

Law and Our Rights

"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

Judicial Administration in Bangladesh

By Syed Ishtiaq Ahmed

A welcome short-term measure was the establishment of the Judicial Training Institute in 1996 during the time of the caretaker government. Another measure of great significance is the initiation of the world Bank Project of Judicial Capacity Building. This, too, was initiated by the caretaker government. This project comprehend reform of judicial administration including modernization with a network of computerization of court administration and judicial management.

THE administration of justice in the sub-continent as it exists today evolved principally through two historical stages during the colonial rule in the sub-continent. The first stages ended with the enactment of the Government of India Act 1935. During that period the three first High Courts were established at Calcutta, Bombay and Madras by Letters Patent granted in 1863. Three years earlier by the Letters Patent of 1862 the High Court of Calcutta was first established. Thereafter, the High Courts at Allahabad, Patna, Lahore and Rangoon were established by 1922 and after the Government of India Act of 1935 a High Court in each province was established.

Basically the two tier judicial system comprising supreme and subordinate judiciary is the legacy of the colonial rule. The term "Subordinate Courts" is a part of that legacy. The term meant that the respective High Courts exercised Appellate, Revisional and Inherent Jurisdiction as well as the power of Superintendence and control over the Subordinate Courts. The Constitutions which came to be framed in the post-independence era retained that terminology. And so did the Constitution of Bangladesh in 1972 in Part IV, chapter II and some other provisions.

Before and after the Government of India Act 1935 a cardinal issue in the colonial struggle of the people and their leaders and of the legal profession was the demand for separation and independence of subordinate judiciary.

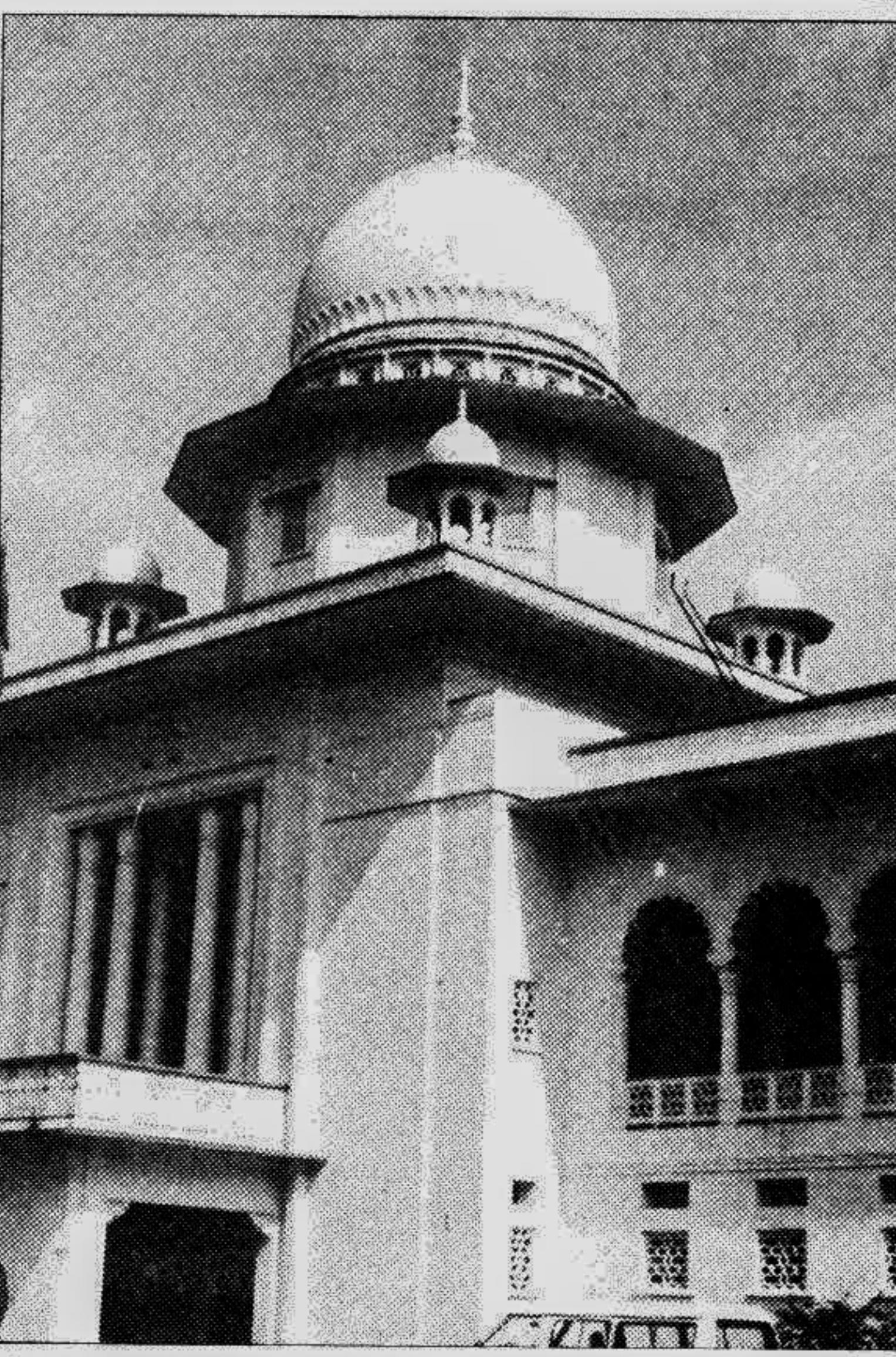
During the colonial rule for the purposes of colonial administration a loose control of judicial administration of the Subordinate Courts which were spread in the mafassil proved

