



COURT corridor

Frequent and abrupt reconstitution of bench impedes flow of justice

BARRISTER MOKSADUL ISLAM

Article 107(3) of the Constitution empowers the Honourable Chief Justice to determine which Judges are to constitute a Division Bench of the Supreme Court and which Judges are to sit for any purpose. Although this Article does not contain the word reconstitute yet the word constitute here also includes reconstitute. Under Article 107(4) the Chief Justice may also delegate that power to the next most senior judge of either Division. However Article 107 of the Constitution as a whole deals with the rule making power of the Supreme Court for regulating the practice and procedure of the Court and both the clauses (i.e. 3 and 4) of Article 107 envisage a set of "rules" only for the constitution and reconstitution of the Benches of either Division.

Recently like many other institutions of the state the Supreme Court of Bangladesh has also come under heavy criticism for, amongst others, constitution and reconstitution of some of the Benches in the Supreme Court apparently on political ground. In an Emergency General Meeting (EGM) of the association Supreme Court Bar Association on June 28 resolved that 'the jurisdiction over all kinds of writ motions of the Bench comprising Justice Shah Abu Nayeem Mominur Rahman and Justice Mainul Islam Chowdhury was withdrawn immediately after the Bench had issued Rule in a Public Interest Litigation (PIL) Writ on June 18, 2006'. However we will not be examining the impact of reconstitution of a Bench on this ground and the author for the purpose of this write-up will not consider the political nature of the Bench. If there is any, 'Bench' means a Single Bench or Division Bench Court having one or two Justices respectively. Well, there may also be a Special Bench with more than two Justices. Under the normal circumstances a Bench may be reconstituted in two different ways. A Bench may be reconstituted by changing its jurisdiction or power without changing its Judges. Change of jurisdiction may occur in various ways e.g. by giving the Bench additional jurisdiction, by limiting its jurisdiction, by changing the jurisdictions of the Court completely etc. And a Bench may also be reconstituted by swapping Judges between Benches with previous jurisdiction of the Senior Justice or with a completely new jurisdiction or a set of jurisdictions. Sometimes reconstitution of a Bench may become necessary especially when a new additional Judge is appointed under Article 98 of the Constitution. A new Justice needs to be circulated between different Benches with different Justices for training or experience. However a new additional Justice is not appointed everyday in the Supreme Court.

There may be hundreds of matters of different categories and for various purposes which usually remain pending in the Daily Cause List of different Benches of the Court. For example (a) 'as-to-be-mentioned', (b) part-heard matters, (c) motion, (d) hearing of appeal or bail, (e) for argument (after hearing), (f) for order, (g) for judgement, (h) applications of different nature etc. To prepare a complete list that may well be pending in the Daily Cause List of different Courts will not be very easy although technically speaking it's not impossible. More interestingly (it's not easy to explain), there may be various matters, although they were not in the Daily Cause List of a Bench yet they were related to that particular Bench e.g. unlisted motions and applications or mention-slips waiting to be enlisted in the Cause List of that Bench.

Now let us examine, in relation to all a few of the matters, normally what may happen when a Bench is reconstituted. All the 'as-to-be-mentioned' matters will have to be mentioned again before a new Court when there is a reconstitution regarding jurisdiction. Part-heard matters may have to be heard again from the very beginning by a new Bench although it was heard for weeks by the previous Bench. If the matters were for 'argument' situation may arise when the lawyers will have to start over again even though that matter was addressed for days or weeks before the other Bench. If the matter was for appeal and bail was granted pending hearing of the said appeal no lawyer is going to bring the matter in the Cause List again as he knows very well that outcome of the appeal may go either way. A lawyer with the help of his clerk works very hard to get the matters in the Daily Cause List of a particular Bench and may be he was watching the matter for months and hoping to get the matter heard any moment. Let's say tomorrow, sudden reconstitution of that Bench, next morning, simply means nightmare for that lawyer and more delay and frustration for his client. Some of the matters which were in the Cause List may need to be heard particularly by the old Bench and under those circumstances a Special Bench with the previous Justices may well have to be reconstituted only for those matters.

