



## Star LAW report

## LAW week



# Summon must be accompanied by plaint

High Court Division(Civil Revisional Jurisdiction)  
The Supreme Court of Bangladesh  
Civil Revision No. 4639 of 1995 with Civil Revision  
No. 4640 of 1995

Mohammadullah and others  
Vs  
Janab Md. Shamsul Alam

Before Mr. Justice Md. Abdul Wahhab Miah  
Date of Judgement : April 1, 2002  
Result: Rules discharged

## Background

**Md. Abdul Wahhab Miah, J:** These two rules have arisen out of two orders of similar nature passed in Miscellaneous Case No. 29 of 1995 and 30 of 1995 both dated 31.10.1995. The rules are passed by the learned Assistant Judge, 4th Court, Dhaka allowing the said cases which were filed under Order-9 Rule-13 of the Code of Civil Procedure. As similar facts and question of law are involved these rules have been heard together and are disposed of by this single judgement.

## Facts in brief

The petitioners in both the rules as plaintiffs filed title suit No. 172 of 1991 and 173 of 1991 in the court of Assistant Judge, 3rd Court, Dhaka on the same day for eviction of their monthly tenants, namely, Md. Shamsul Alam Md. Alam and Haji Abdul Jabbar respectively from the suit premises. Both the suits were decreed ex parte on 26.2.1992. The decrees were put into execution vide Title Execution Case No. 8 of 1992 and 9 of 1992 of the same court. In execution of the said decrees the defendants of both the suits were evicted from the respective suit premises. Thereafter two separate applications were filed by the said two respective defendant under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree.

The applications are stating inter alia that summons of the suits were not served upon them and the plaintiffs in collusion with the process server showed the summons served by hanging and managed to have the ex parte decree. The defendant petitioners came to know about the respective ex parte decree on 14.1.1995, when the police evicted them from their respective premises. On such knowledge the petitioners through their learned advocate enquired into the matter in court and came to know definitely about the ex parte decree. The said applications were registered as Miscellaneous Case No. 3 of 1995 and 4 of 1995. Eventually both the said miscellaneous cases were transferred to the Court of Assistant Judge, 4th court, Dhaka and were renumbered as Miscellaneous Case No. 29/1995 and 38 of 1995.

The Miscellaneous cases were contested by the plaintiffs by filing separate written objection stating inter alia that the summons of the suits was duly served upon the respective defendant. The process server went to the sit premises to serve the summons of the respective suit, but since the defendant refused to accept the summons, the process server served the same by hanging. Besides the service of summons by hanging the same was also served by registered post as the postal peon returned the same with the endorsement 'refused'. As the defendant of the respective suits did not context the suit the court below rightly decreed the same ex parte.

The Court on consideration of the evidence on record both oral and documentary disbelieved the testimony of the process server and came to the definite finding that the report of the process server could not be believed as there was over writing on the service of summons and that although the suit was filed on 13.11.1991, yet, the process server served the summons on 19.9.1991. The court below also found that there was no address of the attesting witnesses as well as their signature on the service return which were shown to have been served by hanging. The court on the positive finding that summons of the suit was not served upon the respective defendant of the suits and that the defendants had no knowledge about the ex parte decree allowed both the miscellaneous cases and set aside the ex parte decrees and restored the suits to its file and number.

Mr. M. I. Faruqi, learned Advocate appearing for the defendant opposite party in both the rules submits that the postal article, namely, the envelope, the summons and acknowledgement due which were allegedly sent to the address of the respective defendant of both the suits, but returned by the postal peon with the endorsement 'refused' do not show that copy of the plaint accompanied the summons. Mr. Faruqi submits that in order to constitute summons within the meaning of Order-4, Rule 1 (b) of the Code copy of the plaint must be accompanied with the summons. And if the summons sent to the defendant did not accompany the plaint even if the same returned by the postal peon with the endorsement 'refused' that would not be a refusal by the defendant within the meaning of Order-5, subrule-2, of Rule 19B of the Code. And such refusal could not be accepted as a proper service of summons of the suit upon the defendant by registered post to hear the suit ex parte, the court rightly set aside the expert decrees.