adequate enough and functioned well. The Civil Rules and Orders (CRO), which contained elaborate instructions and guidance for the administration of civil justice by the Subordinate Courts, had its origin in 1981. These rules were formulated and published under the guidance of the Subordinate Courts. The CRO inherited in the post-independence era by erstwhile east Pakistan was the one inherited from the Subordinate Court of Calcutta.

The CRO was last published in a more comprehensive form in 1935 and since then had been growing in bulk because of modifications and amendments added by correction slips. In 1971 when Bangladesh became independent the need for a thorough revision was felt not because of reformist urges or needs but because emergence of Bangladesh as independent and sovereign state had rendered a good number of rules obsolete. The rules were compiled and published again in 1981 under the authority of Supreme Court of Bangladesh incorporating the changes made upto that time by deleting the obsolete rules. It would be worth while to quote the following from the Preface of the rules published in 1981:

"Many rules also became obsolete with the passage of time. A fairly large number of rules have been amended from time to time in the light of experience as well as to meet the changed circumstances. Formal amendments owing to the emergence of Bangladesh as an independent and sovereign country have also been made in the rules under the provisions of the Bangladesh (Adaptation of existing Bangladesh Laws) Order, 1972."

Over and above, several rules have been newly incorporated



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owing to the passing of few laws after the publication of the existing C.R.O as well as on the basis of experience during the past decades.

In order to rescind the obsolete rules, incorporate the amendments and new rules, the revision of the Civil Rules and Orders became an indispensable necessity.

This volume, with a revised index, embodies all the up-to-date amendments and excludes all the obsolete rules.

These administrative rules prescribed instructions to be followed by each office of the court at every stage from the presentation of a plaint to the execution of a decree and appeal and revision. The responsibilities and duties of the administrative staffs are also contained in these Rules.

If this measure of reform is immediately undertaken and some more long-term and short-term measures are planned and initiated a real beginning will have been made. The initiative for short term measures should not be postponed till the full results of the long-term measures are achieved.

During the colonial rule these rules worked well. The control exercised over the subordinate courts were loose but nevertheless adequate. In an agrarian society where almost all the civil cases were litigations relating to land, the question of control or these courts did not present a problem. Sophisticated trappings of independent courts were for the High Courts established first at Calcutta, Bombay and Madras and later in each province.

In the post-colonial era in the independent states of the Sub-continent this administrative arrangement and dispensation continued substantially unchanged. Under the Government of India Act 1935 which marked the second stage of the colonial administration of justice, independence and separation of the subordinate judiciary from the executive was secured to a great extent if not fully.

Consequently, separation and independence of the subordinate judiciary and the magistracy from the executive organ of the state continues to be the burning issue. Administrative reforms are not likely to bear fruit unless this cardinal issue is resolved.

