



Star LAW report

High Court cannot sit as a court of appeal in writ of certiorari

**Appellate Division (Civil Jurisdiction)
The Supreme Court of Bangladesh
Civil Appeal No 51 of 1996
Bangladesh Tobacco Company Limited and another
v
Md Azizul Huq and another
Before Justice Mahmudul Amin Choudhury, Chief Justice,
Justice Md Ruhul Amin and Justice Abu Sayeed Ahammed
Date of judgment: May 11, 2002
Result: Appeal allowed**

Background

Mahmudul Amin Choudhury C J: This appeal by leave is against judgment and order dated 31st July, 1996 passed by a Division Bench of the High Court Division making the Rule Nisi absolute in Writ Petition No 2607 of 1992 and further directing the appellants-company to reinstate respondent No. 1 in his service with 50% back wages.

The short fact leading to this appeal is that respondent-writ petitioner was earlier appointed as General Clerk (Seasonal) in 1967 by the appellant-company and was subsequently promoted to the post of Assistant Supervisor (Field) in 1973 where subsequently he was confirmed. On 29.9.1978 he was charge sheeted by the management for committing theft, fraud or dishonesty in connection with employer's business or property under section 17(3)(b) of the Employment of Labour (Standing Orders) Act, 1965. It was alleged that on 11.3.1978 respondent recognized three farmers of Alamdanga buying centre of the company which purchased 13,545 pounds of tobacco from those farmers though they were not registered with the company and the respondent showed fake registration numbers of those farmers. Respondent then submitted his explanation on 2.10.1978 denying the charge made against him which was subsequently found to be not satisfactory and a domestic inquiry committee found him guilty and ultimately respondent-writ petitioner was dismissed from service on 25.11.1978. Having received no reply as to his grievance petition on 12.12.1978 respondent filed Complaint Case No 29 of 1979 in the Labour Court, Khulna alleging inter alia that the proceeding against him is illegal and mala fide and he was not given any opportunity to explain his position in relation to the charge nor was allowed to produce witness in support of his case and to disprove the charge. In the Labour Court it was prayed that dismissal order is illegal, mala fide and further that a declaration be made that he was still in service.

The present appellants entered appearance before the Labour Court and submitted that respondent was rightly dismissed from service after a proper inquiry in which he was found guilty of the charge. The Labour Court found that the relief as prayed for by the respondent cannot be given as it was not a civil court and that the respondent has not prayed for reinstatement in service with back wages. The Labour Court was not in a position to grant any relief even though dismissal was not tenable in law and with that finding dismissed the case. Respondent then moved the High Court Division in Writ Petition No 230 of 1982 wherein a Rule was issued but due to proclamation of Martial Law on 24th March, 1982 the writ petition abated. Thereafter with the lifting of Martial Law respondent No. 1 again filed Writ Petition No 2607 of 1992 wherein due to the absence of the appellants' Advocate the matter was heard ex parte and the Rule was made absolute in the terms as aforesaid.

