LAW & our rights

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"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW" -*Article 27 of the Constitution of the People's Republic of Bangladesh*

Star JUDGMENT *review*

Judgement on Sections 54 and 167

The onus is on civil society now

SHAHDEEN MALIK

THE recent judgement on Sections 54 and 167 of the Code of Criminal Procedure has been widely reported in the media, both print and electronic. The salient features, particularly the 15 directions of the judgement, have been printed verbatim in English, and in translated version by some of the Bengali national dailies. The main content of the judgement, thus, has become reasonably known. However, in addition to the 15 directives, the judgement also interprets a good number of other important legal issues. This write-up, therefore, attempts to draw attention to those aspects to indicate that a path breaking judgement such as this needs active and meaningful engagement by the civil society to realise the path of freedom for citizens charted by the judgement.

We can hardly expect our police and government to be over-zealous in ensuring these rights of arrested persons, elaborated and interpreted in this judgement. It would be upto the civil society to be vigilant that these rights are not curtailed in any manner. Understandably, enforcement of these rights would not come about in one day or simply because the judgement says so. It can materialise only if the civil society takes upon itself the task to see that these are realised.

About the judgement

Formally, the judgement was delivered in Writ Petition No. 3806 of 1998 in the case of Bangladesh Legal Aid and Services Trust (BLAST) and others vs Bangladesh. As the number of the case indicates, it was filed in 1998, a few months after the death of Rubel in police custody. Brutal torture of Rubel, a young student of the Independent University of Bangladesh, by police in custody as well as near his house and in front of his relatives led to widespread public condemnation and outcry, compelling the then government to set up an inquiry commission. A number of police personnel who were seen to beat up Rubel in front of his relatives were later prosecuted.

The judgement was delivered by a Division Bench of the High Court Division comprising of Mr. Justice Md. Hamidul Haque (the author judge) and Ms. Justice Salma Masud Chowdhury on the 7th April 2003. One of the most important and immediate impact of the judgement would be on the recent alarming practice of arrest on suspicion under section 54, followed by preventive detention under the Special Powers Act, 1974. Until this very recent wide spread abuse of section 54 as a preliminary step for issuing detention order under the Special Powers Act, 1974, a person arrested on suspicion under Section 54 would have normally been produced before the Magistrate within 24 hours and, normally, he would have been granted bail or discharged if police did not or could not come up with specific allegation of wrong doings against him. However, in recent months, police started to produce persons arrested under Section 54 before the concerned Magistrates with request to send the persons to jail on the plea that detention orders are being issued or would be issued by the Home Ministry within a day or two. In recent well known cases such as those of Dr. Mohiuddin Khan Alamgir, Montassir Mamun and others (including the journalists), the initial arrest was under Section 54, followed by detention order under the Special Powers Act, 1974.

In fact, as has been reportedly mentioned in the print media that of the 11,000 or so persons arrested during the joint-drive of a few months ago, there were no specific allegations of wrong doing/crime against around 8,000 of those arrested. Most of these 8,000 or so persons arrested by the army were routinely shown by the police to be arrested under Section 54, and then they were detained through preventive detention orders issued by the Home Ministry under the Special Powers Act, 1974. Most people who do not frequent the corridors of the Supreme Court are probably not aware of the fact that the joint drive led to the filing of at least 5,000 detention writs against these preventive detentions, horribly clogging up the already over-burden High Court Division.

The enactment of the 'Indemnity Act', following this joint-drive and alleged cruel murder of many innocent persons in custody have diverted our attention from the fact that not even one fourth or so of the persons arrested have been prosecuted for crimes. Most have already been released by the High Court Division, following the writs filed against the preventive detention order.

The bottom line is that thousands of innocent people had to spend a considerable period of time in jail, for no fault and for no rhyme or reason. In a functionally democratic country, such an indiscriminate assault on the liberty and freedom of innocent citizens would have surely led to very serious repercussions for the government. For us, we don't even get any numbers or figures of the persons prosecuted, or at least in the process of prosecution and trial, following their arrest by the joint-forces during their drive. All we got, instead, was that around 8,000 persons were arrested, many of whom were mercilessly beaten and tortured, and then detained for months for no fault whatsoever. The police or the joint-forces could not come up with any reasonable allegation of criminal activities against these persons. Thus, on the one hand, thousands of innocent persons were brutalised, and on the other hand, the perpetrators of these brutalities have been indemnified.

