

and/or without holding that such method was required on the mechanical or economic necessity as provided by sub section (1) of section 32. We have read the discussions prior to reaching the impugned decision, but found not a vestige of discussion on the applicability or non-applicability of the provisions of Public Procurement Act 2006 and the Rules made there under. It has been decided in several cases by the Supreme Court of this Sub-Continent that the government can not act like an individual in disposing of state properties or in granting any benefit or largess in favour of any particular person because of the simple reason that the government is not the owner of the said properties and benefits. They belong to the people of the country and the government is only a trustee for the people and as such they can only act in accordance with law. The ratio of Kasturi Lal case as cited by Mr. Azmal Hossain QC rather supports the above view. Speaking for the court in Kusturi Lal, Bhagwati, J observed:

*"Every activity of the Government has a public element in it and it must, therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government can not act arbitrarily and without reason and if it does, its action would be liable to be invalidated."*

9. Before Kasturi Lal, the Indian Supreme Court in the landmark case of Ramana Dayaram Shetty Vs. International Airport Authority reported in AIR 1979 SC-1628 emphasized that the government can not act in a discriminatory manner in warding a contract.

10. We are of the view that the ECNEC or any executive authority, how high so ever, can not grant any benefit in favour of any one at its sweet will. It will have to act in accordance with law, and in the instant case the said law is Public Procurement Act, 2006.

Since the ECNEC has decided in the instant case to do direct procurement not on mechanical or economic ground as provided by section 32 (1), we are of the view that it has acted illegally. The impugned decision does not even show any urgent state necessity or disastrous event to justify direct procurement under section 68. The impugned decision has not only affected the interests of prospective ship-builders in this country, it has deprived the members of the petitioner of their right to participate in the tender for no fault of them. Thus, we hold that the impugned decision does not come under the purview of exceptions as provided by section 32 and 68, and as such we are inclined to hold that the same is without lawful authority and of no legal effect.

11. In the result, the rule is made absolute without any order as to costs. The impugned decision of ECNEC taken in its 17<sup>th</sup> meeting held on 22.11.2009 for procurement/ construction of four 108 TEU self propelled Multipurpose container ships engaging Khulna Shipyard and Chittagong Dry Dock without inviting any tender is hereby declared to have been taken without lawful authority and of no legal effect.

MMHS.

2011 BLD (HCD) 31  
Md. Imman Ali and Sheikh Hassan  
Arif, JJ

**BANGLADESH NATIONAL  
WOMEN LAWYERS  
ASSOCIATION (BNWLA),  
REPRESENTED BY ITS VICE-  
PRESIDENT, FAHIMA NASRIN**

**v.  
THE CABINET DIVISION,  
REPRESENTED BY CABINET  
SECRETARY, BANGLADESH  
SECRETARIAT, DHAKA AND  
OTHERS\***

*Inclusion of the domestic workers within the definition of 'worker' in the Labour Act will ensure that the workers in the domestic sector enjoy all the benefits within the labour laws. Only then will the mandate of the Constitution be fulfilled.*

We are of the view that the beneficial provisions outlined in the three policy documents namely, Domestic Worker Protection and Welfare Policy 2010 (Draft), National Child Labour Elimination Policy, 2010 and the Children Policy 2011 must be brought into effect at once so that the benefits of the provisions of those policies may be given to the domestic workers and, in particular, to the children in domestic work. It is our view that at any cost children below the age of 12 should not be allowed to engage in any type of work, including domestic work, and that, we believe, is the intent of the (Draft) Domestic Worker Protection and Welfare Policy, 2010, which in turn reflects the provisions of the Labour Act as found in section 44. Quite clearly, the children below the age of 12 are required to go to school. The National Policy on education is such that pri-

mary education is compulsory for all children, and for such education policy to be effective and meaningful, children below the age of 12 should not be made to work under any circumstances. In particular, sending children long distances away from home for the purpose of engaging in domestic labour must be avoided. Because by doing so the poverty cycle is being stoked by creating more illiterate citizens, who in turn flood the unskilled labour market. The girls who are deprived of education become targets of early marriage, and as illiterate mothers, beget illiterate children which again stokes the poverty cycle. The apparently benevolent sections of our community, who believe that they are doing a favour to the poor by feeding and clothing the children, who come to work for them, should ask themselves, firstly whether they would deprive their own children of the benefits of education and make them work; and secondly, whether they would treat their own children in the way we see them treating the poor child domestic workers. We believe that by engaging children under the age of 12 years in full-time domestic work, injustice is being done. These hapless children, victims of poverty and often victims of natural calamities, who are citizens of this country and entitled to equal protection under the Constitution and other laws, are being deprived of compulsory education mandated under article 17 of the Constitution.

(Para—33)

However, in a poor country such as ours, we cannot hope to eliminate overnight all the bad practices which have developed over centuries. The whole country is stricken by poverty, and children, being the most weak and vulnerable, are the easiest targets for forced labour and exploitation. In such a situation the government must ensure that any children taken away from their home are registered with the proper authorities so that their whereabouts can be traced. Each employer

\* Writ Petition No.3598 of 2010

who takes on any domestic child worker, or even an adult worker must register the name and details with the local government units, namely the Pourashava or City Corporation. More importantly, there must be constant monitoring of the movement of these children perhaps from one household to another, particularly with the view to ascertaining and ensuring their physical security. To that extent we find the provisions highlighted in the জাতীয় শিশু শ্রম নিরসন নীতি, ২০১০ (National Child Labour Elimination Policy, 2010) to be in many ways beneficial for the children, if those provisions can be implemented. We, therefore, strongly urge the government to take immediate steps to implement the provisions of the National Child Labour Elimination Policy 2010. (Para—38)

Ms. Fahima Nasrin, Advocate, For the petitioner.

Mr. Md. Motaher Hossain, Deputy Attorney General with Mr. Samarendra Nath Biswas, Assistant Attorney General with Mr. Md. Jahangir Alam, Assistant Attorney General, For the respondent No.3.

Judgment delivered on February 9 & 15, 2011.

