaries of independence, got higher compensation by the intervention of the Supreme Court in Cooper's case (: MANU/SC/0011/1970 : AIR 1970 SC 564), Anti-social elements i.e. FERA violators, bride burners and a whole horde of reactionaries have found their haven in the Supreme Court.

326. These utterances are more offensive and aggressive than the speech delivered by the then Chief Minister Namboodirpad but after considering the entire speech the Indian Supreme Court found that it did not amount to contempt of Court. It was observed by the Indian Supreme Court that if anyone draws attention to this danger and aspect and measures an institution by the class content he does not minimize its dignity or denigrate its authority. Looked in that perspective, though at places little intemperate, the statement of the Minister in this case cannot be said to amount to interference with the administration of justice and as to amount to contempt of court. The Minister's statement does not interfere with the administration of justice. Administration of justice in this country stands on surer foundation. Therefore, it appears that in India there has been a significant shift in the concept of contempt of Court and the Judiciary is reluctant to invoke the jurisdiction unless it interferes with the administration of justice or lowers down its dignity though it was held that the minister perhaps could have achieved his purpose by making his language mild but facts deadly.

327. This concept of liberalization has further been fortified in the case of Vishwanath reported in 1990 CrlLJ 2179. That case centers round a statement made by the former Chief Justice of India. The Chief Justice stated, "The Judiciary in India has deteriorated in its standards because such judges are appointed, as are willing to be 'influenced' by lavish parties and whiskey bottles." The Chief Justice further stated, "In every High Court, there are, at least 4 to 5 judges who are practically out every evening, wining and dining either at a lawyer's house or foreign embassy." He estimated the number of such judges around

90.

328. Chief Justice Venkataramaih reiterated that close relations of judges be debarred from practicing in the same High Courts. He expressed himself strongly against sons, sons-in-law and brothers of judges appearing in the courts where the latter are on the Bench. Most relations of judges are practicing in High Courts of Allahabad, Chandigarh, Delhi and Patna.

329. According to Chief Justice Venkataramih, practically in all the 22 High Courts in the country close relations of judges are thriving. There are allegations that certain judgments have been influenced through them even though they have not been directly engaged as lawyers in such cases. It is hard to disregard the reports that every brother, son or son-in-law of a judge, whatever his merit or lack of it as a lawyer, can be sure of earning an income of more than Rs. 10,000 a month.

330. Considering the entire statement the Indian Supreme Court held that the said utterances did not amount to contempt of Court and held that it was obvious from the statement as a whole that it refers only to such judges who were practically indulging every evening in wining and dining at a lawyer's place or a foreign embassy or whose sons, sons-in-law and brothers are minting money by abusing their position. Having regard to these facts they did not think that it was a fit case where action for contempt is called for.

331. Even in England, the homeland of the birth of law of contempt the rigours of contempt, is being liberalized as time goes on. In England in 1900 in R. vs Gray (1900) 2 QB 36, the publication was held to amount to contempt but in 1936 after the lapse of 36 years a more offensive article was published in newspapers pointing out the inequality of sentences citing as example two sentences at the local sessions under charges of intent to murder but this time the Court took a liberal view and held that it did not amount to contempt of Court as it is the ordinary right of members of the public or the press to criticize in good faith in private or public the public administration of justice. See Ambard vs Attorney-General of Trinidad and Tobago (1936) All England Report 704. It appears that in 1968 the English Court became refreshingly pro-free-speech as is evidenced from the observations made by their Lordships in the Court of appeal in R vs Metropolitan Police Commissioner (1968) 2 All ER 139 Salmon LJ observed that, "The authority and reputation of our Court are not so frail that their Judgments need to be shielded from criticism of Mr Quinton Hog. Their judgments, which can, I think, safely be left to take care of themselves, are often of considerable public importance. It is the inalienable right of everyone to comment fairly on any matter of public importance. This right is one of the pillars of individual liberty - freedom of speech, which our courts have always unfailingly upheld. It follows that no criticism of a judgment, however vigorous, can amount to contempt of Court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide off the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits" and in the same case Lord Denning made the things further clear. The learned Lord said, "It is a jurisdiction which undoubtedly, belongs to us but which we will most sparingly exercise, more particularly as we ourselves have an interest in the matter.

332. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity that must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and

our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy, still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

333. In 1982 in the case of Home Office vs Harman (1982) All ER 532, it has been laid that principle of 'open justice' in a democracy demands that public administration of justice will be subject to public scrutiny.

334. In that case Lord Scarman observed:

> To sum up this part of the argument, the common law by its recognition of the principle of 'open justice' ensures that the public administration of justice will be subject to public scrutiny. Such scrutiny serves no purpose unless it is accompanied by the rights of free speech, i.e. the right publicly to report, to discuss, to comment, to criticize, to impart and to receive ideas and information on the matters subjected to scrutiny. Justice is done in public so that it may be discussed and criticized in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case. It cannot be desirable that public discussion of such matters is to be discouraged or obstructed by refusing to allow a litigant and his advisers, who learnt of them through the discovery of documents in their action, to use the documents in public discussion after they have become public knowledge.

335. Thus, it appears that in England robust criticism of judges is now not frowned upon by the judiciary itself as evident in the Spycatcher's case. The Spycatcher's case is a well-known case. Mr Peter Wright, a former member of the British Secret Service, wrote this book and the same was published in America. An attempt was made to publish the book in UK and Australia. We feel obliged to say something about the duties and responsibilities of the judges of this court because whenever a contempt proceeding comes before this court on account of scandalizing the judge or the Court quality and character of the judge comes into the picture.

336. The British government instituted a case to stop publication of the book in both the countries. The Court of Appeal of England granted a limited interlocutory injunction.

337. The publishers appealed to the House of Lords in the same afternoon and instead of vacating the injunction, it was further extended. At this, "The London Time's came out with a blistering editorial by stating that "yesterday morning the law looked simply to be an ass... But yesterday afternoon the law was still an ass.... "The Daily Mirror" of London also came out with the front-page caption "You fools" and published the photographs of the three Law Lords of the House of Lords upside down. But this robust and ridiculous criticism did not provoke any action for contempt. So, the trend in the English Jurisdiction is that the Court is becoming more and more in favor of upholding the principle of free speech or freedom of press and any criticism of the judges or the Court is ignored unless it exceeds the limit i.e. tainted by bias or imputation of motive.

338. In Pakistan also, the Supreme Court in 1998 observed that the judges and courts are alike open to the criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court can or would treat that as

contempt of Court.

339. In Bangladesh also, the trend is more or less the same. In Noman's case reported in 18 DLR (SC) 124 Cornelius CJ held that a litigant and his lawyer are at perfect liberty to express their want of confidence in the judge of the High Court when they are convinced that the learned Judge of the High Court was in contact with the opposite party to the proceeding as a result of which the learned Judge of the High Court was obtaining a personal advantage to himself a duty must be undertaken and discharged to remove the grave point to the administration of justice; such a serious development must be prevented and suppressed.

340. After liberation of Bangladesh in the case reported in 44 DLR (AD) 309 it has been observed by the Appellate Division that freedom of speech and freedom of press is recognized by Article 39 of our Constitution. Therefore, the courts must be ready to suffer fair criticism because justice is not a cloistered virtue. Only in exceptional case of malice or bias, Court will invoke the power. Recently, the question of contempt came up for consideration before the High Court in the case of Habibul Islam Bhuiyan, and Moinul Hosein respectively, which are reported in 51 DLR(AD) 68 and : LEX/BDHC/0220/2000 : 53 DLR 138. There the allegation was against the then Prime Minister of Bangladesh that she while making some statements to the press made derogatory statements against this Court which lowered down the dignity, prestige and authority of this Court. On both the occasions this Division and the Appellate Division respectively taking into consideration the contents/ remarks opted not to issue any contempt Rule. In 51 DLR's case the Appellate Division, in deciding whether the facts called for drawing up of a proceeding for contempt, had decided to opt for discretion not to issue Rule keeping in view the elaborated dictum of Lord Atkin (AIR 1936 PC 141) which has always been a guiding principle with this Court. Similarly, in : LEX/BDHC/0220/2000 : 53 DLR 138 Abdur Rashid, J held that statements based on inaccurate assessment of situation, however, grossly misreading those may be, cannot amount to contempt, and following the path chartered by the Appellate Division for taking cognizance of an offence of contempt he concurred with the other judge and disposed of the application without issuing any Rule. We have already noted earlier that Abdur Rashid, J rightly observed that the concept of contempt of Court is undergoing constant change in all societies with the advancement of human civilization and modem development. It is well said that, nowadays, the Courts are reluctant anywhere to use this power off and on as freedom of speech and expression are gaining tremendous force as fundamental rights and further observed that the right to freedom of speech and expression as guaranteed by the Constitution is subject to limitation as imposed by the Constitution. He rightly noticed that what could readily be read as contempt in 1900 or 1912 or 1936 is not so easily read now in the context of expanding rights guaranteed as fundamental to human existence. Thus, it is clear from the trend of our decisions also that Court is very magnanimous in ignoring comments made against it and only invoke the jurisdiction in exceptional cases when it is actuated by malice or bias. In the European Union also the right of free speech is expanding rapidly.