The judgement on section 54 and Special Powers Act, 1974 held that:

"A person is detained under the preventive detention law not for his involvement in any offence but for the purpose of preventing him from doing any prejudicial act. So there is no doubt in our mind that a police officer can not arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54. If any authority has any reason to detail a person under section 3 of the Special Powers Act, the detention can be made my making an order under the provisions of that section…."

Compensation issue

Another far reaching proposition of law enunciated in the judgment is the issue of compensation for victims of torture and cruel and inhuman treatment by the police. Our Constitution, needless to say, prohibits torture or cruel, inhuman or degrading treatment. However, instances of torture, particularly on remand, are routine. Hence, the Court posed the question whether it is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. In answering this question, and relying on Indian precedents, the Court held that:

"…where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case there is scope for awarding compensation to the victim and in case of death of a person to his nearest relation."

Basis of the judgement

The crux of the judgement is, of course, on sections 54 and 167. Section 54 of the Code of Criminal Procedure empowers any police officer to arrest a person. Subsection (1) of this section 54 has been the main provision which has been abused by the police as this sub-section provides that the police can arrest a person if (a) the person has been concerned in any cognizable offence, or (b) against whom a reasonable complaint has been made, or (c) credible information about his involvement in crime has been received, or (d) there is a reasonable suspicion about his involvement in a crime. This last part -- there is a reasonable suspicion about a person's involvement in a crime -- is what enables police to arrest anyone, claiming that the police had suspected the person of being involved in crime. Police can arrest anyone on this suspicion which, until this judgement was not limited by any criterion or ground of reasonableness of suspicion. To limit the abuse of police power, the judgement laid down that if a person is arrested on suspicion:

"… the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognisable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information …"

Any suspicion now, after the judgement, is not good enough. The arresting officer has to record all the relevant information which led to his suspicion. The judgement distinguished between suspicion and knowledge. "A police officer can exercise the power if he has definite knowledge of the existence of some facts and such knowledge shall be the basis of arrest without warrant," further emphasising that "There can be knowledge of a thing only if the thing exists." The 'suspicion', which has been abused and misused by the police as the reason for arrest, can no longer, after this judgement, be an indefinite and undefined guess or imagination or whim of the police. The judgement elaborated:

"If a person is arrested on the basis of 'credible information', nature of information, source of information must be disclosed by the police officer and also the reason why he believed the information. 'Credible' means believable. Belief does not mean make-belief. An ordinary layman may believe any information without any scrutiny but a police officer who is supposed to posses knowledge about criminal activities in the society, nature and character of the criminal etc., cannot believe any vague information received from any person. If the police officer receives any information from a person who works as 'source' of the police, even in that case also the police officer, before arresting the person named by the 'source' should try to verify the information by perusal of the diary kept in the police station about the criminals to ascertain whether there is any record of any past criminal activities against the person named by the 'source'.

…… Use of the expression 'reasonable suspicion' implies that the suspicion must be based on reasons and reasons are based on existence of some fact which is within the knowledge of that person. So when the police officer arrests a person without warrant, he must have some knowledge of some definite facts on the basis of which he can have reasonable suspicion."

After arrest on such suspicion, which now has to be grounded on known fact and knowledge and these grounds have to be recorded by the arresting police, the person arrested must be informed of the grounds for which he has been arrested. After any arrest, the Constitution provides that the arrested person shall not be denied the right to consult and to defend himself by a legal practitioner of his choice.

Changing scenario

What usually happened until now is that after arrest on vague and undefined 'suspicion', police would keep the person in police/thana custody and produce him to the Magistrate within 24 hours without any obligation of informing the person of the reasons for his arrest, nor communicating the fact of his arrest to any relative or friend of the arrested person and the arrested person would not be allowed to talk to a lawyer. Now all these would have to change: (a) the arrested person has to be informed of the reasons for his arrest; (b) the police would have to inform a friend or relative of the person arrested, unless he is arrested from his home or work place (the assumption is that in such an instance of arrest his relatives/friends would know of the fact of arrest and take appropriate measures); and (c) the arrested person must be allowed to consult a lawyer, if he so chooses. The judgement emphasised

"We like to give emphasis on this point that the accused should be allowed to enjoy these rights before he is produced to the Magistrate because this will help him to defend himself before the Magistrate properly, he will be aware of the grounds of his arrest and he will also get the help of his lawyer by consulting him. If these two rights are denied, this will amount to confining him in custody beyond the authority of the constitution."

These are very important propositions of citizens' charter of liberty, which would now be our duty to safeguard and preserve.