### Judgment

Md. Imman Ali, J : By this application under Article 102 of the Constitution the plight of child domestic workers has been brought to our notice by BNWLA, which is an established and reputed organization of women lawyers, who deal with empowerment of women and welfare of children, and protection of their rights. An incident of physical violence against a child domestic worker has been highlighted as reported in the daily national newspaper Amar Desh on 03.05.2010 (Annexure-A to the writ petition).

2. The newspaper reports that for breaking a flower vase, the lady of the house tied up the child housemaid, pushed her on to the floor and inserted the handle of a hot cooking

utensil (stirrer/paddle) (গরম খুঁটি) into the back passage of the domestic housemaid, aged 10 years, and that the girl was in a critical condition receiving treatment at the Dhaka Medical College Hospital. The report also gives details of how the girl was sent by her poor father two years previously to work as a housemaid and that she was tortured for every small mistake that she made in and around the house. After the incident she became ill, but was kept confined in the house and on the third day, seeing her critical condition, the lady of the house took her to the government hospital. The doctors informed the police and the lady of the house was arrested.

3. A Rule Nisi was issued on 04.05.2010 calling upon the respondents No.1 to 6 in connection with their inaction to take appropriate steps against respondent No.7 (the employer of the domestic child worker) regarding the incident reported in the daily newspaper "Amar Desh" dated 03.05.2010 and to report to this Court within 24 hours with regard to their actions and measures taken in connection with the incident and as to why direction should not be given to respondents No.4 to 6 to send the victim Shuma (10) for immediate treatment in the nearest One Stop Crisis Centre at Dhaka Medical College Hospital and why the respondents shall not be directed to monitor the employment of children as domestic workers, and/or such other or further order or orders passed as to this Court may seem fit and proper.

4. In due course, affidavit-in-opposition has been filed on behalf of respondent No.3. Ministry of Women and Children Affairs, agreeing that respondent No.7 is a brutal and perverted woman and had inflicted inhuman torture on the poor helpless daughter of unfortunate parents, who was sent to work as a maid servant only to relieve their hunger. It is further stated in the affidavit-in-opposition that respondent No.3 also wants to support the

victim and discussed about the process of rehabilitating the victim so that she may be self-reliant in future. It is further stated that respondent No.3 is also taking steps to make people aware by making publicity so that maid-servants and other similarly placed working persons get protection from the State functionaries by making enforcement of fundamental rights in every sphere.

5. The learned advocate for the petitioner has filed a supplementary affidavit in Court detailing numerous other examples of violence inflicted upon domestic workers, in particular child and female domestic workers.

6. The learned advocate for the petitioner also has placed before us bundles of material with regard to children working in this country and particularly those working in the domestic sector. She has brought to our notice the innumerable cases reported in the daily newspapers almost every day concerning atrocities committed upon helpless children, who find themselves working in the households of the relatively affluent living in the major cities of the country. The learned advocate submits that the children and women, who are engaged as domestic help, find themselves in a helpless situation being far away from home and no one to turn to in times of need. She points out that there is no record maintained by anyone with regard to the women and children employed in the domestic sector and it so happens on many occasions that even the family members of the children are unable to trace their whereabouts until it is too late. She submits that the government should take steps so that the employment of women and children in the domestic sector may be monitored and their rights as workers ensured in accordance with the Constitution and the law of the land. She submits that the domestic workers who work in the houses do so from early morning till late at night and even children are obliged to

do all the work of any adult. She further submits that as a result the children are deprived of their right to education and to enjoy their childhood. Children of tender years are engaged in hazardous work not suitable for their age. Moreover, as is apparent from the cases highlighted in the supplementary affidavit, they are subjected to inhuman torture sometimes leading to death and at other times leading to suicide. It is also a fact that, in particular the female domestic workers are subjected to physical as well as sexual abuse often leading to pregnancy and culminating in either murder in order to avoid detection of the pregnancy or suicide in order to cover up the humiliation suffered by the victims. She points out that the employers, who are committing such heinous offences are very often well educated and holding high position in society and in government, and yet they are committing such offences with impunity. She also points out that in many cases action is taken against the employers by filing cases with the police station, but the police are reluctant to record any case against the perpetrators, particularly since they are well-to-do and influential persons. Moreover, if and when any cases are started, the employers somehow manage to get the case settled by paying the informants/ complainants, thus defeating any possibility of getting justice for the children and other domestic workers.

7. The learned advocate for the petitioner has filed in Court a supplementary affidavit annexing paper cuttings relating to several incidents of child domestic workers who have been mistreated by their employers and a number of whom were raped and some of them were either murdered or committed suicide. In a separate bundle the learned advocate for the petitioner has annexed numerous other paper-cuttings and other articles giving details of effects on children of child labour and in particular domestic child labour. For

ready reference, a few such incidents are mentioned below:

- Daily Bhorer Kagoj (22.01.2011): A child domestic aid named Laksmi Shita Chakma, aged 11 years, was brutally tortured as she had allegedly broken a house-hold item. After indiscriminate beating, the educated lady employer mutilated her body by putting hot iron on different parts of her body. The incident took place in Netrokona District.
- Daily Jano-Kantha (18.01.2011): Child domestic aid Asma Khatun, aged 15, was working at a house in Rampura, Dhaka. The couple-employers used to beat her for small mistakes and confined her in the bathroom for the whole night. On a Saturday night, the employers put hot Khunti (cooking utensil) on different parts of her body and confined her in the bathroom. Upon hearing her groaning, the neighbours informed police on the next morning.
- Daily Ittefaq (28.12.2010): Domestic aid Dolly Begum was beaten to death by her employers at Tejgaon, Dhaka on a suspicion that she had stolen a golden chain. To hide the killing, the employers hanged her body to make it appear as a case of suicide.
- Daily Kaler Kantha (02.11.2010): Even police never came across a case of torture on child domestic aid like the torture on Shohagi, aged 11 years. The employers at Dilu Road, Dhaka used to beat her indiscriminately and give her rotten food when she was hungry. She finally ended up in the One-stop Crisis Centre (OCC) of Dhaka Medical College Hospital as her employers put acid and hot Khunti (cooking utensil) on different

parts of her body. Acid was even poured on the genital organ of her body.

- Daily Prothom Alo (29.07.2010): Employers at a rented house in Kaliakoir Upazila, Gazipur killed five year old domestic aid Shilpi Akter by beating and strangulation. The doctor in Shafipur Hospital found several marks of injuries on her body.