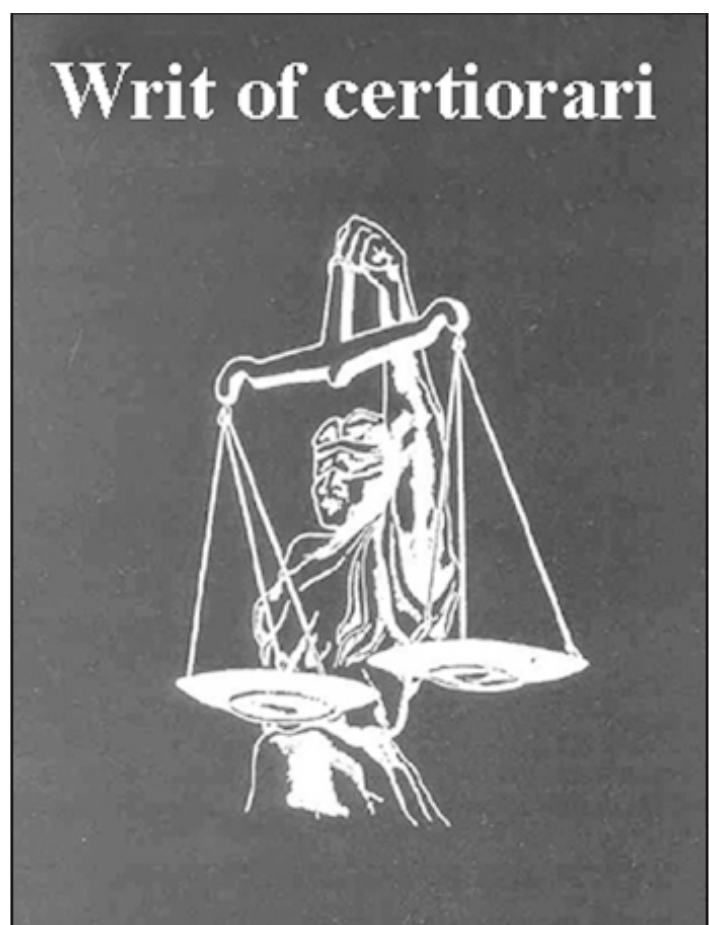
While making the Rule absolute the High Court Division observed that the Labour Court was competent to pass any appropriate order granting relief to the respondent. It could pass any order as it deems just and proper and it might in appropriate cases order for reinstatement of any complainant. The High Court Division also observed that respondents' prayer for the relief though made in a declaratory form was in essence a prayer for reinstatement in service with full back wages. It was further observed that the Court or Tribunal is constituted to do justice to the parties and not to throw away a case on technical ground. It was observed that people who come to take justice from a Labour Court are mostly illiterate persons and a defect in the prayer portion should not stand in the way of giving relief to a worker when his complaint is found to be correct. The learned Judges ordered for reinstatement of the respondent with 50% back wages as noticed above.

Leave was granted to consider the following:

"Mr. Md. Khalilur Rahman learned Advocate for the petitioners submits that although the high principles as above can not be disputed, the High Court Division nevertheless acted in excess of its jurisdiction under Article 102 of the Constitution in arrogating to itself the powers of an appellate court over the decision of the Labour Court and granting a relief to the respondent which lies squarely in the discretion of that court. He submits that if there was a failure on the part of the Labour Court in granting relief to the respondent under the law the only course open to the High Court Division was to send the case back to the said court for passing an order in accordance with law. In any event he submits that the High Court Division was not justified in passing the order for reinstatement of the respondent in service with 50% back wages after a lapse of 18 years from his dismissal from service following a proper departmental enquiry."

Deliberation

Mr. Md. Khalilur Rahman, learned Counsel appearing on behalf of the appellants led us through the judgement of the Labour Court as well as of the High



Court Division and submits that the Labour Court in passing judgment dated 27.1.1982 found after consideration of the materials that though the order of dismissal was not tenable in law but the labour Court found that the declaratory relief as prayed for by the respondent could not be given as it was not a civil court and that the respondent not having prayed for reinstatement in service with back wages the Labour Court was not in a position to give any relief even though the order of dismissal was not tenable in law and with that finding dismissed the complaint case. But the High Court Division acted like an appellate court and ordered for reinstatement of the writ petitioner-respondent with 50% back wages though legally respondent was not entitled to any such relief. It is submitted that when there was proper inquiry by