341. Now we would like to enlighten another point of this branch of law. The traditional concept is that a statement, even if based on true facts, will amount to contempt if it interferes with administration of justice or lowers down the authority of the Court in the public estimation. The rationale behind it, as it appears to us, is that initially the Court was identified with the king or as its agent and no subject could criticize the King or his action good or bad but gone are those days when Monarch was the Sovereign being the representative of God and the fountain of justice. Gone are the days when any criticism of the Monarch was not only a treasonable crime or contempt of Court but also used to be considered a sin against God. But now we live in modem democracy where people are the repository of all powers and the Court exercises their authority as representatives of the people under the constitutional framework. It is now acknowledged that judges are mere

mortal, imbued with human follies and judges have frailties, after all, they are human, they need to be concerted by independent criticism.

342. We have been persuaded by Mr MAmirul Islam to address this issue inasmuch as in the affidavit-in-opposition this question has been agitated by Janakantha and in the course of argument, relying on the Annual Report of Transparency International (Bangladesh), he submitted that various opinion polls, survey and report of Transparency International (Bangladesh) disclose the concern of corruption in the judiciary. He further submitted that the similar concern has been expressed by the then Chief Justice in his second article published in : LEX/BDAD/0068/1999 : 2000 BLD 85 titled "The Judicial Independence and Accountability of Judges and the Constitution of Bangladesh". In that article he stated that "Evidence is steadily and increasingly surfacing of widespread corruption in the judicial system in many parts of the world including Bangladesh. It is not possible to say that judiciary is totally free from corruption. He further stated that "Judges are also taking bribe and not performing their job diligently and fairly". In the course of his argument, Mr Amirul Islam, relying on the observation made by the then learned Chief Justice in his article and as well as the report of the Transparency International (Bangladesh), submitted that, just as there is no contempt in the BLD's publication of the above mentioned statements made by the Honorable Chief Justice, similarly, there is no contempt whatsoever, by Janakantha or any other newspapers for publishing the concerns and the statement made by Justice Naimuddin Ahmed. Thus, the submission, in fact, poses a new question, as to whether a man can be proceeded against if he makes a statement derogatory to the judiciary or alleged corruptibility of the judges if based on facts. It appears to be a serious question in the context of the present situation prevailing in our country as surfaced by the said article and the report of the Transparency International (Bangladesh) published on corruptibility of the judiciary in 1998. In the said article the learned Chief Justice highlighted the position relating to contempt and judicial accountability taking into account the fact of actual corruption that exists within the judiciary.