Reconstitution of any Bench is completely a discretionary power of the Hon'ble Chief Justice. The writer neither found anyone who knows if any of the previous Chief Justices ever delegated this power to the next most senior judge under Article 107(4) of the Constitution nor have seen any rules or regulations for this purpose. However, sincerely speaking, reconstitution of any Bench without considering the matters pending in the List of a particular Bench impedes natural flow of justice and at times may deny justice. It has become imperative that a set of 'rules' as envisaged therein in the Article 107 of the Constitution are framed for this purpose reflecting all the abovementioned and other aspects of the Daily Cause List.

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LAW event

Migrants' security

SADIA SAMAD

Ideas and thoughts on security have been changing over the years. Much has changed in the concept of security in the post cold war period. Traditional security thought is very much about geo-politics, deterrence, power balance and military strategy, and state remains the centre concern of this perspective. However, a new school of security studies focuses primarily on non-military challenges to security that includes economic security, security against environmental degradation, HIV-AIDS, drug trafficking, migratory pressures, ethnic conflicts, arms smuggling, sea piracy and others. Non-traditional security (NTS) also acknowledges that a majority of challenges are transnational with regard to their origins, conception and effects. In both analytical and policy terms, NTS incorporates the state as a primary referent object of security but also moves beyond it by incorporating other referent objects like human collectivities. Professor Amitav Acharya, Deputy Director and Head of Research of the Institute of Defence and Strategic Studies, Nanyang Technological University, Singapore was speaking on Theoretical Construct of Securitisation at the regional workshop organised by the Refugee and Migratory Movements Research Unit (RMMRU) on 21-22 August 2006 at the BRAC Centre Inn to mark the conclusion of a project on Population Movements: Non-traditional Issue in South Asian Security Discourse that was supported by the Ford Foundation.

In some quarters migration has been perceived as a source of insecurity to some state and society. For this reason migration is being brought into the security discourse. The speakers at the workshop expressed the view that increased securitisation of migration in post 9/11 world has contributed to undermining human security of migrants in many parts of the world. They stated that there was no empirical evidence to support claims that migrants are linked to terrorism and other crimes. In this workshop eight research papers were presented by the scholars of different South Asian countries depicting different scenarios of migration in the region. Each of the research studies focused on a particular aspect of migration in the South Asian region. The researchers that were carried out are Migration and Non-traditional Threats to State Security: The Case of Karachi, Perceived Bangladeshi Domestic Workers in Delhi, Migration for Livelihood between India and Nepal, Human Security of Trafficked in Persons of South Asia, Bangladeshi Workers in Irregular Status, Migration from India and Neighbouring Countries: Nature, Dimensions and Policy Issues, Experiences of Return from Italy in Irregular Sri Lankan Migrants. The participants in the workshop acknowledged that South Asian borders are prone to migration. Cross-border movement is a very common phenomenon between the countries.

Professor Rehman Sobhan in his address as chair of one of the sessions stated geographical affinity of the border although encouraging cross border migration but the labours have demands in the receiving countries due to various reasons. He also suggested that the labour sending countries could collaborate with each other to ensure better protection of the migrants as there is a demand for labours from across the border in different types of professions. The workshop addressed that international migration is growing at the rate 3 percent of the world's population or about 175 million persons (WB 2006) per year and \$167 billion has been transferred to developing countries as remittances in 2005 up 73 percent from 2001. In this context migration has become an important factor in the process of globalisation. At the concluding ceremony of the workshop Foreign Secretary Mr. Hemayetuddin was the chief guest who stated that migration should not be viewed as a zero-sum game, rather, "we should focus on the positive-sum aspect of migration creating a win-win situation for both sending and receiving states." He also stated that a multi-ethnic and multi-cultural society can foster greater understanding and tolerance. The linkages between migration, remittances and economic development are more than obvious and by the same token, there is positive correlation between economic development and security, the foreign secretary noted.

Mr. Iftekharuzzaman, Executive Director, Transparency International, Bangladesh and advisor to the NTS also underscored the need to re-visit the concept of security. He stated that the current reality demands more attention to the fulfilment of human security.

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LAW alter views

Independence or separation of judiciary?