With her affidavit the learned advocate for the petitioner has also annexed a copy of the National Child Policy, 2010 (Draft) and also a copy of the National Child Labour Elimination Policy, 2010, which has been published in the gazette as a notification dated 22.03.2010. The learned advocate has submitted before us that the National Child Policy, 2010 (জাতীয় শিশু নীতি, ২০১০) has been passed by the cabinet and is likely to be published in the gazette shortly.

8. The learned Deputy Attorney General appearing on behalf of respondent No.3, the Ministry of Women and Children Affairs, has also submitted a supplementary affidavit in opposition annexing a copy of the draft Domestic Worker Protection and Welfare Policy, 2010 (গৃহকর্মী সুরক্ষা ও কল্যাণ নীতিমালা, ২০১০) as well as a copy of the National Policy for Eliminating Child Labour (জাতীয় শিশুশ্রম নিরসন নীতি, ২০১০) mentioned above.

9. The learned advocate for the petitioner submits that the Labour Act, 2006 defines a child (শিশু) as anyone up to the age of 14 years and an adolescent (কিশোর) as anyone between the age of 14 and 18 years. She submits that there is a prohibition within section 34 of the Labour Act employing any child in any profession or establishment, and adolescents may be engaged in employment or in an establishment, but may not be made to work unless they have a certificate from a registered medical practitioner. Section 35 prohib-

its parents or guardians of any child to enter into an agreement concerning the employment of the child. However, she submits that the Labour Act defines a labourer in section 2 sub-section (65) as anyone engaged in any establishment or industry in exchange for payment, but does not include anyone engaged in work as a domestic worker. The definition of establishment appearing in section 2(31) means any shop, trade establishment, industrial establishment, premises or yard where workers are employed for the management of an industry. She submits, therefore, that the persons working inside the house in exchange for payment either cash or in kind, are totally excluded from purview of the existing Labour Act. She submits that it cannot be denied that persons engaged as workers inside the house within the household of any family are rendering service for long hours doing all kinds of work and yet they are not getting the recognition of being workers. She submits that there are numerous cases, where the workers do not receive any payment even when payment has been agreed between the employers and the domestic employee or his/her parent and yet the employee has no legal redress for the non-payment of his or her wages. The learned advocate submits that it is apparent from the cases reported in the newspapers, which have been produced before this Court, that most of the children employed within the households of well-to-do persons travel long distances from their remote villages and are often confined within the houses of the employers and dealt with mercilessly on occasions of small indiscretion. The newspaper reports also exemplify the barbaric actions taken by many employers against their domestic workers. She also points out that the incidents of rape of the domestic working girls is all too common and often leads to either murder in order to hide the incident of rape and pregnancy or suicide by the girl in order to hide their shame and the

shame which would otherwise come upon their families. She submits that all this is happening because there is no supervision, control or sanction for the benefit of the domestic workers, and in particular the child domestic workers. She points out that the children are often taken away from their parents by middlemen and brought to the cities in search of work. Very often the parents are not aware of the whereabouts of their children and depend on the middleman to trace them. Sometimes they do not see their children at all until it is too late and they get to see only their dead bodies. She points out that some of the cases exemplify how the children are brutally and inhumanely tortured by their employers.

10. The learned advocate also points out that the children, who are engaged in working in the domestic sector, are deprived of education and there is none to look after their future wellbeing. She points out there is a fallacy abound that the employers are doing a favour to the children and their families, who would otherwise starve. However, in effect a whole section of the society is being put at a disadvantage for their foreseeable future. Referring to the National Child Policy 2010, she points out that, although there are many beneficial provisions mentioned therein, there is no initiative to include the domestic workers in the definition of workers within the Labour Act. With regard to the employment of children below the age of 14, the policy is very vague, inasmuch as it is stated that the children under the age of 14 are prohibited from being engaged in fulltime employment. But there is no mention as to any age below which a child may not be engaged in working in domestic sector. The learned advocate points out that the National Child Labour Elimination Policy, 2010 also does not clearly show up to what age a child would be totally prohibited from working. The policy shows that the children under the age of 14 years shall not be em-



ployed in regular work. It is also mentioned that the children who are engaged in household work are generally appointed for fulltime service, so much so that opportunity for their education, food and board, recreation and entertainment should have to be ensured and they should be restrained from hazardous occupation and that they shall not be meted out physical, mental and sexual torture. But as it happens there is no prohibition on employing children even at the tender age of 6-10 years. She submits that no child below the age of 12 should be employed in any sector, because that would harm the child's mental, physical and intellectual development and would deprive them of their education and childhood.

11. The learned Deputy Attorney General appearing on behalf of respondent No.3, by reference to the National Child Labour Elimination Policy 2010 (জাতীয় শিশুশ্রম নিরসন নীতি, ২০১০), and the Domestic Worker Protection and Welfare Policy, 2010 (গৃহকর্মী সুরক্ষা ও কল্যাণ নীতিমালা, ২০১০), submits that the government has every intention to protect the rights and physical wellbeing of all domestic workers, and in particular child workers as is manifest from the two policy documents. However, he submits that both the documents are of recent origin and the government is in the process of realizing the intendments of these policy documents by way of promulgating rules and regulations in the near future. He submits that although there is no minimum age stated when a child may not be engaged in any employment, the policy statements indicate that even when children are engaged in any light work they may not be made to work for more than five hours per day; they shall not be made to do any work which creates any mental or physical pressure upon them; in any unhygienic and insecure surroundings; without wages or for low wages; prejudicing their education; being forced to work and being forced to do work which is degrading in nature.

12. We have considered the submissions of the learned advocates, perused the petition and the affidavits and the supplementary affidavit and affidavits-in-opposition as well as supplementary affidavit-in-opposition filed by the learned advocates on behalf of the parties.

13. It is patently clear that children of all ages, particularly from the poverty-stricken rural areas, are being sent, to the towns and cities for doing work in the household of their employers. Undoubtedly, there will be the lucky ones who will work and help supplement their family's income without coming to any harm. However, we are most concerned at the large numbers of incidents where children of very tender age appear to have been sent out to work by their parents as domestic workers, who have been meted out horrendous treatment by their employers often leading to injury, death and sometimes suicide, not to mention the often invisible mental and psychological harm. It appears that the government has of late taken some initiative to promulgate policies in respect of child domestic workers and for the elimination of child labour, which we shall deal with in due course.