343. Therefore, the question that crops up is that can it be said even if a statement is based on facts that it would amount to contempt? We are alive to the situation that when a person imputes any motive to a judge or the judiciary he does so at his own peril. However, on enquiry if it is found that the allegation leveled, against the judge or the judiciary is true then will he still be found guilty of contempt? If the answer is in the affirmative then it will lead to an absurd proposition and the truth will be buried in the name of justice. We live in an age where every citizen has the fundamental right to know and in many countries there is law of freedom of information. We are lagging behind in that regard. In a free society it is the inalienable right of every citizen to know about the State functionaries including the judiciary as it is a public institution. Therefore, will a citizen be denied the right to say that a judge has taken bribe if, in fact, he has done so? No doubt, this sort of statement, prima facie, imputes corruption to a judge but if after making such statement he can prove that the judge has, in fact, taken bribe will he be convicted even if the allegation is substantiated. In our opinion, the answer is in the negative. We are not oblivion of the fact that if a man makes a statement imputing bias or motive to a judge he does so at his own risk but in a secular democratic society where the fundamental right of the freedom of speech and the press is recognized he is at liberty to assert so if he can prove so. We have already noticed while discussing about the elements of contempt that it is the privilege of the judge when he acts as a judge and not in his private capacity.

344. So, when a judge takes bribe he does not act as a judge. He acts in derogation of law. Therefore, the act of taking bribe by a judicial officer or a judge of the superior court cannot be attributed to be an act in the capacity of a judge or the judicial officer. Therefore, in such cases the weapons of contempt of court is not available. In a free

society if the people are not free to tell the truth it cannot be said to be a free society. Ours is not a closed society nor it is based on dogmatic Marxist ideology. We are all advocates of free society and endeavor to enjoy the fruits of free society. If a citizen is forbidden to tell the truth when it concerns a judge of this Court that would demolish the pillars of free society. We are of the considered view that in the light of the provisions as contained in Chapter III of our Constitution every citizen of the State is entitled to tell the truth without fear and he may make a statement if based on fact that a judge is corrupt or is susceptible to corruption or is in the habit of taking bribe. If a citizen can tell that in respect of any other person in the service of the Republic why the judges should be privileged? Judges are also citizens of the State and their salaries are also paid from the consolidated fund of the State and they also owe a duty to the people at large. In final analysis, it appears to us that an innocent and honest citizen can come up with such an allegation but at his own peril and if he can substantiate it, it would not amount to contempt because in the name of contempt of court we cannot bury the truth, as burial of truth strikes at the root of the justice delivery system. The view taken by us gets support from the observation of Cornelius, CJ as made in 18 DLR's case. Mr Mahmudul Islam, in reply to a query of ours, candidly said that if the allegation is true that will not amount to contempt. We have no doubt, earlier noticed that it has been consistently held in various decisions in this Subcontinent that truth is not a defense in contempt. But it is equally true that there is a long line of decisions where contemners were punished simply on the ground that the statements were not based on facts, if the statements were based on facts certainly the maker of the statements could not be visited with punishment. Truthfulness or falsity of the allegation, therefore, remains as an element of contempt. No one can be condemned for telling the truth for truth shall prevail at all times to come. No one can bury the truth. At the same time it does not mean that anyone can interfere with due administration of justice or is entitled to lower down the authority of the Superior Courts. This Court will adopt magnanimous attitude and shall ignore trifling allegations but shall strikes promptly when the allegation is scurrilous or tainted with motive or malice. The legal touchstone is that any statement which in some manner shake the confidence of the community in a judge or in the judicial system is straightaway contempt regardless of context or purpose or degree of publication or absence of any clear and present danger of disaffection or of its being a bona fide plea for orderly change in the judicature and its process. The dilemma of the law of contempt arises because of the constitutional need to balance two great but occasionally conflicting principles-freedom of expression and press and fair and fearless justice remembering the brooding presence of Articles 39(1)(2)(a) and (b) and 108.

345. Similarly, in Rex vs BS Nayyar, the Court considered a representation made to the Premier of the State about a judicial officer and also to the President of the All India Congress Committee. The Court took the view that such complaints may be addressed to the Premier about judicial officers since Government had to consider under the then rules the conduct of judicial personnel. "If these complaints are genuine and are made in a proper manner with the object of obtaining redress, and are not made mala fide with a view either to exert pressure upon the Court in the exercise of its judicial functions or to diminish the authority of the Court by vilifying, it would not be in furtherance of justice to stifle them by means of summary action for contempt, but rather the reverse." A pregnant observation made by the Court deserves mention:

> It would indeed, be extraordinary if the law should provide a remedy, the conduct of even a member of the highest Judicial Tribunal in the exercise of his judicial office may be the subject of enquiry with a view to see whether he is fit to continue to hold that office and yet, no one should be able to initiate proceedings for an enquiry by a complaint to the appropriate authority by reason of a fear of being punished for contempt, and I can find no justification for this view.