A R KHANDAKER

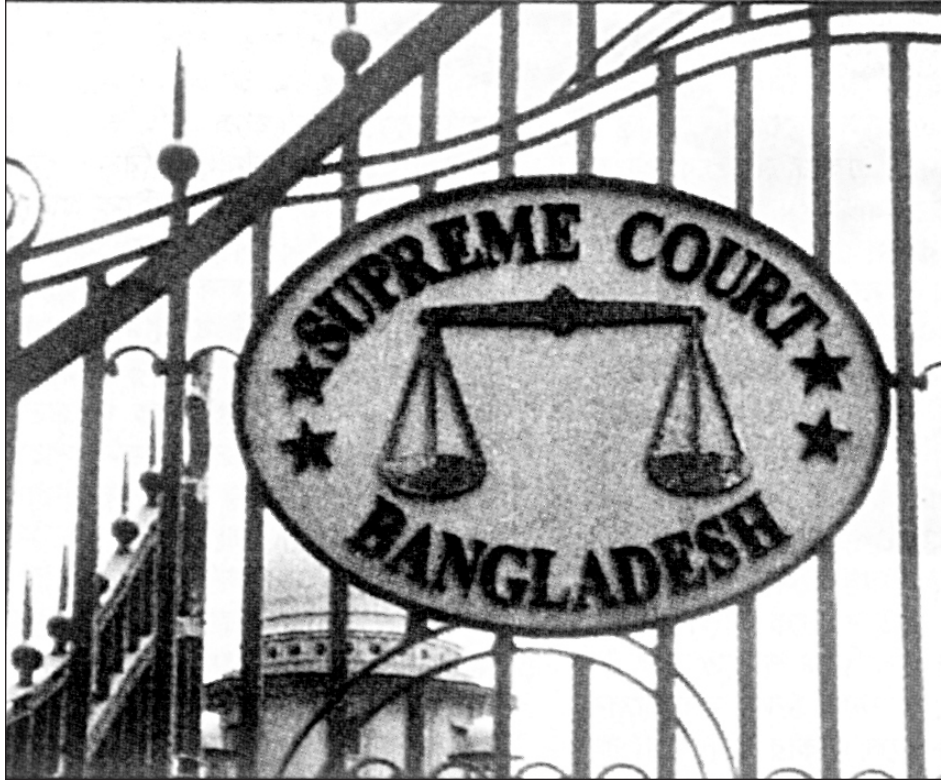
A tug of war is going on between the government and the judiciary at present. The Supreme Court has ordered the government to take action to finalise the separation of the Executive from the Judiciary. When initially the Supreme Court issued the Rule, the government did not respond. The Rule was made absolute. Now perhaps the government is finding it difficult to implement it and is praying for more time again and again. The matter deserves a dispassionate and objective consideration before a final decision is taken and precedence is created. It seems pertinent to consider at least two issues.

Firstly the form of government has been spelled out in the constitution that it will be a Republic and have a parliamentary system of government having a constitutional president with power to pardon and a council of ministers headed by a prime minister and three distinct organs namely the Legislature, the Executive and the Judiciary. The constitution lays down specific functions of different organs of the government. The parliament is supreme and the lawmakers alone being the elected representative of the people can bring about any change by amending the constitution as and when necessary.

The Supreme Court has been authorised to interpret the provision of the constitution as and when required. Therefore the order of separation of the judiciary does not seem to be within the purview of the business to be dealt with by the Supreme Court. The powers and functions of, in other words, the jurisdiction of High Court Division as laid down in Articles 101 and 102 of the constitution of Bangladesh do not empower the Supreme Court to supersede the function of the National Assembly. The judiciary is very much a functionary of the government. The duty of the government is to govern, to administer, to provide security to lives, property, and honour of the citizens both internally and as well as from the external enemy. Judiciary helps the government to carry out one of the functions of the state and in doing so it should be able to function independently with no interference from any quarter or under any influence of fear or favour (116A of the constitution).

The justice system in Bangladesh has been a legacy of the justice system as introduced by the British during the colonial days. The justice system was divided into civil and criminal. All civil matters relating to property, marriage, endowment etc were dealt under civil laws following the civil procedure code and criminal violation of personal rights were dealt under criminal justice system following the criminal procedure code. In the civil side the lowest court was that of the munsif, with a hierarchy of sub-judges court/assistant judge's court, additional district judges and district judges court, High Court and in the apex, the Supreme Court.

In the criminal side magistrates with third, second and first class powers were appointed under the district magistrate and additional district magistrate to manage the criminal justice system. The district and the session judges were also linked with criminal justice system as appellate authority and with the withdrawal of committal proceedings, with original jurisdiction. As



such the magistrates are under the judicial control of district judges. Besides, as mentioned above, Article 116A of the constitution provides that all persons employed in the judicial service and all magistrates shall be independent in exercise of their functions. The point to be noted here is that the law makers in all probability emphasised on independence of the courts and not separation. Without the assistance of the magistrates the criminal administration function of the district magistrate will become infructuous and the criminal administration will be in a mess and the concept of the magistrates as administrative judges will melt away, possibly to the jeopardy of public interest.