14. At the outset, we wish to refer to a research paper prepared by Tracy Adam-Badr, LLM Candidate for 2011 of Cornell Law School, Cornell University, USA, entitled "Exploitation of Child Domestic Workers in Bangladesh". We find the work to be a thorough exposition of the multi-faceted problems faced by domestic child workers. The study makes reference to numerous research studies in the field conducted by the International Labour Organisation (ILO), UNICEF, Save the Children Sweden and Denmark (SCSD) and many reputed authors and researchers of Bangladesh. Referring to a study by ILO, the author writes as follows:

"Child labor as domestic help can indeed be an example of exploitative employ-

ment according to the ILO. *Child domestic labor* (CDL) refers to "[d]omestic work undertaken by children under the legal minimum working age, as well as by children above the legal minimum age but under the age of 18 under slavery-like, hazardous or other exploitative conditions – a form of 'child labour to be eliminated' as defined in international treaties."<sup>1</sup> One of the most common and traditional forms of child labor, the term child domestic labor alludes to "situations where children perform domestic tasks in the home of a third party or 'employer' under exploitative conditions (long working hours, with no or little wages, for example, or below the minimum working age)."<sup>2</sup> In referring to the definition provided for in the Convention's Article 3, the ILO recognizes that "[a]lthough domestic labour by children has often been excluded from national minimum age for work legislation – usually because of the difficulty of implementing it in private households – the reality is that the vast majority of children in domestic labour would find a place in one or more of these categories, either because of the nature of the work they are required to perform, the treatment they receive or the means by which they entered into the situation in which they find themselves."

15. A similar research analysis regarding public policy considerations and exploitation of child domestic workers in Bangladesh carried out by Matthew Farrell, J.D. 2011 of Cornell Law School, USA comments as follows:

"Many scholars and social scientists note that 'parents who send their children to work do not do so out of sloth and meanness, but to escape extreme poverty and hunger for the household, which includes the child.'"<sup>3</sup> Child laborers (including child domestic laborers) tend to come from poorer families.<sup>4</sup> A study by Save the Children Sweden Denmark (SCSD) found that poverty was the primary reason that 92% of the surveyed child domestic workers were employed as domestic workers.<sup>5</sup> Poverty-stricken parents of child domestic workers could not support their children for various reasons, such as lack of funds, lack of land to cultivate, large family size or loss of an earning members' earnings due to illness.<sup>6</sup> The SCSD study found that "92% children are engaged in work as a domestic worker due to poverty...37% children came to cities to work as domestic worker as their parents were unable to bear their education costs. 26% came due to food crisis and 17% children willingly engaged in domestic work when observing the family crisis."<sup>7</sup>

16. The stark reality is that in Bangladesh domestic workers are not included in the definition of 'worker' in the Labour Act, 2006. On the contrary, 'domestic servants' are spe-

<sup>3</sup> Kaushik Basu, *International Labor Standards and Child Labor*, 42(5) CHALLENGE 80, 83 (1999).

<sup>4</sup> Claire Salmon, *Child Labor in Bangladesh—Are Children the Last Economic Resource of the Household?*, 21 J. DEV. SOC'YS 33, 34-35 (2005).

<sup>5</sup> SAVE THE CHILDREN SWEDEN DENMARK (SCSD), *CHILD DOMESTIC WORKERS – LIVING INSIDE ROOM AND OUTSIDE LAW AND ROLE OF GOVT. AND CIVIL SOCIETIES IN BANGLADESH*, 62 (2009) [hereinafter SCSD REPORT ON CHILD DOMESTIC WORKERS].

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 34-35.

<sup>1</sup> See INTERNATIONAL LABOUR ORGANIZATION, *HELPING HANDS OR SHACKLED LIVES? UNDERSTANDING CHILD DOMESTIC LABOUR AND RESPONSES TO IT*, 1 (2004).

<sup>2</sup> *Ibid.*

cifically excluded from the purview of the Act by section 1(4)(nna) [১(৪)(নন)] of the said Act. We note from sub-section (65) of section 2 that the definition of worker (শ্রমিক) does not include those who are engaged in the domestic sector. At the very outset we wish to clearly state that such a situation should not be allowed to continue since evidently the persons engaged in the domestic sector, be they children below the age of 18 years or adults, are rendering service from day in and day out, from morning till night. It is unfortunate that such service has not been recognized as such and finds no place in the labour laws. As a result the workers within the domestic sector do not enjoy the rights afforded by the labour laws to other workers and have no redress for non-payment of salary, violation of conditions of work, unhygienic work place, restrictions on hours of work, rest days, holidays etc. We are of the view that it is high time that the work done in the domestic sector is recognised as such and the rights of these workers ensured by including the workers of the domestic sector within the definition of 'worker' in the Labour Act, 2006.

17. Another aspect of child labour, particularly of children engaged in domestic labour, is the effect of long hours of work within the confines of the four walls of the employer, which results in serious mental and physical disorders, having a lasting effect on the life of the child. A study done by the Department of Psychiatry and other faculties of the University of Addis Ababa was published in 2006 in an article in the Ethiopia Journal of Health Development, titled: "Child labour and childhood behavioural and mental health problems in Ethiopia". The findings with regard to child domestic workers are as follows:

"Disorders were more common in the domestic child labourers in the non-labourers and other categories of labourers. This might be explained by the degree of control exerted by their employers

and the lack of personal freedom. Additionally, domestic child labourers work much longer hours than other groups of child labourers. They also encounter various types of abuse more frequently than other groups..... [P]rivate homes are closed environments that could expose domestic workers to be victims of exploitation as well as to physical, sexual and emotional abuse, all of which are well known risk factors or emotional disorders."

18. In an article published by the ECLT Foundation under the auspices of the International Labour Organisation (ILO) and the International Programme on Elimination of Child Labour (IPEC) some consequences for children engaged in labour were detailed as follows:

"Child labour does more than deprive children of their education and mental and physical development - their childhood is stolen..... [W]orking long hours, child labourers are often denied a basic school education, normal social interaction, personal development and emotional support from their family. Beside these problems, children face many physical dangers - and death - from forced labour."