Mr. Faruqi drew my attention to the fact that the envelopes which were allegedly sent to the respective defendant of the suits for service of summons by registered post are with the record and contain only the summons. I have seen the envelope. I have found on the summons and no copy of the plaint accompanying it.

## Deliberation

Order IV of the Code of Civil Procedure has dealt with the procedure of institution of suit and Order V of the Code has dealt with issue and service of summons. In answer for point raised by the learned Advocate, I feel it necessary to quote the relevant rules of the two orders of the Code, namely Rule 1(b) of Order IV and Rule 2 of Order V. Rule 1(b) is as following:

"A plaintiff shall file, along with the plaint, for each defendant a copy of the summons along with a pre-paid registered acknowledgement due cover with complete and correct address of the defendant writ on it."

Rule 2 of Order V of the Code is as following:

"Every summons shall be accompanied by a copy of the plaint or, if so



permitted, by a concise statement."

From a reading of the above two provisions of the Code it appears that copy of the plaint is an integral part of the summons. In other words to constitute a summons, within the meaning of the said provisions of the Code plaintiff must be accompanied with the summons, either it be served by the process server or by registered post.

As found here in before, the summons of the respective suit which were returned by the postal peon with the endorsement 'refused' did not accompany the plaint. And as such, refusal to receive the summons, if there be any by the respective defendant of the suits could not be construed as refusal within the meaning of Rule 19B(2) of Order-V of the Code.

## Decision

For the discussions made above, I find substance in the submission of Mr M R Faruqi and hold that the summons in both suits were not at all served upon the respective defendant by registered post. So far as the findings of the courts below as regard the service of summons by the process server. Mr Islam found it difficult to assail the same with reference to the materials on record. Since the trial court on consideration of the evidence on record both oral and documentary came to the definite finding that the summons of the suit was not served upon the respective defendant of both the suits and that the respective defendant had no knowledge about the suit and the exported decree till 14.1.1995 which are based on proper consideration of the evidence on record, this court sitting in revision can not interfere with the said finding of fact.

In the result these Rules are discharged without any or as to cost. The impugned orders are maintained.

Mr. Mahmudul Islam, for the petitioner and Mr. M. I. Faruqi with Mr. M. Selamullah, for the opposite party.

## READER'S queries



### Your Advocate



This week your advocate is **M. Moazzam Husain** of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

**Q:** After my parents death two of my brothers built two buildings in our parents residential plot in suitable position of that land. And rest of the land is not at all suitable to built any residential house more than one room. It can be mention here that after our parents death we did not divide and go for division by law of our parents property. At one stage I raised the question to my brothers that you have made your home in such a way there is no place for me to make any home. Where I shall make my house? They replied that since by law they are also entitled to get due share of that land so they have made the house on their due property. And why didn't you make any house here earlier? You can do whatever you like with the rest of the land. We have built our house spending lot of money; since it's our hard earned money so, we can help you. In this situation my question is: (a) After the parents death, where the properties has not been divided among us by law, can my brothers grab the land in this way? (b) As per above-mentioned situation, what can be done by law to restore my legal right of that land? (c) My brothers have made house for them in suitable position of that land since they have enough money to do so. Is it not illegal to act like this?

**Abdur Rahman,**  
Mohammadpur, Dhaka.

**Your Advocate:** Your problem is not much complicated. The dispute centers round construction of buildings by two of your brothers in the undivided shares of your paternal land. As per your claim they have built their houses in the most valuable portions of the land to the prejudice of your interest. That is, you are left with less valuable portion of the land not suitable for building a house. Your brothers' explanations are that they have built their houses earlier and that they have already spent a lot of money in building their houses. They have rather found fault with you as you could not take the first chance in making your house. So seemingly they have taken it as a chance. All these are really lame excuses having no validity in the eye of law. Upon those excuses the other heirs can not be deprived of their due share in their paternal property. Law is, you have right and title to every inch of your paternal property and unless the same is partitioned by family arrangement or by decree of a competent court none has the right to occupy any portion of the same far less, the better portion. Your remedy lies in serving a legal notice to your brothers for amicable partition. If they do not pay any heed to it you will have to file a suit for partition in an appropriate court of law. In case a suit is filed it would be the court to decide the issue and pass a decree distributing the entire land legally and equitably among all the heirs of your parents. There are laws to resolve the dispute in case of already existing buildings or permanent structures. If you are finally dragged to court, consult a good civil lawyer with the title-documents relating to all the properties left behind by your parents. Things would be all right.