In the constitution of Bangladesh of 1972 a real and effective guarantee for separation and independence of the subordinate judiciary was provided. But through the vicissitude of time this has been reversed by retrograde steps. Standing at the dawn of a new century we find that the prevalent condition is indeed a matter of great national concern. What is worse, long periods of authoritarianism and martial law had by now resulted in mental resistance of the executive and every political government in power to the question of separation and independence of judiciary. Public con-

fidence in judiciary is continuing to erode. Yet the task is simple. A political government in power, if it has the requisite majority to amend the constitution, then by itself or if it does not have the majority then by a consensus has to take the initiative of restoring Articles 115 and 116 of the constitution as these were originally in 1972.

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Islam treats women very unfairly and deprives them of all their rights. In practice, many examples are indeed available of such treatment meted out to women by Muslim men. Women are often put behind the veil, forbidden to leave their homes unless accompanied by a close male relative; they are often married off at an early age and have fewer opportunities for education. The treatment of women by the Taliban in Afghanistan reinforces this image of women in Islam.

Woman is also fully and absolutely entitled to property rights, as a man is. Her father or husband cannot take property away from her except by her express consent. As for inheritance, the Koran states that she will get half the share that her brother does. But this is more than compensated by way of the mahr she receives at the time of marriage, and she has no obligation to maintain herself. The obligation to maintain her is her father's or husband's.

She can spend her inherited properties according to her own pleasure. In case of divorce, also, she receives compensation by way of what the Koran calls mata' (provision for her maintenance until she lives or remarries). If a woman cannot marry, the Koran gives her father the right to make special provisions for her through wasiyah, his will, before the rest of the property is left to be inherited by other children. Thus, from whichever angle of the Quranic provisions, the rights of women have been taken care of by Islam in a just manner.

The Prophet of Islam also tried to combat prejudices against the girl child by stating that those who bring up girl children properly, feeds and clothes them and gives them the best possible education, will not be touched by hell-fire. The Prophet's dearest child was his daughter Fatima. When Ali, Fatima's husband, wanted to take a second wife, the Prophet showed his strong displeasure. Ali did not take another wife so long as Fatima was alive. This was also a message that polygamy is not a general license to marry more than one wife at one's pleasure, but is permitted only in some exceptional circumstances, to protect the interests of widows and orphans.

Muslim men have hardly been faithful in their observance of the Quranic injunctions for the empowerment of women. They have even resorted to weak hadith to violate Quranic injunctions. Thus, the male ego and the local cultural ethos must be held responsible for the plight of Muslim women today, and not the Quran.

OPINION

Writ Against Shipping Companies : An Issue of Concern

By Md. Ayub Chowdhury

PRICING action on own product or services by a company is its right; accepting or rejecting the same is the right of customers in a free economy where market forces finally stabilise the price. Protection under Article 102 of the Constitution has been sought to stop collection of Terminal Handling Charge (THC) by shipping companies. This seems to limit rights of shipping companies (carriers) to price their own services. THC or whatever term it is called is one of the charge items in carriers' tariff resulted from corporate pricing decision having regard to the conference membership compliance, if any. Preference of writ to restrain latitude in pricing its own services by carrier drew criticism. Even in those old days, those valid and recognised cartel or pool actions were thrown out by market forces, not by any other special order. This smoke appears to have been formed in the trade from a recent HC rule on 24 shipping companies interim ordering to stop collection of THC which is a mere recovery of actual costs the shipping companies incur in handling the shipment of customers. Planners in shipping industry including international regulating bodies and conference like FMC, TSA, ANERA, IBPC do not find this as a welcoming symptom. International carriers also require to operate under these regulatory bodies and any isolated local action not standing to correspond may affect the trade. If our national carrier BSC, not made a respondent in the writ, is found charging THC to customers, may or may not be in equal amount, it may add to further vouch the validity for THC bill.

While writ order is yet to be in the hands of respondents, respected applicants (customers) alleged that THC charged by shipping companies is a charge for use of port terminal which carriers can not legally charge as the CPA facility do not belong to them and also seek order to CPA to direct shipping companies not to collect any THC. I think, we should look more into the contents than the term THC which bears confusing word 'terminal' in it. What is charged by carriers as THC is not a charge item in CPA charge schedule but an item in carriers' tariff time to time adjusted by conference or corporate decision. By charging THC, carriers are not realising any port dues from customers nor the carriers are charging for any 'port service' as wrongly implied in writ application. Carriers are simply doing a pass-on action of few charges paid to various parties including CPA. Impact of costs may be on different players in service chain but the incidence shifts to ultimate consumers in the form of additions built into pricing at stages and so the THC is in this case. All charges including ocean freight could be lumped into one name or may be for strategic planning reasons charges are named in different terms. It is closely like

plaintiffs. Our import-export ratio is approx 3:2 and it is unavoidable that there will be more imports than exports and so will be the more containers sitting at port. While port overruns its capacity, shipping companies at forefront get chopped with penal rent. Emergence of forwarding companies did play a greater role towards stabilising carriers' charges. It is market force which should fix the price of business service; unfortunately not a court order.