19. We may also add that the stories narrated in the newspapers tend to support the fact that children working in the domestic sector are subjected to horrific acts of torture, maltreatment and various forms of exploitation, which often leads them to flee from the clutches of their employers. Death of domestic workers from falling down from roof-tops of high rise buildings while attempting to escape has become a daily affair in Dhaka. Those who are unfortunate in their desperation to escape tyranny of their employers find themselves in the streets and become exposed to prostitution and begging. Indeed, this is a matter of grave concern.

20. In her study, noted above, Tracy Adam-Badr of Cornell Law School, refers to the Baseline Survey of 2006 conducted by ILO, and observes as follows:

"In the 2006 Baseline Survey, the most common forms of abuse were found to be scolding and beating. When the child domestic workers were asked if they have ever experienced sexual violence or any other physical abuse in their employer's house, 60 percent of those surveyed admitted to having been abused. The forms of child maltreatment indicated are vast; beatings on the slightest pretext and the scalding of child domestic workers with boiling water or brandings with hot iron appear commonplace. Child domestic workers are typically not given a proper place to sleep and must generally make themselves available to their employer at all times.<sup>8</sup> Deprived of educational opportunities at such a formative age, their chances of securing a well-paying job is put into question. The exploitation of child servants crosses into the zone of unacceptability due to this maltreatment. In a more recent survey conducted in 2008, child domestic workers interviewed recounted cases of beating by their employers. However, one study noted that in regards to the children, "their attitude conveyed that they regarded this suffering as a natural outcome of migration that simply had to be endured in order to realize

the perceived financial benefits" of their labor."

21. So far as the recent actions taken by the government in connection with children is concerned, we note with appreciation that the new Children Policy of 2011 defines a child as anyone up to the age of 18. At long last the definition of a child has come in line with the definition as recognised internationally. We note that the Labour Act, 2006 defines a child in section 2 sub-section (63) as anyone below the age of 14 years and section 2(8) defines anyone between the ages of 14 to 18 years as an adolescent. This can easily be amended so as not to conflict with the general definition of child.

22. At this juncture, we may simply point out that for the sake of uniformity a child should be defined in all laws as anyone below the age of 18 years, and, if necessary, the restriction or concession to allow children of a certain age to work may be defined in the Labour Act as has been done. Therefore, children up to the age of 14 may not be engaged in doing work as mentioned in section 34 of the Labour Act. The law is relaxed to some extent by section 44 which provides that a child who has reached the age of 12 years may be engaged in light work, if it does not harm his health or if his education is not hampered. Section 44 of the Labour Act provides as follows:

**44. Exception in certain cases of employment of children:**

(1) Notwithstanding anything contained in this Chapter, a child who has completed twelve years of age may be employed in such light work as not to endanger his health and development or interfere with his education:

Provided that the hours of work of such child, where he is school-going, shall be so arranged that they do not interfere with his school attendance.

<sup>8</sup> A study conducted by Save the Children Sweden Denmark found that although the World Health Organization recommends at least 8 hours of sleep a day for adults and more for children, 66% of the surveyed child domestic workers only received 5-6 hours of sleep each day. Furthermore, the study found that the majority of child domestic workers worked extremely long hours each day: 36% of child domestic workers surveyed for the study worked an average of 9-12 hours a day, 30% worked 13-15 hours a day and 16% worked 16-18 hours a day. See SAVE THE CHILDREN SWEDEN DENMARK (SCSD), CHILD DOMESTIC WORKERS - LIVING INSIDE ROOM AND OUTSIDE LAW AND ROLE OF GOVT. AND CIVIL SOCIETIES IN BANGLADESH, 36-37 (2009) [hereinafter SCSD REPORT ON CHILD DOMESTIC WORKERS].

(2) All Provisions applicable to an adolescent workers under this Chapter shall mutatis-mutandis apply to such child workers.

23. Thus, clearly the law provides that only children who have crossed twelve years may be engaged in light work only and there is emphasis on education of the working child, which cannot be hindered in any way. This aspect is totally overshadowed and ignored in the cases where children are sent away from home to work in the domestic sector. Only in rare cases are child domestic workers allowed time off to attend class for one or two hours a day at the instigation of NGOs which provide the facilities specifically for these children.

24. Section 34 also provides that an adolescent, i.e. a child between the age of 14 and 18 years, may be engaged to do work so long he has a certificate from a registered medical practitioner certifying his fitness. We are of the view that the same provision should apply to children working in the domestic sector. We note from the draft of Domestic Worker Protection and Welfare Policy, 2010 (গৃহকর্মী সুরক্ষা ও কল্যাণ নীতিমালা, ২০১০) that similar provision is embodied in the draft policy, which provides as follows:

“১৪ (চৌদ্দ) বছরের নিচে কোন শিশুকে গৃহকাজে নিয়োগ করা যাবে না। তবে বিশেষ অবস্থায় বারো বছর বয়ঃপ্রাপ্ত কোন শিশুকে গৃহকাজে নিয়োগ করা যাবে যা তার স্বাস্থ্য ও উন্নতির জন্য বিপজ্জনক নহে, অথবা যা তার শিক্ষা গ্রহণকে বিঘ্নিত করবে না। শিশু যদি বিদ্যালয়গামী হয় তা হলে তার কর্ম সময় এমনভাবে নির্ধারণ করতে হবে যেন এটি তার বিদ্যালয় গমনকে বিঘ্নিত না করে।”

25. This, in our view, is commensurate with the provision as mentioned above in section 44 of the Labour Act. The National Child Labour Elimination Policy 2010 recognises the provisions and definitions of child and child labour within the Labour Act, 2006. It

also recognizes the existence of child labour in situations and circumstances other than the establishments and industries and includes the formal sector namely, industry, commercial establishment, transport and communication, shipbreaking etc. and informal sectors, namely agriculture, livestock, fisheries, domestic work (emphasis added), construction work, breaking bricks, pulling rickshaw van, day labour and street urchins. The policy also recognises the need to regulate the hours of work and wages to be paid to the child workers as well as to ensure the physical and mental health nutrition and education of the children and their working surroundings. It further recognises that those children engaged in the domestic sector are engaged on a fulltime basis and as such their food, recreation and education must be ensured and they must be protected from doing any hazardous work, also they must be protected from physical, mental and sexual torture. We note that in general the National Child Labour Elimination Policy 2010 contains very many beneficial provisions which, if given effect to, would ameliorate the situation of child workers within the country. It is recommended in the said Policy that there will be a focal Ministry/focal point dealing with matters of working children recognising that such supervision has not been allocated to any Ministry. It further recommends the establishment of Child Labour Units and National Child Labour Welfare Council.