## LAW letter

### Juvenile prisoners' plight

On September 16, 2003 eight inmates were reportedly attempted to commit suicide by way of causing dent and mutilating their own body using sharp blades and broken bottle at National Juvenile Correction Centre in Tongi, Dhaka. Juvenile delinquents have alleged that the centre authorities do not provide enough food. They hardly get opportunity to play as well as watch TV. Furthermore, in most time their hands are fastened by handcuffs. When they raise their voice against irregularities of the authority, they have to sustain severe physical torture. Finally, the torture and denial of total recreation persuaded them to attempt to commit suicide. On the same day, we learnt from a press release of Bangladesh Legal Aid and Services Trust (BLAST) published in The Daily Star that a boy named Jamal(14) continues to languish in the Juvenile Correction Centre at Tongi even though the court acquitted him of charge about 10 months ago. These two incidents are clear evidences of how much the authorities are negligent about child rights.

In fact, juveniles have been treated so badly that they aren't reformed or corrected rather they transform into recidivist. It should be mentioned that the prime objective of juvenile justice system is to protect the children from recidivism and to ensure their rehabilitation as well as to smooth reintegration with society. When a juvenile opt to commit suicide in sheer depression, we can easily say that the end of juvenile justice system is totally frustrated from all respects.

In this context, we can reiterate that we have huge good laws such as the Probation of Offenders Ordinance 1960 and The Children Act, 1974, but we have seen hardly implementation of those laws. In lieu of sending into correction centre, we can set free juvenile in the society on condition of good behaviour under the Probation Order. Of course, we may get some results from it as it is proved by statistics.

**Bivuti Taratder,**  
LL.B (3rd year), Department of Law, DU.

### Forgive the child

Being born within the four walls of jail Nasrin, a five year child of Parvin, an accused of Shajnin murder case, does not have any idea of living in an open and a free environment. That is why the little innocent girl asked its mother to go back in the jail while its mother standing before the Judge in the court. The most unfortunate news for that unlucky child is that its mother was rewarded the death sentence. Needless to say no one should raise question regarding the judgement. But the conscious citizens definitely can raise question of the life of a five year child whose mother is to die within very short time or as soon as all proceedings of judgement is completed. It is not known whether the judge considered the maternity of said Parvin who gave birth a female child after being imprisonment. In the history of near past of the



judiciary this case is a unique where a mother with having a minor child given death penalty.

Here the judgement of Indian Prime Minister Rajiv Gandhi murder case can be mentioned where a woman accused having a minor child was sentenced to death. Sinia Gandhi, wife of Rajiv Gandhi, forgave the accused woman who was unfortunately a mother of a child, in thinking the future life of that child. And it's definitely a good instance. With this I am not appealing to Mr & Mrs Latifur Rahman who lost their beloved daughter to forgive the said woman. I am just questioning them to think for a while about the instance made by Sonia Gandhi and side by side that innocent girl to whom her mother is also beloved one.

It is needed to say that before final judgement the question of the life of said minor girl (whose father left her mother) must be settled.

**Kalyankar,**  
Dhaka.

## FOR YOUR information

### Treaty on the Non-Proliferation of Nuclear Weapons

Multilateral treaty adopted July 1, 1968, and in force from March 5, 1970. It establishes safeguards to ensure that states parties that do not have nuclear weapons do not use their nuclear materials to manufacture weapons.

### Two Freedoms Agreement

Formally the International Air Service Transit Agreement. A multilateral treaty adopted at Chicago on December 7, 1944 and in force since January 30, 1945. It grants aircraft from one state party the privileges to (1) fly over the territory of other states parties without landing and (2) land for non-commercial purposes.