346. From our aforesaid discussions it is clear that present approach is a little different from the English and its orientation is more akin to American jurisprudence although there is much in common to all. Now it is a moot point whether we shall still be bound to the regal moorings of the law in RV Almon. The straight answer is no. We must pursue the republican approach. Here we reiterate that it is only the judges of the Court who can keep image and authority of the Court intact by their proper conduct and total commitment to duty.

347. The laws relating to contempt may be misrepresented or misused unless it is read and appreciated in the context and meaning of freedom of speech. All the authorities, precedents and case laws from different jurisdictions around the world have emerged as a consistent and modem jurisprudence, which do not support the view for suppressing the freedom of speech, Gone are the days when the Monarch was the Sovereign, being the representative of God and the fountain of justice. Gone are the days when any criticism of the Monarch was not only a treasonable crime or contempt of court but also used to be considered a sin against God. It is now acknowledged that judges are mere mortals imbued with human follies and "if judges have frailties-after all, they are human they need to be corrected by independent criticism" as suggested by Mr Justice Iyer, "if judiciary have serious shortcomings which demands systems correction through socially oriented reform initiated through constructive criticism, contempt power should not be an interdict. All this, far from undermining the confidence of the public in Courts, enhances it and in the last analysis cannot be repressed by indiscriminate resort to contempt power. Even bodies like the law commission or the law institute and researchers, legal and sociological, may run contempt risk because their professional works sometimes involves unpleasant criticism of judges, judicial processes and the system itself and thus hover perilously around the periphery of the law if widely construed. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardized by an undefined apprehension of contempt action. Judiciary also acknowledges that its prestige is not so fragile that it would be eroded away by legitimate criticism of the way the justice delivery system works or fails to deliver ultimate justice in society. In fact, responsible judicial system encourages such 'critiquing' of the judiciary in order to ensure that it does not become fossilized, to keep the dynamic process alive and to reach new frontiers as pilgrims on the journey to justice." In such journey, Justice Krishna Iyer has given the wise caution in the celebrated Judgment. "We would like to underscore need to draw the lines clear enough to create confidence in the people that this ancient and inherent power, intended to preserve the faith of the public in public justice, will not be so used as to provoke public hostility as overtook the star Chamber" (Baradakanta Mishra, Registrar of Orissa High Court): MANU/SC/0071/1973 : (1974) 1 SCC 374).

348. Here we would like to reiterate what Gajendragadker, CJ speaking for the Court observed:

> We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.
>
> If judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion.
>
> To wind up, the key word is "justice", not "Judge"; the key-note thought is

> unobstructed public justice, not the self-defense of a judge; the corner-stone of the contempt law is the accommodation of two constitutional values- the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.

349. The legitimacy of the judicial organ of the State is closely connected with the perceived confidence of the people. Unlike the other organs of the Republic, the Judiciary is not mandated to govern through election or accountable through election. Unlike the Executive the Judiciary does not control or have power over the Army, Navy, or the Police of the Republic. Nor does it have control or power over the finance or the 'purse string' of the Republic as is available to other organs of the Republic. The judiciary therefore derives its power and legitimacy solely from the perceived confidence of the people.

350. Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure, particularly fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matters of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judge". In the words of President Roosevelt; such a person can hardly be an independent Judge.

> Judges are by their oath of office bound to preserve, defend and protect the Constitution and, in exercise of this power and function they shall act without any fear or favor and be guided by the dictates of conscience and the principle of self-restraint. It is these principles which restrain them from exceeding the limits of their power. Judges must always scrupulously keep in mind these principles while discharging their official duties, for their devotion to duty and quality of Judgment is their sword against any sort of attack on them.