26. The draft Domestic Worker Protection and Welfare Policy 2010 also contains very many beneficial provisions including, in the case of children between the ages of 14 and 18, the provisions for having a contract with the employer and the parents and guardian of the child giving details of the type of engagement, the wages, working hours, rest and recreation time, arrangement for education, type of work, board and lodging etc. There is also suggestion to have an employment identity

card containing details of the child, his parents, and address as well as details of the employer, including his age, date of employment, type of work etc. There is also suggestion to have a registration authority who will record details of the domestic workers within the local government setup. We are reminded that such registration is already in practice in India and Indonesia.

27. It may be profitable to mention that India passed the Domestic workers (Registration social security and welfare) Act 2008, section 11 of which provides as follows:

“11. REGISTRATION—(a) Notwithstanding anything contained in any law for the time being in force, all domestic workers, employers or service providers shall be registered as per procedure hereinafter prescribed

(b) Every employer/service provider and domestic worker wherever applicable, shall within one month of the commencement of the employment of domestic worker, in the household, shall submit to the District Board or any person so authorized by the District Board, application along with prescribed fee, for registration, providing such details as prescribed. Provided that the Board or any such person so authorized may entertain any such application for registration after expiry of the period fixed in this behalf, if satisfied that the applicant had sufficient cause from making the application in time.

c) Where a domestic worker undertakes part time work in two or more households and is not engaged through any placement agency, it shall be the duty of such domestic worker to register with the District Board

Provided further that where such worker is engaged through any agency and works in more than one household, it shall be the duty of such agency to register the worker

(d) where a domestic worker leaves the work in a district and moves to any other area

in any part of the territory of India and takes up work in any household in such part either on his/her own or through any agency or middleman, it shall be the duty of such worker or agency or middleman, to inform the concerned Board where so registered regarding the move and register with the Board At the place where work has been taken up.

(e) Notwithstanding anything contained in provisions above, where a domestic worker is engaged through a middleman or agency or service provider for work in any household, it shall be the duty of such agency or middleman or service provider and not of the main employer in whose household such worker works, to register as per the procedure prescribed.

28. In Indonesia, the 1993 Ordinance on Manpower, and the guidelines for its implementation as specified in Gubernatorial Decree No. 1099 of 1994, is a positive step for domestic workers in that it provides a specific legal reference point on domestic work. Its strengths are that:

- It requires recruitment and placement agencies to ensure that their domestic worker clients are provided with accommodation, training, health care, at least 6 months employment, a choice of employment, a written contract, and no fees charged by the agent
- It requires employers to provide domestic workers with pay, food, drink, annual leave, a new set of clothes per year, a decent place to sleep, humane treatment, an opportunity to worship, basic health care, registration with the Lurah (urban district) Head, and registration with the Jakarta Manpower Office (if an agent is not used)
- It requires the Office of the Governor of Jakarta to appoint a Domestic Worker Dispute Resolution Team
- It contains penalties of up to three months imprisonment for violations.



29. Unlike our proposed Domestic Violence Act, the Anti-Domestic Violence Law of Indonesia provides specific protection for domestic workers. Section 2 of the Anti-Domestic Violence Law covers husbands, wives, children, relatives and an explicit reference to "live-in domestic workers" for the duration of their service with a household. This group of domestic workers is indeed the most vulnerable. Article 10 states that victims of violence have the right to access: protection by families, police, prosecutors, courts, lawyers, social organizations, and other parties; health care, tailored and confidential handling of their case; support from a social worker and legal aid; spiritual guidance; Article 15 requires all persons who are aware of a situation involving domestic violence to take all possible steps to provide protection and assist with having the case processed by the authorities. Chapter VI includes several responsibilities of police handling reports of domestic violence. These include the responsibility to provide emergency protection, to follow-up on complaints, and to advise alleged victims of their rights.

30. We find clear justification in including the domestic workers in the Anti-Domestic Violence Law since the violence takes place within the home and generally shut out from the outside world. In such a situation the domestic workers, who, in all practicality, are part of the household and equally screened in the confines of the home, should be included in the Domestic Violence Act. There is a new law proposed for Bangladesh similar to the Anti-Domestic Violence Law of Indonesia. Sadly, the protagonists campaigning for the new law do not find it necessary or desirable to include in such law the rights of the domestic workers, who by all accounts are frequently subjected to violence inside the home from the other inmates.

31. There is no reason why similar provisions cannot be introduced in our law for the

sake of the poor women and children as well as others, who choose domestic labour as a means of livelihood.

32. So far as monitoring of the movement of domestic workers, particularly child workers, is concerned, a form of registration at source, i.e. by the existing local government set-up, namely the Union Parishad, would also help to reduce trafficking in persons as well as death and disappearance. There have been many instances where children and young women have been lured away from their homes on the pretext of giving them work in the towns. Their illiteracy prevents them from knowing exactly where they are being taken and from tracing their path. They soon find themselves in the brothels in India.