Civil society's duty

Our governments, past and present, and their police perceive themselves in terms of the power they have to arrest and harass citizens, and not in terms of striving to ensure and enlarge rights and liberties of citizens. There are historical exceptions of a society or two which had prospered in the midst of non-freedom and rightlessness. But, generally, the world does not have many instances of advancement of societies where rights and liberties of citizens were not ensured first. Economic development and prosperity follow liberty and not the other way round.

We can hardly expect our police and government to be over-zealous in ensuring these rights of arrested persons, elaborated and interpreted in this judgement. It would be upto the civil society to be vigilant that these rights are not curtailed in any manner. Understandably, enforcement of these rights would not come about in one day or simply because the judgement says so. It can materialise only if the civil society takes upon itself the task to see that these are realised.

Dr. Shahdeen Malik is an advocate of the Supreme Court. He will discuss the other aspects of the judgement relating to restriction on remand and offered guidelines for the government to amend the relevant laws in the second part of this write-up, next week.

LAW *opinion*

Expanding ADR

Legal resource has to be developed

MD. NUR ISLAM

THE causes of backlog and delay of suits and cases in our country are systematic and profound. The legal system's failure to impose the necessary discipline at different stages of trial of cases allows dilatory practice to protract the case life. Today the legal system is ossified to a point and slow to the degree where they can not flexibly assist the litigants in resolving their dispute easily and quickly. Outside the subcontinent legal cultures in Singapore, Hong Kong, Australia, England and many other countries have already introduced different alternative Dispute Resolution (ADR) methods to settle disputes outside the court. Remembering that a litigant is justifiably interested in results and procedural niceties, efforts became absolutely necessary to accelerate the disposal of cases and to reduce the backlog of cases.

Taking this view in mind the alternative dispute resolution system has been introduced and developed in our country beside the formal justice system in order to eliminate the endless sufferings of the poor litigants. This new device can be developed by practising dispensation of justice in traditional methods like mediation, conciliation, and arbitration for a long period of time. Here role of individual is less significant and group/community gets emphasis in such system. Thus violation of an individual's right is violation of the right of the community/group to which he belongs.

Objectives of ADR

In the recent past the alternative dispute resolution system (ADR) has been developed in the USA and the rate of success of ADR is significantly high, as the parties have been able to come forward to sit together to talk together and finally resolving their disputes. The prime aim of alternative dispute resolution system in civil justice delivery system in Bangladesh is closing the hostility between the disputing parties and restoration of harmony. In this system a high degree of public participation and co-ordination is badly needed. A general sense of satisfaction develops which helps in enforcement of the decision, when people's participation is ensured as to tending evidence, asking questions and making opinions. Thus the reconciliation can be eased, which is the fundamental objective of ADR system.

CPC, Artha Rin Adalat Ain, 2003 & ADR

For the first time in our legal system the provision with regard to ADR has been introduced by amending the Code of Civil Procedure. In chapter V of Artha Rin Adalat Ain, the provisions of ADR have also been incorporated. Surely, this concept is a denovo in our civil justice delivery system. Now ADR has come within the domain of civil procedure code.

By the recently enacted sections 89A/89B of CPC, the ADR system

(mediation and arbitration) has been introduced, the two terms 'mediation' and 'arbitration'. Section 89A lays down that except in a suit under the Artha Rin Adalat Ain, 1990 (Act. no 4 of 1990) after filing of written statement, if all the contesting parties are in attendance in the court in person or by their respective pleaders, the court many by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or the party or parties, where no pleader or pleaders have been engaged, or to a mediator form the panel as may be prepared by the District Judge under subsection 10, for undertaking efforts for settlement through mediation. Similarly, the term 'settlement conference' has been used to denote mediation process in the part V of Artha Rin Adalat. The provisions have been made in this regard that the court can mediate the suit matter after filing the written statement by the defendant or defendants, by adjourning the subsequent procedures of the suit.

Remarkable features

In terms of section 89A, the normal 'mediation' process is supposed to be applied and in case of the section 89B with regard to Arbitration the dispute shall be settled in accordance with Salish Ain, 2001 (Act. no. 1 of 2001) so far as may applicable.

Conversely, in Artha Rin Adalat Ain as stated in part V of the same, the presiding judge will call upon a settlement conference with regard to the same.

The settlement conference will be held in camera in Artha Rin Adalat Ain, whereas no such camera provisions were included in section 89A and 89B of the civil procedure code.

The explanation in respect of mediation and settlement conference has been clearly stated in the acts.