### Declaration of the Rights of the Child

United Nations General Assembly Declaration of November 20, 1959, which states that children are entitled to special protection and to the help necessary to develop in a healthy and normal manner.

### Dumbarton Oaks Conference

Conference at Dumbarton Oaks Estate in the city of Washington from August to October 1944, which was attended by China, the Soviet Union, the United Kingdom, and the United States for the purpose of outlining a draft charter for the United Nations.

## LAW lexicon

### Moot

Also called a "moot point": a side issue, problem or question which does not have to be decided to resolve the main issues in a dispute.

### Moot court

Fictional or hypothetical trial, usually hosted by law schools, as training for future barristers or lawyers.

### Misrepresentation

A false and material statement which induces a party to enter into a contract. This is a ground for rescission of the contract.

### Natural justice

A word used to refer to situations where audi alteram partem (the right to be heard) and nemo iudex in parte sua (no person may judge their own case) apply. The principles of natural justice were derived from the Romans who believed that some legal principles were "natural" or self-evident and did not require a statutory basis. These two basic legal safeguards govern all decisions by judges or government officials when they take quasi-judicial or judicial decisions.

## Govt seeks more time to separate judiciary

The government has again filed a petition with the Appellate Division seeking for the 15th time extension of a deadline by four months for the implementation of the 12-point directive charting out virtual separation of the judiciary from the executive. It has also sought clarification of the division's May 26 order that gave the government a four-month extension of the deadline expiring on September 26. The petition has been submitted to the court's Section Office, as the day of submission was a weekly holiday of the court. Hearing of the petition before the full bench of the Appellate Division is likely to take place on Sunday. It can be mentioned that the government filed a petition seeking modification of the draft on separation of the judiciary in April. The court rejected the prayer on May 26, saying finalisation or implementation did not require any policy decision of the government. However, there has so far been hardly any follow-up to the decision. Only one meeting of the cabinet committee on separation of the judiciary took place on September 4 and it did not push the issue further. The BNP-led four-party coalition has already been given extension on four occasions. Previously, the caretaker administration was given three extensions in as many months and the Awami League government seven. The 12-point directive was issued in December 1999. - *The Daily Star*, 26 September.

## Judge court in hill areas soon

A bill has been passed in the Parliament making provision for setting up the district and sessions judge's court in the three hill districts. Minister for Law, Justice and Parliamentary Affairs Moudud Ahmed proposed 'The Chittagong Hill Tracts Regulation (Amendment) Bill, 2003'. The government passed the Chittagong Hill Tracts Regulation (Amendment) Bill, 2003 to set up the districts and sessions judge's court at Rangamati, Khagrachhari and Bandarban districts. The Rangamati, Khagrachhari and Bandarban districts will constitute three separate sessions divisions and the district judge concerned will be the sessions judge of the respective sessions division. According to the bill the joint district judge will be the assistant sessions judge. - *Law Desk*.

## BDR to be deployed during Durga Puja

The government has decided to deploy para military force BDR to maintain law and order during the upcoming Durga Puja. This was stated by Home Minister Air Vice Marshal (ret'd) Altaf Hossain Chowdhury while talking to a joint delegation of Bangladesh Hindu-Buddha-Christian Front and the Hindu Religious Welfare Trust on the government preparation ahead of the puja. He warned of stern actions against attempts of harming the communal harmony during the upcoming Durga Puja, the greatest religious festival of the Hindu community. The minister told the Hindu community leaders that Bangladesh Rifles (BDR) troops would be deployed at all festival sites along with regular police, ansars and plain clothes men to keep peace. - *Law Desk*.

## Lawyers likely to go on strike

Lawyers of the country will go for a strike for an indefinite period from 1 October to realise demands for cancellation of the Bangladesh Legal Practitioner and Bar Council (Amendment) Bill, 2003 and the Civil Procedure Code (Amendment) Act (except Rule 115) 2003. The lawyers under the banner of Sammilito Ainjibi Somonnoya Parishad in a meeting have taken the decision. - *Observer*, 23 September.