33. We are of the view that the beneficial provisions outlined in the three policy documents namely, Domestic Worker Protection and Welfare Policy 2010 (Draft), National Child Labour Elimination Policy, 2010 and the Children Policy 2011 must be brought into effect at once so that the benefits of the provisions of those policies may be given to the domestic workers and, in particular, to the children in domestic work. It is our view that at any cost children below the age of 12 should not be allowed to engage in any type of work, including domestic work, and that, we believe, is the intent of the (Draft) Domestic Worker Protection and Welfare Policy, 2010, which in turn reflects the provisions of the Labour Act as found in section 44. Quite clearly, the children below the age of 12 are required to go to school. The National Policy on education is such that primary education is compulsory for all children, and for such education policy to be effective and meaningful, children below the age of 12 should not be made to work under any circumstances. In particular, sending children long distances away from home for the purpose of engaging in domestic labour must be avoided. Because by doing so the poverty cycle is being stoked by creating more illiterate

citizens, who in turn flood the unskilled labour market. The girls who are deprived of education become targets of early marriage, and as illiterate mothers, beget illiterate children which again stokes the poverty cycle. The apparently benevolent sections of our community, who believe that they are doing a favour to the poor by feeding and clothing the children, who come to work for them, should ask themselves, firstly whether they would deprive their own children of the benefits of education and make them work; and secondly, whether they would treat their own children in the way we see them treating the poor child domestic workers. We believe that by engaging children under the age of 12 years in full-time domestic work, injustice is being done. These hapless children, victims of poverty and often victims of natural calamities, who are citizens of this country and entitled to equal protection under the Constitution and other laws, are being deprived of compulsory education mandated under article 17 of the Constitution.

34. Moreover, in the premise that the children would not consent to go away from home to toil for long hours in a strange surrounding, arguably there would be violation of article 34(1) of the Constitution which prohibits forced labour. Our attention has been drawn to a project of Save the Children Sweden and Denmark (SCSD), which deals with the problem of domestic child workers who originate from particular areas of Mymensingh and Netrokona districts, and used to be sent to Dhaka to do household work. The INGO (international NGO) is working in 22 Union Parishads. It has been seen that by the intervention of the INGO with the help of a local NGO, the flow of child domestic workers from that locality has been stemmed. The NGO provides means of income generation for the parents and also free schooling for the children. The parents no longer feel the need to send their children away from home. The organisation has assisted in rehabilitation of a

number of children who are now attending school and are happily reunited with their family. We feel that there should be concerted efforts by all international and national non-government organisations and also the government of Bangladesh to replicate such success in eliminating child labour throughout the country.

35. It is as well to mention here the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001. Article 3(d) of the said convention includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." An ILO study on hazardous child labour in Bangladesh found that more than 40 types of economic activities carried out by children were hazardous to them. The survey also reveals that except for light work, child labour usually had harmful consequences on the mental and physical development of children. Domestic work with all the hazards of working with dangerous implements and fire, as well as working long hours, would be classified as hazardous work, especially when children aged less than 12 years are involved.

36. In Writ Petition No.1234 of 2004, the case of *Ain O Salish Kendra (ASK), represented by its Executive Director and another -VERSUS- Bangladesh, represented by the Secretary, Ministry of Labour and Manpower, Bangladesh Secretariat, Dhaka and others, (2011) 31 BLD 36* this Court dealt elaborately with regard to child labour and provisions of compulsory education giving recommendations as to how education is to be ensured for children of compulsory school age. It must always be borne in mind that children are not in a position to consent to work and work is forced upon them by the poverty of their family and the inability of their parents to adequately provide for them and ensure their food security and education.

Moreover, the lack of education of the children creates a vicious cycle of poverty since the children who are deprived of education can never hope to get out of the poverty cycle and can never hope to achieve anything in life other than menial work or becoming a burden upon the State joining the ranks of criminals. In order to break this vicious cycle of poverty it is essential that the government formulate policies which will ensure that the children of school-going age attend school and should, by strict government policy, restrain under-aged children from being employed and protected from being employed forcibly by their parents.

37. The stories which have been brought to our notice, as reported in the newspapers, quite clearly show the horrific results of children being engaged in domestic work throughout the country. It does not take too much imagination to realise the situation in which the children of tender years are taken away from their home, from the protection of their family and from the loving surroundings of their kith and kin and placed in a situation where they are confined effectively in servitude. They are far away from home with no one to turn to in case of need and when danger looms above their heads, and that is how they end up being tortured, raped and murdered. It is somewhat akin to the situation in the dark days of slavery when black Africans were rounded up from their homes, packed like sardines into ships and carried to far away America where they toiled in the houses of the white Americans. The slave trade has been long abolished. Sadly, we are far behind times and still engage in practices that are not far less than slavery. In fact the practice of 'দাসত্ব' or bonded labour is still prevalent in many parts of the country where children of the poor families are pledged to the rich on payment of lump sums of money. The poor and hapless children work for their masters until the loan is paid off. In the case cited

above, we directed that the practice of দাসত্ব or bonded labour must be ended immediately.

38. However, in a poor country such as ours, we cannot hope to eliminate overnight all the bad practices which have developed over centuries. The whole country is stricken by poverty, and children, being the most weak and vulnerable, are the easiest targets for forced labour and exploitation. In such a situation the government must ensure that any children taken away from their home are registered with the proper authorities so that their whereabouts can be traced. Each employer who takes on any domestic child worker, or even an adult worker must register the name and details with the local government units, namely the Pourashava or City Corporation. More importantly, there must be constant monitoring of the movement of these children perhaps from one household to another, particularly with the view to ascertaining and ensuring their physical security. To that extent we find the provisions highlighted in the জাতীয় শিশু শ্রম নিরসন নীতি, ২০১০ (National Child Labour Elimination Policy, 2010) to be in many ways beneficial for the children, if those provisions can be implemented. We, therefore, strongly urge the government to take immediate steps to implement the provisions of the National Child Labour Elimination Policy 2010.

39. So far as children between the age of 14 and 18 are concerned certainly they would not be of compulsory school-going age under the present legal scheme, but nevertheless the government policy must be such that opportunity should be made available to these children to continue studies, if they so desire and accordingly, their work hours must be geared in such a way as to enable their further education/vocational training. The provisions for registration of their movement and engagement in the domestic sector as workers must also be monitored strictly. Children between the ages of 14 to 18, who are engaged

in the domestic sector, will be incorporated automatically within the provisions of the Labour Act, if and when those provisions are amended in order to include within the definition of workers those persons of any age working in the domestic sector.

40. We note that within the Bangladesh Code (a compilation of laws in Bangladesh) there exists "The Domestic Servants' Registration Ordinance, 1961" which required all persons rendering domestic services within Kotwali, Sutrapur, Ramna and Tejgaon police stations of Dhaka district to report for registration with the Officer-in-charge of the respective police station within 15 days of taking up such employment. We are not aware whether that law was actually brought into force. However, it is obvious that the need for registration was felt even at that time. The present scenario, as apparent from the above discussion, makes it imperative to put in place a system of registration and monitoring of all persons engaging in domestic work. Inclusion of the domestic workers within the definition of 'worker' in the Labour Act will ensure that the workers in the domestic sector enjoy all the benefits within the labour laws. Only then will the mandate of the Constitution be fulfilled.