the department and when there was no prayer for reinstatement before the Labour Court the High Court Division acted beyond jurisdiction in making the Rule Nisi absolute. Mr. Md. Khalilur Rahman in support of his submission placed reliance in the case of Bikash Ranjan Das Vs. The Chairman, Second Labour Court, Dhaka and others reported in 29 DLR (SC) 280 wherein it has been held that when an order of domestic tribunal is challenged all that the court is to see is that whether the charge framed against the delinquent was such as constituted an offence or default which calls for a penal action and that the employee was given an opportunity to defend himself in allowing him to cross-examine the witness and to call evidence in his support and that the tribunal was constituted by impartial person and that there were materials before the domestic tribunal to come to a finding and it has also been held that the domestic tribunal is not bound by the Evidence Act and the expression used by it cannot be attributed to as if it were a civil Court. It is only to be seen whether the employee did make any statement and if from that statement a conclusion could be drawn by the domestic tribunal or not. That it has further been held that a different conclusion is possible is no ground for interference. Mr Md. Khalilur Rahman also placed reliance in the case of Ayesha Salahuddin Vs. Chairman, 2nd Labour Court and another reported in 32 DLR (AD) 68. In that decision it has been held that the jurisdiction in the nature of certiorari is exercised by the High Court Division to issue such writs where the subordinate Tribunals acted wholly without jurisdiction or in excess of it or in violation of the principle of natural justice or refused to exercise jurisdiction vested in them or where there is an error apparent on the face of the record. It has also been held that the jurisdiction in the nature of certiorari is not so wide or large as to enable the High Court Division to convert itself into a court of appeal and examine for itself materials to come to a new finding and substitute it with finding of the tribunal whose judgement is under challenge. Mr Khalilur Rahman placing reliance on these two decisions submits that the High Court Division acted illegally and without jurisdiction in making the Rule Nisi absolute directing reinstatement of the respondent with 50% back wages for which the writ petitioner has not made any prayer before the Labour Court.

Mr. Mansur Habib, learned Advocate appearing on behalf of the respondent submits that though the respondent has not prayed for reinstatement with back wages before the Labour Court but the High Court Division is competent to give the relief by way of reinstatement with back wages as in the Labour Court the following payer has also been made "any other relief or reliefs may be awarded in favour of the petitioner including his back wages to which the petitioner is entitled in law and equity" and even in such a case the High Court Division could have sent back the case to the Labour Court for giving proper relief.

Admittedly respondent No. 1 has not prayed for his reinstatement in service with back wages, relief sought for is in declaratory form and the Labour Court found that such relief is not available to the respondent even though he has a good case for directing reinstatement. It appears from the perusal of the record that the Labour Court found that the respondent has a case but because of wrong prayer no relief can be granted. The High Court Division on the other hand granted relief by way of reinstatement. In view of the aforesaid decisions of this Court we hold that the High Court Division was not justified in passing the order of reinstatement of the respondent in service with 50% back wages. The High Court Division acted beyond jurisdiction. It is well settled that the High Court Division cannot sit as a court of appeal in such matters and act as a civil appellate authority. The law on the point has been very clearly expressed in the aforesaid two decisions of this Division and there is nothing to differ with these decisions.

Decision

In view of the aforesaid we hold that the High Court Division committed wrong and illegality in making the Rule Nisi absolute and as such it requires interference.

The appeal is, accordingly allowed judgement and order dated 31st July 1996 passed by the High Court Division in Writ Petition No. 2607 of 1992 is hereby set aside and the Rule earlier issued is discharged.

Mr Md Khalilur Rahman, Advocate (Mrs. Syeda Afsar Jahan, Advocate with him), instructed by Mvi Md Wahidullah, Advocate-on-Record for appellants. Mr Mansur Habib, Advocate instructed by Mr Md Nawab Ali, Advocate-on-Record, for respondent No.1.

HUMAN RIGHTS advocacy

Parents should talk to their teenage children to keep them on the right

SALEHA BEGUM

ONE morning this summer Juni, a Class VI student, failed to go to her school. She suffered a sudden bout of vomiting soon after she finished her breakfast. The illness surprised her mother, a middle class homemaker. She was suspicious too.

The mother's suspicion came true when a doctor revealed that her daughter was pregnant. "How come... I don't believe it," the mother protested in a trembling voice.