Fulfilling the objective of the functioning of the state may not be possible by a water tight compartmentalisation of the judiciary and the executive as they are interdependent and their functions are complementary. The function of the executive, particularly of the police whose duty is to bring the offender to justice will slacken down without a helpful attitude of court. Likewise a court's order remain in paper if the executive does not sincerely carry it out. A sincere cooperation between the Codes, Constables and the Courts can only help realising the objective of administration of criminal justice. If every one is honest in his duty he has to believe in mutual cooperation and not isolation. No one's duty is trifling. Therefore, no one should have any complex and every one should maintain due decorum of his office. The goal of service to the society should get the utmost attention and in this context the Quranic injunctions may be adhered to (S. Nisa-A58 & S Maida-A8).

I see no problem between the judiciary and the executive. In his book 'Not the Whole Truth' Justice MR Kayani made many adverse and interesting remarks of the marshal law promulgated in 1958 by Field Marshall Ayub Khan and

vehemently criticised many of the actions taken under it. The book was originally given the title 'The Whole Truth'. Mr Khan although had all the power to take any action but while writing the introduction for the book said, "I do not agree with some of his views but he has a right to express his opinion but would seek his permission to add one word 'Not' on his title reading as 'Not the Whole Truth.' In my forty years of service I hardly came across an occasion when the judiciary made complaint against the executive's interference in carrying out its proceedings. Such complaints are cropping up only during recent years. The judges are probably finding it difficult to brush them aside. This is not because of any fault in the system but because the system is not being allowed to function freely without undue interference.

The problem lies with the persons in authority who can be indiscreet towards the prospect of immediate personal gain and can be oblivious to the cause of ultimate justice and fair play. It is also unfortunate that the person sitting on the chair of a judge cannot also turn a deaf ear to the threat of unreal fear or temptation. The earlier it is realised by all concerned the better for the society.

In Japan they have an independent Public Prosecution Department which deals with all prosecution matters. Being a separate and independent organisation it can play a better role and works as buffer between the court and the administration. All the personnel in the Public Prosecution Department are law graduates and under the control of the Chief Public Prosecutor. Bangladesh government may perhaps give it a consideration.

The author is a retired IG of Police.

LAW update

Computerised land management system in Dhaka

KHALEDA PARVEN

RECENTLY a computerised land management system (CLMS) has been introduced in Bangladesh through the implementation of a pilot project in Demra circle of the capital Dhaka. The system is being considered as an important milestone in the field of land related computerised public information service system.

The public authorities concerned say this system will provide citizens with current and accurate information about land administration of the project area. They believe, new computerised system will reduce increasing number of civil litigation and scope of forging document and help ensure regular tax collection. In fact, many social unrests and crimes have their root in land related disputes.

This project has been implemented at such a time when land related civil litigations and their efficient management have become a real challenge for the government. After the partition of 1947, Bangladesh (then East Pakistan) started with a population of 30 million; however, today it is a nation of around 140 million people.

Due to the fact that Bangladesh is a small country with a very high density of population where the economy is also largely based on agriculture, land related disputes form the major part of all civil litigations. One main reason behind gradual increase in the number of land related civil litigation is that there is no modern record keeping and data retrieval system. This results in loss of huge revenue and many unwanted confusion in transfer of landed property from one hand to another.

In this situation, the CLMS of Demra can be proved to be extremely useful in civil case handling in the lower courts of Bangladesh. In fact the Demra project was undertaken to strengthen the capacity of A/C land offices so that land related suits could be managed in a very efficient way. The system will provide land verification certificates before purchase of land. There will be rapid update of land record and resolution of mutation cases as well as continuous update of land use change and tax. Printed records will also be available to the public. This has set a good example of improved information service for the people concerned. Lack of reliable information is a major weakness in Bangladesh's



land administration system. In many cases, this is the main reason for over-sale and over-registration of a single landed property which ultimately promote litigations.

Currently, there are 3.2 million land dispute cases pending in the courts. If the project runs according to plan, it is expected that this will reduce land related conflict in the society, minimise litigation cost and expedite litigation procedure dramatically.