41. In the above facts and circumstances, we hereby direct the government as follows:

1. In order to make the provision and concept of compulsory primary education to be meaningful, we direct the government to take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is nec-

essary as a foundation for their future life.

2. Education/training of domestic workers aged between 13 and 18 must be ensured by the employers either by allowing them to attend educational or vocational training institutes or by alternative domestic arrangements suitable to the concerned worker.
3. We urge the government to implement the provisions mentioned in the National Elimination of Child Labour Policy 2010 published in the gazette dated 08.04.2010. In particular, we strongly recommend the establishment of a focal Ministry/focal point, Child Labour Unit and National Child Labour Welfare Council in order to ensure implementation of the policies as mentioned in the Policy, 2010.
4. We direct the government to include domestic workers within the definition of "worker" in the Labour Act, 2006 and also to implement all the beneficial provisions of the draft of Domestic Worker Protection and Welfare Policy 2010 as announced by the government.
5. The cases relating to the violence upon the domestic workers must be monitored and prosecution of the perpetrators must be ensured by the government. We note with dismay the disinterested and sometimes motivated way in which the prosecution conducts the investigation and trial procedure resulting in the perpetrators being acquitted or discharged or even remaining untouched due to the high position, which they hold in the society. The government has a duty to protect all citizens of this country, be they rich or poor. It must not be forgotten that the domestic workers



come from a poverty-stricken background and deserve all the more protection from the government and the authorities setup by the government.

6. In order to prevent trafficking, in particular, and also to maintain a track on the movement of young children from the villages to the urban areas, parents must be required to register at the local Union Parishad the name and address of the person to whom the child is being sent for the purpose of employment. The Chairman of the Union Parishad must be required to maintain a register with the details of any children of his union who are sent away from the locality for the purpose of being engaged in any employment. If any middleman is involved, then his/her name and other details must be entered in the register.

7. Government is directed to ensure mandatory registration of all domestic workers by all employers engaging in their household any child or other domestic worker and to maintain an effective system through the respective local government units such as Pourashava or Municipal Corporations in all towns and cities for tracking down each and every change of employment or transfer of all the registered domestic workers from one house-hold to another.

8. Government should take steps to promulgate law making it mandatory for the employers to ensure health check up of domestic workers at least once in every two months.

9. The legal framework must be strengthened in order to ensure all the benefits of regulated working hours, rest, recreation, home-visits, salary etc. of all domestic workers.

10. Laws must also ensure proper medical treatment and compensation by the employers for all domestic-workers, who suffer any illness, injury or fatality during the course of their employment or as a result of it.

42. With the above observations, recommendations and directions, the Rule is made absolute, without any order as to costs.

43. Before parting we wish to note our appreciation to BNWLA for bringing this very important aspect of our society to the attention of this Court. We also appreciate the invaluable assistance rendered by learned advocate Ms. Fahima Nasrin and the learned DAG Mr. Md. Motaher Hossain.

44. Let a copy of this judgment be communicated to the Ministry of Women and Children Affairs, Ministry of Labour, Ministry of Education and Ministry of Local Government and Rural Development at once. MMHS.

2011 BLD (HCD) 31  
Nozrul Islam Chowdhury, J  
SREE GANENDRA NATH MONDAL,  
SON OF LATE KAMAL CHANDRA  
MONDAL OF VILLAGE-DURGABATI  
P.S.SHYAM NAGAR. DISTRICT-  
SATKHIRA.

v.

SREE KALIPADA MONDAL SON OF  
LATE AMULLYA MONDAL OF  
VILLAGE- MADIYA, P.S.  
SHYAMNAGAR DISTRICT-  
SATKHIRA & ANOTHER.\*

*Assessment and evaluation of the evidence on record is the primary duty of the trial court as well as the appellate court as a last court of fact and more so when a judgment of the trial court is reversed by the appellate court, it is incumbent upon the appellate court to assess and evaluate the evidence by himself or itself and in the absence of such evaluation the judgment of reversal on the basis of finding of facts can not but be erroneous.*

Order 41 Rule 31 of the Code of Civil Procedure is a mandatory provision of law to be followed by the appellate court, in this regard, which mandates that in the event of reversal of the judgment by the appellate court in that case it is incumbent upon the appellate court to arrive at a finding upon proper assessment and evaluation of the evidence on record and then advert to the findings of the trial Court and in the absence of proper assessment and evaluation of the evidence on record mere reversal of the finding of fact will not do. The reversal of the finding of facts on the

basis of proper assessment and evaluation of the evidence on record while reversing the Judgment of the trial Court, is the mandate of Order 41 Rule 31 of the Code of Civil Procedure which must be followed by the appellate court which is the last court of fact.

Para—13)

The very task of sifting out the truth out of bundle of facts, the assessment and evaluations of the evidence on record is a recognized process.

Para—15)

Mr. Bivas Chandra Biswas. Advocate, for the petitioner.

Mr. P.C.Guha Advocate with Mr. Samiran Malick. Advocate, for the opposite parties.

Judgment delivered on 11 January, 2011.

#### Judgment

Nozrul Islam Chowdhury, J: The opposite party Nos.1 and 2 as pre-emptor brought Miscellaneous Case No. 59 of 1993 before the Senior Assistant Judge, Shyam Nagar, Satkhira seeking pre-emption of the case land under Section 96 of the State Acquisition and Tenancy Act claiming themselves to be co-sharers to the case holding by inheritance. In the said Miscellaneous Case two petitioners were impleaded as pre-emptees while opposite party Nos.3-25 were impleaded as other opposite parties in the said Miscellaneous Case being the necessary parties herein.

2. The Miscellaneous Case was contested by the pre-emptees upon filing written objection. Eventually the case was taken up for hearing by the learned Senior Assistant Judge, Shyam Nagar, Satkhira where three witnesses from each sides were examined in support of their respective cases before the trial court

\* Civil Revision No.4874 of 1998.