Angry and ashamed, the mother brought her daughter back home and allowed her another day to come to terms. Next day, the mother talked to the girl for hours to know what had actually happened. Juni blamed the unwanted pregnancy on the rickshaw-puller who the family hired to carry her to school. Juni told her mother how she got into the trouble. One day that summer she found her undergarments soaked with blood on her way to school. A panicked Juni sought help from the young rickshaw-puller who told her that he knew how to stop it. The man took her to his slum home, where she had sex with the girl. The rickshawwallah continued the trick with the girl for several weeks. Juni never discussed the matter with any one else.

Reports of sexual abuse of adolescent girls and elopement of girls with their boyfriends have become common these days because of guardians' lack of awareness and absence of sex education in Bangladesh.

It was about 6 in the morning. Everyone in the family of Rehnuma Perveen Luna left their beds, expect Luna. Her mother went to wake her up, but Luna was not there in her room. Everyone started looking for her but she was nowhere.

Instead a letter was found left on Luna's table. It was full of complaints against her mother. But in the letter she did not mention where she had gone. Her father searched railway station, bus and launch terminals, hospitals and the houses of Luna's friends desperately looking for her, but he didn't find her. Three days later they came to know that Luna was staying with one of her boyfriends in Jessore. She was later brought back to Dhaka. Since then, Luna has never received the treatment from her family members she used to do before this incident.

Mesbahul Alam Sajal, a class X student, has been behaving unusually for the last few months. Having failed to find out the reasons, his parents took him to a doctor. After a marathon sitting, Sajal admitted to the doctor that he has been taking drugs and accused some of his bad friends of encouraging him.

He told the doctor that he started seeing changes in his body when he was a student of class VIII and experienced night pollution occasionally. He later disclosed all this to his friends and they provided him with some porno magazines. They gradually inspired him to take drugs.

The three characters have three different stories. However, they have one

thing in common: negligence or lack of care from their families. The time when a boy or a girl transforms from childhood to adulthood is called adolescent age in our society but the UNICEF terms it as "Storm-Stress" and it happens from 10 to 20 years.

Doctors say that the children from 9 to 14 years of age are seen restless because of changes in their bodies and minds.

According to the 1991 Bangladesh census, the number of 9-14 age group children in the country is about 1.57 crore and among them 73.67 lakh of them are girls. Most of these children face various problems, including sexual abuse, for lack of proper guidance and sex education.

Sultana Pervin, a homemaker, says parents in our country are unable to become free and frank with their children and they never discuss with them many important things what they need to learn at their adolescent age. "They think that their kids will get spoiled if they discuss with them sex-related problems one faces at this age. I think it's a wrong attitude," Sultana says.

"The problem is worse in rural areas, where most families are illiterate," says she. Sharmin Akhter, another class X student, says her mother never inquires about her problems she needs to discuss with her. "So I have to depend on friends to know about physical problems and changes although they are ignorant like me," Sharmin says.

A 1997 study conducted by Breaking The Silence, a non-government group, reveals that the children of 9-14 age group, both in urban and rural areas, are widely abused and the girl children are the worst victims. Among its 50 respondents, the NGO found 46 of them abused in one way or the other by the members linked with their families.

Dr Anisa Jahan, a pediatric and consultant of Child Development and Neurology Institute at Dhaka Shishu Hospital, says the adolescent period is equally promising and vulnerable for children.

Monwara Pervin, psychologist of the Shishu Hospital, says the guardians and other family members should be friendly with adolescent boys and girls at this crucial period. They need to be frank to know their problems and help them get over those. "The guardians can also engage their kids in various extra-curricular activities to keep them away from bad associations," she said.

Rokeya Mannan, Headmistress of Agrani School and College, emphasises the importance of sex education to make children aware about physical changes at adolescent time so that they can protect themselves from sexual abuses.