Another aspect of this project is that, CLMS will transform employee-dependant land management into a modern management in order to determine land tax appropriately. The information system will classify lands according to their use and set appropriate tax according to government rule. Under this new system, land revenue will be collected from the land owners in scheduled time and such information will also be provided to them so that illegal land registration could be prevented.

After all, the new system would reduce public sufferings, increase revenue earnings, cut down conflicts and protect government interest. Therefore, this project model is being extended to other four circles of the City.

Demra CLMS is a dream project, which has introduced a modern IT based land related information and document management system. If the same model could be implemented for entire land administration and civil case management system in the district courts, number of civil litigation would reduce dramatically.

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LAW week



7 killed, 60 bullet-hit as cops, BDR open fire

At least seven people were killed and about 300 injured as police and Bangladesh Rifles (BDR) opened fire on demonstrators advancing towards the office of Asia Energy Corporation (Bangladesh) Pvt Ltd in Dinajpur in August 26. Thousands of demonstrators, mainly farmers and indigenous people including women armed with bows and arrows and sticks, joined the protest apprehending massive eviction and loss of farmland that might be caused by the implementation of the Phulbari Coalmine Project. The protesters enforced an indefinite hartal at Phulbari starting from August 27 in protest of the police action. The Asia Energy said in a statement that "unrepresentative" outsiders created trouble at the Phulbari coalmine site, UNB reported.

Witnesses said the protesters under the banner of National Committee to Protect Oil and Gas, a platform of different rights groups and leftist parties, marched towards the Asia Energy office around 4:30pm after a huge rally at the Dhaka intersection. They chanted slogans against the British company that is operating the Phulbari project. Thousands of demonstrators took control of Phulbari on the second day of an indefinite strike and set fire to houses of some Asian Energy employees, clamouring for ouster of the London-based company. The agitators also vandalised the Asian Energy office and cut off road and rail links between Dinajpur and the other districts in protest at Saturday's police actions that left at least five people dead and over 300 injured. According to unconfirmed reports, seven people died that day when police and Bangladesh Rifles men fired on the locals demonstrating against open-pit coalmine project at Phulbari. --The Daily Star, August 27-29.

Govt to end tenure by not separating judiciary

The judiciary will not be separated from the executive during the tenure of the present government although it was a key election pledge of the BNP-led four-party alliance. In response to a government prayer, the Appellate Division of the Supreme Court (SC) yesterday adjourned hearing of the judiciary-separation case until November 12. It gives the coalition government a further opportunity to sidestep its responsibility to implement the 12-point SC directive for separation of the judiciary. The ruling alliance is scheduled to hand over power in October, and therefore the caretaker government will be in power when the hearing will resume. On July 27, barrister Amir-Ul Islam, intervenor in the case, placed before the SC a comparative chart depicting 'the anomalies that the government has created' with regard to implementation of the 12-point directive.

Following Amir-Ul's argument about the chart yesterday, Attorney General AJ Mohammad Ali submitted a prayer for adjournment of the hearing. He contended that the government needs time for making submissions relating to the chart and petitioned the court to hold the next hearing after the upcoming vacations. The court first goes on a vacation for one and a half months from September 1. It will remain open for a week before going into another vacation slated to end on November 4. Amir-Ul opposed the government prayer and asked the court to fix today [Monday] for next hearing. He contended if the next hearing date is preceded by the vacations, the tenure of the government will end by that time. On hearing both the sides, the SC adjourned hearing until November 12. --The Daily Star, August 28.

Dhaka, Delhi to fight border crime together

Bangladesh and India agreed to examine the possibility of quickly instituting a mechanism to combat terrorism and organised crime that often spill over the 4200km porous border. The countries share as security figured high in the home secretary-level meeting. Delegations of the two neighbouring countries yesterday concluded the four-day talks with agreement on holding regular meetings between their border forces, and joint media briefings by their local commanders, if an incident 'takes place'. To ensure that truth is known to both sides, it was decided that the Joint Boundary Working Group (JBWG) will visit the enclaves and areas under adverse possession 'at an early date'. Home Secretary Safar Raj Hossain led the Bangladesh side while his counterpart VK Duggal the Indian side at the 7th meeting of its kind that reached several agreements without setting any precise mechanisms or dates for their implementation. --The Daily Star, August 28.