351. Before parting with this case we would like to say a few words on the subject. Parliaments in all countries are loath to cope with the changes in the society and lags behind in enacting laws to update or modernize the same. The contempt jurisdiction in our country is governed by the Contempt of Courts Act, Act XII of 1926. The said Act was passed at a point of time when the country was under the British Rule. Both the legislature and the courts at that time were overwhelmingly influenced by the common law of England and, in fact, the concept of 'contempt' of common law was given legislative recognition by the 1926 Act when not only this part of the world was British Colony but also we were the British 'subject' who had no fundamental rights of any nature. Since then much waters have flown down the river Buriganga and the civilization marched forward progressively ahead. But unfortunately, our Parliament failed to take note of the fact that tremendous changes have taken place in our society and while framing the Constitution, the founders, therefore, conferred jurisdiction of contempt upon the Supreme Court under Article 108 of the Constitution. In a free society the media plays a vital role in mobilizing the public opinion as well as exposing the misdeeds of different organs of the State and others. Media, both electronic and press, has acquired importance in all walks of life. Circulation of newspapers, treatment of news and its readers' expectation have widened the activities of the press. Freedom of speech including freedom of press is recognized by our Constitution as a fundamental right. Article 39 of our Constitution provides that this freedom is subject to only reasonable restrictions imposed by law in the interests of the security of the State., friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. Here it must be remembered that the first attempt at a comprehensive legislation relating to

contempt of courts in British India was the Contempt of Courts Act, 1926 but that was far from a comprehensive piece of legislation. Thus, in India in 1952 the said Act was repealed and replaced by the Contempt of Courts Act, 1952. The 1952 Act though made some significant improvements in the law, yet with the passage of time it was found not to meet the necessities of the day. Thus, in 1971 in India came the 1971 Act which highlighted the importance given to freedom of speech in their Constitution and of the need for safeguarding the status and dignity of courts and the interests of administration of justice. Pakistan also is not lagging behind. They have replaced the 1926 Act by the Contempt of Courts Act, 1926. England, mother of common law, also took a revolutionary step in codifying their law on contempt and in 1981 the British Parliament passed the contempt of Courts Act, 1981. But unfortunately, our Parliament is oblivion of the fact that the Contempt of Courts Act, 1926 needs recasting to cope with the present-day society. In the case of Saleem Ullah vs The State, 44 DLR (AD) 309, the Appellate Division as back as on 23rd of July, 1992 made the following observations.

> Our Parliament may consider updating the law of contempt of Courts in the light of our Constitution.

352. It seems that the said observation of the Appellate Division could not impress upon the Parliament to move in that direction and as a result the law in this regard could not yet be updated. But now that we have a Law Commission which is entrusted with the responsibility of suggesting measures for updating the outdated law, they should with earnest endeavor take up the task of updating the law in the light of the aforesaid observation of the Appellate Division and place it to the Government for their consideration. In recasting the law the Law Commission should also keep in mind that the existing law relating to contempt of Courts is somewhat uncertain, undefined and also unsatisfactory. The jurisdiction to punish for contempt touches on two important fundamental rights of the citizen, viz, the right to personal liberty and the right to freedom of expression and press as enshrined in Article 39 of the Constitution and therefore in scrutinizing the entire law on the subject the Law Commission should keep an eye on these aspects.

353. Before concluding, we think we would be failing in our duty if we fail to record our appreciation and gratitude for the great and valuable assistance offered to the Court by the very able and erudite submissions made during the hearing of these cases. Eminent Counsels appeared who in the discharge of their responsibilities to the Court, did not spare themselves and brought to bear to the hearing their vast learning and enormous industry, notwithstanding that the hearing had to proceed for several dates. We found in Mr Mahmudul Islam, a great Attorney-General, the highest judicial officer of the State, who was although fair and impartial in making the submissions and helped us immensely by placing the relevant law in its true perspective without any inclination to either side. We found a true Attorney-General in him who by his vast and invaluable knowledge and experience most ably assisted the Court with the possible highest degree of efficiency and sincerity.

354. The other learned Counsels, namely-Mr M Amirul Islam, Mr Rokanuddin Mahmud and Mr Mainul Hosein also made equally great contribution highlighting the various legal provisions on the subject and we have been immensely benefited by their able and generous submissions. Their high quality of submissions on the law, in fact, helped us in addressing all the points that have been raised in these rules. We would have been guilty of ingratitude if we did not mention their names and express our gratitude for helping the Court in arriving at a correct decision. This sort of qualitative submissions will always help the Bench in delivering quality judgment and therefore, we bring it on the record to appreciate the service rendered by all the learned Advocates including the learned Attorney-General.