NewsNetwork

LAW letter

Law students of colleges should be invited to human rights summer school



ELCOP (Empowerment Through Law of the Common People) arranged 11 days long 3rd Human Rights Summer School at BARD in Comilla. The summer school began on 11 December and came to an end on 22 December last year. About 48 students from the four universities of the country participated the summer school. The theme of the summer school this time was 'Human rights and development; who can be a human rights lawyer and what can be expected from him/her?' I liked the idea of the summer school (though I could not understand why it was named as summer school when it was held in the early winter). Activities like this one will definitely increase awareness about human rights among lawyers and general people. Initiatives like this should be welcomed.

However, in my view, the 3rd summer school had a flaw. Though law students of all the four universities participated the school, there were no law students of colleges. Not only the law students of the country become lawyers. Lots of students obtain LL.B (pass) degree from different law colleges under the National University and then become lawyers. In fact, the number of practicing lawyers of different bars of the country is larger than the number of lawyers who come from universities. So, law students of different colleges should have been invited to the summer school. Law students would zealously attend such school and it would add to their knowledge of human rights. I hope the next human rights summer school would invite law students of different colleges of the country together with the university students.

MA Hasan
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Judge Court, Narayanganj

LAW week



Violation of human rights in 2002

About 1,246 persons were died, 8,741 were injured and 5,717 were arrested in relation to violation of human rights during the period of 1st January to December 31, 2002. Among the deceased 454 were children. The statistics are revealed by a report prepared by "Odhikar" a human rights organisation based on newspaper report. According to the report 143 children committed suicide, 171 persons were trafficked and 72 were subjected to acid attack during the period. Dowry related crimes also increased in this period. About 190 deaths have taken place of which 29 were suicidal death. About 90 persons were subjected to torture for dowry, 1,350 women and children were subjected to rape during the period, the report revealed. The report further said that about 104 persons were died in jail and police custody. Besides, 83 persons were died in the hands of the law-enforcing agency, 40 people died in army custody during the ongoing Operation Clean Heart started from 17 October across the country. The report shows that death in the hands of law enforcing agency increased in the year of 2002. -Law Desk.

Army to be deployed during UP polls

Army will be deployed during the election of the union parishad in aid of the civil administration to ensure free, fair and peaceful election. The decision came on a meeting of the Election Commission chaired by the Chief Election Commissioner. The election of the lowest tier of local government will take place between January 25 and march 16 of the ensuing year. If Operation Clean Heart comes to an end during this time army will be called out to help the civil administration again during the election. -News Today, 31 December.

UAE bans use of children as camel jockey

The United Arab Emirates (UAE) has banned the use of children as camel jockey in its popular sport of camel racing. A spokesman of the UAE embassy briefed it in a campaign against the use of children in sports launched by "Angiker Bangladesh". The ban was ordered by Sheikh Hamdan Bin Zayed Al Nahyan, chairman of the Emirates Camel Racing Federation and Minister for Foreign Affairs of UAE. The UAE has banned use of children as camel jockey respecting continuous requests from the Government and different NGO's of Bangladesh. Every year hundreds of Bangladeshi children are trafficked to UAE to be used as camel jockey. The ban now bring an end to such trafficking, concerned people expect. -Law Desk.

Judiciary must be separated

Chief Justice Mainur Reza Choudhury has said that the judiciary must be separated from the executive as per the direction of the Appellate Division of the Supreme Court. There is no alternative, he reiterated while addressing the Convention of Bangladesh Ain Samity at Dhaka University. He said that the Constitution is the solemn expression of the people and the Appellate Division directed for the separation in order to establish rule of law in the society. Three years have been passed but the government fails to comply with the direction, causing the anxiety of the people. The separation of judiciary can help establish rule of law in the society but the vital role should be played by the lawyers and the judicial officials of the judiciary, he further said. -Prothom Alo, 28 December.