## Charge framing of frigate case soon

Dhaka Divisional Special Judge Court has fixed the date for charge framing on October 4 against the Awami league president Sheikh Hasina and five others in Frigate purchase case. The judge of the court has fixed the date of charge framing following a time petition submitted by her lawyers. Earlier on August 30 Opposition Leader Sheikh Hasina was granted bail in this case by the Dhaka Metropolitan Session Judge Court. The case later has been transferred from the Dhaka Metropolitan Session Judge Court to Dhaka Divisional Special Judge Court. - *Bhorer Kagoj*, 23 September.

## Women permitted to go S Arabia for jobs

The government has permitted several recruiting agencies to send women workers to Saudi Arabia as domestic helps under certain terms and conditions. This permission followed an inter-ministerial meeting a few months ago to withdraw restriction on sending women workers abroad as domestic helps. The restriction was imposed in 1998 under the Awami League rule in the wake of reports of some untoward incidents involving women workers abroad. None of the agencies will be allowed to send women workers abroad unless they fulfil the terms and conditions. The terms and conditions are: A recruiting agency must operate a permanent training centre in Dhaka and a round-the-clock office in any major city in Saudi Arabia to take prompt legal actions in case of any untoward incident. The women workers must be given at least a 30-day training on household work. - *Law Desk*.

## Act likely to prevent pornography in cinema

The Govt is going to enact a law to prevent obscenity in country film and to stop video piracy. The draft of the law is awaiting approval of the Cabinet. Though there is a law to control of screening of film and to stop vulgarity and piracy, due to various loopholes the culprits are not being punished. That is why this re-enactment of the law. In the proposed law there are provisions for five-year imprisonment and fine of Tk 20 lakhs for screening obscene film or uncensored part of film. Besides, for the persons related to video piracy, a provision is kept which provides eight years imprisonment and fine of Tk thirty lakhs. Moreover, taking licence for using electromagnetic machine will be obligatory as soon as the law comes into force. - *Ittefaq*, 24 September.

## War crime case against US Gen. thrown out

The Belgian Court of Appeal has thrown out a war crime case brought under a controversial Belgian law against retired US general Tommy Franks, who commanded the US-led war on Iraq. The case was brought under the 1993 'universal competence' law, which in its original form allowed Belgian courts to rule on crimes against humanity regardless of the nationality of the perpetrator or where the crimes took place. Faced with pressure, namely from Washington, the Belgian Government agreed this year to scrap the law and in August parliament approved a new, watered down version. The court ruled that it must apply the new law. However, the case was filed on May 17 Iraqis and two Jordanians over the use of cluster bombs in civilian areas of Iraq. - *The Independent*, 24 September.

## Life term for 'Killer' Abbas

The Speedy Trial Tribunal of Dhaka has awarded life term to Abbas Ali alias Killer Abbas, a top-listed terrorist of the city in connection with an armed case. The court also fined him Tk 50,000. In default, he will have to suffer two more years of rigorous imprisonment. The court has decided the case after examining 11 prosecution witnesses, out of 14. Killer Abbas is number 3 among 23 top-listed terrorists, who were tried in the court. - *Inqilab*, 25 September.

## Indian HC against illegal Bangladeshis

The New Delhi High Court has asked the government to take action against illegal migrants from Bangladesh in New Delhi on the basis of a plan endorsed by it. A two-member bench comprising Chief Justice B C Patel and A K Sikri has given the direction to the city government on a public interest litigation filed by a Delhi lawyer, who alleged that 2.8 million Bangladeshis are residing in Delhi illegally and taking benefits of the government schemes meant for the bona fide Indian citizens. The High Court asks the government to identify the Bangladeshis dwelling in slums and secure allotment of alternative sites by the authorities. The court points out that foreigners are issued ration cards and voters' identity cards by corrupt officials and politicians. A lawyer of Delhi government informs the bench that 1.3 million Bangladeshis are living in the national capital. The petitioner, who filed the petition in 2001, alleged that lakhs of Bangladeshis were enrolled as voters in Delhi and appealed to the court to direct the Indian government, Delhi administration and police to detect and deport them. - *The Daily Star*, 26 September.