Some drawbacks

Our society has not been matured enough to accept the notion of ADR system. So it has to face some drawbacks in many respects. Attempts in various countries to incorporate virtues of ADR system into the formal one have generally failed. In our context, it can be said that due to introduction of ADR system in the Artha Rin Adalat Ain, some corrupt government officials/employees in the financial sector may be elite to indulge themselves into more corruption and irregularities. And as such the government may incur severe financial loss, injury and irregularities. Resultantly, our development process may be hindered or be depressed. By taking this legal protection the parties may make a foul play with the help and collaboration of the employees of the financial sectors. Secondly, the provisions are there in the Acts relating to refund of the court fees paid by the parties in respect of plaint or written statement and parties are entitled to such refund. The government may face heavy loss in respect to procurement of court fees. In our country, the judicial sector has yet not been declared as 'service sector' and as such the court fee provision is a must. Thirdly, in case of granting adjournment of proceeding/hearing the provision is made that only one adjournment could be allowed. But with heavy cost further adjournment hearing could be granted.

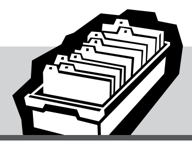
In this sphere, the two terms 'sufficient' and 'reasonable' appear to be absent but we have still got no alternative of these two terms. Justice cannot be mode of the infliction of injustice one should remember this. Apart from this, one may side with the weaker party where the stronger insists on excessive compensation or refuses to accept a reasonable demand for compensation.

Concluding remarks

Alternative facility in Bangladesh is yet to take a meaningful uplift. But this newly enacted provisions facilitating the ADR system in your justice delivery process is highly appreciable which will open a new horizon in our legal firmament. For meaningful expansion of ADR in Bangladesh legal resource has to be developed among the rural poor by providing them with alternative lawyers and judge. The next step would be for the society to come forward to accept change of traditional legal procedure. Only reformative thinking, new values, new projection and positive outlook with determined action can achieve this.

Md. Nur Islam is Assistant Judge, Rajshahi.

FACT *file*



Harassment of women at workplace

FARID HOSSAIN

On her first day at work at a garments factory nothing spectacular happened to Rokeya. When she struggled with her sewing machine, she found by her side the factory's chief supervisor. The man, who Rokeya thought was his father's age, sat beside her high stool trying to help her cope with the thread and needle. She found nothing wrong when, after a few minutes of help, the man patted her on her shoulder and promised, "Don't worry. I'll be here whenever you need me."

The scene kept repeating. The supervisor began volunteering assistance to Rokeya even when she did not need it. He would occasionally ask her to stay back even after her work assuring her to provide some extra lessons about cutting and sewing. "You have talents," the man would tell Rokeya, a beautiful woman with dark large eyes set on a round face. Then one late night this winter when some 30 other workers had left Rokeya's floor the supervisor arrived, - his eyes red from a bout of drinking. With a lightning speed the man grabbed her by the waist and planted a kiss just in time to stop her screaming. She struggled hard to slip out of the man's clutches and ran out of the building weeping. It did not take long for her to realise that she could not go home that late in the night. So, she went to another floor upstairs where she found several other women still at work.

Next day, Rokeya did not turn up at her work. When co-workers pressed to know the reason she told them about the supervisor. Rokeya was stunned when her roommates told her to forget the night and return to work. "It has happened to many of us," said one. Others nodded. Roekya's colleagues were right.

At least 30 percent of female garment workers have heard of sexual assault in their factories, according to a recent survey conducted by Dr. Dina M Siddiqi, a fellow of Dhaka-based Centre for Police Dialogue. And 27 percent of female garment workers reported physical harassment at their factories, says the study on "Globalisation, Sexual Harassment and Workers' rights in Bangladesh.

Widespread use of slang language is the most common form harassment identified by the workers who have been interviewed for the study. Says the study: The study further said that the workers also accuse supervisors, linemen, line chiefs and production managers of harassment such as: pulling by the hair, slapping, hitting, stroking, touching the body, and even kissing workers as the latter sit at their machines.

So, it will be wrong to overlook such incidents as just isolated behaviours of some individuals. The harassment is affecting the country's growing female labour force.Bbut how to fight such harassment? It's not easy. Because of the stigma associated with sexual abuse or harassment, most victims want to keep silent. It is difficult to encourage women to talk about it. Fear of being stigmatised is one big reason for their silence. There is also another great fear of losing job. At a private clinic in Dhaka a female nurse endures such harassment and she thinks it's not a good idea to complain against her male boss. The boss has made it a habit to call the nurse to his office every weekend night to relax and talk.

- News Network