EC goes for guideline to streamline poll monitoring

Irked by the poll observers' non-compliance with the Election Commission's (EC) policy for observing polls during the last parliamentary election, the commission yesterday decided to make the policy more stringent this time around to prevent mushrooming of observers.

An EC meeting chaired by Chief Election Commissioner (CEC) MA Aziz decided to amend some provisions in the existing policy and to introduce a provision of punishment for observers in cases of gross violations of the policy for observing the polls during the next general election, sources said. The decision came in wake of a widespread controversy about the neutrality of the organisations which have already started lobbying to become authorised to observe the next election. The EC's policy on poll observation was formulated just before the October 2001 general election. Before the formulation of the policy, there was no legal framework for observing the polls. The number of poll observers in October 2001 parliamentary election increased by five times compared to the seventh parliamentary election held in June 1996. Sixty eight organisations deployed as many as 2,18,006 observers during the October 2001 election while the total number of observers was only 40,000 during June 1996 election, sources said. Some of the organisations took blank identity cards for observers from the EC and deployed students of schools and colleges to observe the October 2001 election violating a policy that requires an observer to be at least 25 years old.

Only 18 organisations submitted observation reports to the EC after the election while others ignored the EC's directive to submit their reports. Sensing a trend of an increase in the number of poll observers and observing recent activities of some organisations in pursuit of becoming observers, the EC fears the number is likely to shoot up in the next parliamentary election. --The Daily Star, August 28.

Why case against CPD trustees not be quashed

HC asks govt, Mahmudur

The High Court (HC) yesterday issued a rule ordering the government and Energy Adviser Mahmudur Rahman to show cause within four weeks why the case pending before the CMM's Court, Dhaka against five eminent citizens should not be quashed. An HC division bench also stayed all proceedings of the case filed by Mahmudur Rahman until disposal of the rule. The rule came in response to a petition filed by the five citizens, who are also members of the board of trustees of independent think-tank Centre for Policy Dialogue (CPD). A Dhaka court on August 9 issued arrest warrants against the five following a defamation suit filed by Mahmudur, also executive chairman of the Board of Investment (BoI). The accused are noted economist and CPD Chairman Prof Rehman Sobhan, CPD Executive Director Debapriya Bhattacharya, its trustee board member/former adviser to a caretaker government Syed Manzur Elahi, former finance minister M Syeduzzaman, and former president of the Metropolitan Chamber of Commerce and Industry (MCCI) Laila Rahman Kabir. The HC granted them ad interim anticipatory bail on August 10. Dr Kamal Hossain and Dr M Zahir yesterday moved for the petitioners. They were assisted by advocate Ramzan Ali Sikder. --The Daily Star, August 29.

Law enforcers asked to follow CrPC

HC directs authorities after first ever suo moto issued against Rab action. The High Court (HC) yesterday directed law enforcing agencies, with emphasis on Rapid Action Battalion, to follow the provisions in the Code of Criminal Procedure (CrPC) in cases of arrests of citizens. The direction followed a HC suo moto ruling issued against the government, police and Rab on July 27 asking them to explain in two weeks why they should not be directed to produce Kishore Kumar, whom Rab had arrested on July 19, before the court to prove that he was not being held unlawfully. A High Court division bench issued the first ever suo moto by the HC against any Rab action following a report published in a Bangla daily, Janakantha, on July 24 under the headline 'No whereabouts of the youth for four days after arrest by Rab in Jessore'. After the issuance of the suo moto, Human Rights and Peace for Bangladesh (HRPB) President Advocate Manzil Murshid applied to the HC to be a plaintiff in the case and sent an enquiry team to Jessore on August 20 for field investigation. During a hearing on the ruling yesterday, HRPB submitted its report about the arrest to the HC in the form of supplementary affidavit. Submitting affidavit in opposition, Attorney General AJ Mohammad Ali told the court that Kishore Kumar was arrested at midnight on July 23 in connection with recovery of four bombs, the FIR (first information report) was lodged the same day and he was sent to the court the following day. While moving for HRPB, Barister Amir-Ul Islam told the court yesterday, "Although there is a provision in the CrPC for producing a citizen before a court within 24 hours of an arrest, police and Rab personnel are not following it in many cases." It is necessary for the courts to intervene in such illegal activities, he said. After hearing submissions of both sides, the bench directed the law enforcers, specifically mentioning Rab, to follow the CrPC provisions in case of arrest of any citizen. --The Daily Star, August 29.