Counter intelligence to fight corruption of police

The government plans to form a counter intelligence department to combat corruption of police. A working group was formed earlier to make the draft policy in this regard. The working group after examining the activities of intelligence department of three countries and present condition of the police department has finalised the draft policy. The draft policy will be submitted to the cabinet committee soon. -Inqilab, 29 December.

Undertrial prisoners languishing in Ctg jail

4,500 under trial prisoners are languishing in Chittagong jail. Some of them have been serving different jail terms but others are languishing in the prison since their arrests. Of the undertrial prisoners 128 are women and 29 are children. They are living in inhuman condition in Chittagong Central Jail, which has a capacity of only 1000 inmates. Of the 4,500 prisoners of Chittagong jail 500 were convicted and the rest are under trial prisoners. -Daily Star, 28 December.

10 thousand arrested in Operation Clean Heart

About 10 thousands and 400 people were arrested by the joint forces during the Operation Clean Heart commenced from 17 October 2002. Among the arrested people 2,287 were the listed criminals and 7,820 were non-listed criminals. The rest 293 were arrested on mere suspicion. The joint forces of Military, Police and BDR launched 50 thousands and 258 operation during the operation clean heart. About 40 persons were reportedly died during the operation. -Jugantor, 30 December.

Frustrating special laws

Speakers of a seminar said that the special laws of the country enacted to combat certain crimes failed to do so specially in the case of violence against women and children. The seminar on "present criminal proceedings under special laws assisting the rights of the citizens and also effecting the effectiveness" was organised by Bangladesh National Women Lawyers Association (BNWLA). The key note paper of the seminar presented by Fawzia Karim revealed that enactment of special laws like Acid Control Act, 2002 and Prevention of Women and Child repression Act, 2002 has virtually failed to contain violence against women. Arrest without proper investigation is one of the loopholes of the laws. Improper use of the special laws by the lawyers is another problem of the laws, she added. Unawareness and improper use of the special laws by the law enforcing agencies and lawyers community wanes the effectiveness of the laws, the keynote paper observed. Most of the cases filed after a long period of the commission of incidence when the evidence is abolished. -Bhorer Kagoj, 31 December.

Rapid action team into operation soon

Newly formed Rapid Action Team will begin its action from the last week of January 2003. It has been formed recently by the government to combat crimes especially after the withdrawal of the joint forces engaged in anti crime drive across the country. The team comprising 144 members is now taking commando training in Rajendrapur Cantonment. The team consists of 96 Constables, Naiks and Habildars, 36 Inspectors, Sergeants and Sub-inspectors and 14 officers from Assistant Superintendent of Police (ASP) to Superintendent of Police (SP) level. The team will be divided into two groups, each having 11 members headed by ASP. Each group consists of one ASP, one Inspector of police and one Sub-inspector of police, two Habildars or Naiks and six Constables of police. The Rapid Action Team will commence its action initially in Dhaka metropolitan area under the supervision of Dhaka Metropolitan Police (DMP). Sophisticated firearms and modern vehicles will be supplied to the team. The government will also provide all logistic support to it. Subject to its success such teams will be formed in other metropolitan cities of the country later on. -Daily Star, 30 December.

Indian SC declares strike of lawyers illegal

Indian Supreme Court has declared the strike of lawyers as illegal. It has declared that lawyers have no right to go on strike or call for boycott, not even on a token strike. This observation was made by a five judge's constitution bench of the Apex Court. Referring to problems listed by bar council for the reasons behind the strike of lawyers the bench said that the bar may be concerned about such things but there can be no justification to paralyze administration of justice. Article 145 of the Constitution of India and section 34 of the Advocates Act give the Supreme Court and the High Courts to frame rules regarding conditions on which a person including an advocate can practise in the Supreme Court or higher courts and courts subordinate thereto. The right of the advocate to practise involves a lot of acts to be performed by him in discharging his duty. -Daily Star 28 December.

Corresponding Law Desk

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