355. Before we conclude we would like to remind us that justice is not hubris; power is not petulance and prudence is not pusillanimity, especially when judges themselves are prosecutors and mercy is a mark of strength and not whimper of weakness. The Courts always ignore by a majestic liberalism trifling and venial offences the dogs may bark, the caravan will pass.

356. We also realize how hard it is to resist with sage silence the shafts of acid speech and how alluring it is to succumb to the temptation of argumentation where the thorn not the rose triumphs. The testimony of history says truth's taciturn strategy has a higher power than a hundred thousand tongues or pens. Thus, in contempt jurisdiction, silence is a sign of strength since Court's power is wide and the judge is the prosecutor and arbiter.

357. We would like to conclude the case with a warning to ourselves and reiterate what Justice Krishna Iyer said, "If judges decay, the contempt power will not save them and so the other side of the coin is that judges, like Caesar's wife, must be above suspicion." No amount of law can save our this institution or protect the judges, unless we do ourselves. It is for us to maintain and uphold the dignity, authority and the prestige of the institution and we can do that by fully committing ourselves to that end.

358. For the reasons aforesaid, we find the alleged contemner No. 1 Matiur Rahman Chowdhury, to be in contempt of this Court. Having regard to the gravity of the contumacious Article, the recklessness with which it has been written, false statement contained in the article, and the alleged contemner's influential position in the society, we do not think justice will be met by awarding him a token punishment in the form of fine. He must also undergo imprisonment.

359. Accordingly, the Rule in Criminal Miscellaneous (Contempt) Case No. 6506 of 2000, so far it relates to Matiur Rahman Chowdhury, and Mrs Mahbuba Chowdhury, is made absolute. Matiur Rahman Chowdhury, the reporter, writer and Chief Editor of 'Daily Manabjamin' is convicted for contempt of Court and sentenced to undergo simple imprisonment for a period of one month and to pay a fine of Tk. 2,000 (Taka two thousand) only within 2 (two) months, in default to undergo simple imprisonment for a further period of 15 (fifteen) days. Mrs Mahbuba Chowdhury, the Printer and Publisher of "Daily Manabjamin, is convicted for contempt of Court and sentenced to pay a fine of Tk. 2,000 (two thousand) only within 2 (two) months, in default to undergo simple imprisonment for 2 (two) days.

360. The Rule in Criminal Miscellaneous (Contempt) Case No. 6506 of 2000, so far it relates to Editor, Printer, Publisher and Report of 'The Daily Ittefaq', the Editor, owner, Printer, Publisher and the reporter of "The Daily Sangbad and the Chief Editor, owner, Editor, diplomatic correspondent, Printer and Publisher of 'The Daily Janakantha' is disposed of with caution.

361. The Rule in Criminal Miscellaneous (Contempt) Case No. 6722 of 2000, so far it relates to HM Ershad, the former president of Bangladesh, is made absolute. For reasons stated above and taking into consideration the gravity of the offence committed by him we sentence him to suffer simple imprisonment for 6 (six) months and also to pay a fine of Taka 2,000 within 2(two) months, in default to undergo simple imprisonment for a further period of l(one) month.

362. The Rule in Criminal Miscellaneous (Contempt) Case No. 6711 of 2000, so far it relates to Justice Naimuddin Ahmed, in the light of the reasons given above, is disposed of.

363. The convict contemners are directed to appear before the Deputy Commissioner,

Dhaka, within 2(two) months from date to serve the sentence, in default the Marshal of the Court is directed to take the contemners, Matiur Rahman Chowdhury and HM Ershad into custody and confine them to Dhaka Central Jail to serve the sentence as imposed. In default of payment of fine by Mrs Mahbuba Chowdhury within 2(two) months the Marshal of the Court shall take her into custody and confine her to Dhaka Central Jail to serve the sentence. The cassette in question submitted by 'Manabjamin' and the transcript thereof be kept with the record.

The office is directed to send a copy of this judgment to the Secretary, Law Commission, Dhaka, for perusal and necessary action.