As the shipping companies involve in container transportation as opposed to traditional vessel operation, they do involve in handling of container beyond the water limit and so they involve in charges outside water limit and, as evident from the contents of THC, it is a recovery of costs incurred outside water limit. It is not unfair that chart of accounts do track the cost and revenues separately with the terms they best fit and THC is in this case. So a need to take a proper look at the term 'THC' and also what it attempts to recover. For example, charges made on carriers by CPA, contract, equipment vendor and misc permitting parties make up more than 100% of the amount recovered from customers in the form of THC or whatever named let alone the other costs that the carrier keep incurring locally. Even writ application specified the fact of loading/discharging tariff of CPA which is charged on carriers and this is one of the parts of the costs carriers pass on to customers in the form of a revenue widely known as THC. Had not the CPA tariff been chargeable on carriers, significant part of THC might not have been an issue today. Fat part of inland haulage tariff (IHC) are railway freight and CPA lift-on/off charge. IHC charged by carriers is also a similar pass-on action but not an issue with the customers is a point to reckon.

Formulating own tariff or price so as to recover cost and margin is justified in all business with profit objective. Writ also mentioned that freight or C&P contracts are included in L/C and there can not be any other charge than freight. L/C is a contract between importer and exporter while Bill of Lading is the evidence of contract between importer/exporter and carrier which includes reference to carriers tariff having a local charge recovery item of THC in it. All charges including charges towards recovery of costs incurred at port in whatever name it is called are embodied in carriers' tariff, adjusted time to time, and collection of THC or similar charges in Bangladesh come under the purview of tariff. Instance of all-in contracts on exports is also sometimes seen which dispenses at THC bill; choice goes to customers.

If we look at the definition of THC given by learned authors and seem to have been considered by authorities and UN bodies, definition not inserted

in the definition of port service as wrongly implied in writ application. Carriers are simply doing a pass-on action of few charges paid to various

parties including CPA. Impact of costs may be on different players in service chain but the incidence shifts to ultimate consumers in the form of additions built into pricing at stages and so the THC is in this case. All charges including ocean freight could be lumped into one name or may be for strategic planning reasons charges are named in different terms. It is closely like

here for copyright limitation, it clearly establishes the fact that THC is an item payable to shipping companies. It did not say as an illegal charge by carriers. Whatever exporters or importers pay to CPA as per CPA tariff is customers' costs having impact on them, what shipping companies pay to CPA and other parties is also the cost incurred in handling the relevant shipment, burden of which is passed to customers as built in carriers' tariff spoke as THC. How THC tariff is made up might address many unanswered questions though the disclosure of confidential information by conference or carriers remain their choice. At times, conference members offering unofficial rate cuts to customers also remain unappreciated by trade. THC is not a recent action; it dates decades back possibly since the time container shipping saw light.

Writ also sought CPA to issue

directive to shipping companies to stop THC collection which CPA is not empowered because carriers are not billing any CPA charge item to a third party which CPA missed out collection.

Carriers are CPA users like exporter and importers; CPA has its own charge tariff and do the carriers have their own. CPA can not ask carriers to stop collection of any revenue nor CPA can stop local charges incurred by carriers to be passed on. In other words, one party can not dictate the pricing of another party unless the issue falls within the parameter of government price control.

This writ paved an opportunity for shipping companies to explain ample valid commercial grounds and justify their pricing and firmly prove before honourable HC that THC is not an item on CPA charge schedule which CPA missed out collection: THC is a mere recovery of actual costs incurred on handling of customers' consignments; THC is just a pass on action by carriers as it is done in ordinary product pricing. THC is a charge which could even be named otherwise without the words 'terminal handling' in it to iron out confusion. CPA, not enjoying a price control right, can not dictate pricing decision of one its users and this is an issue seeking order to limit rights to pricing.

Customers, here exporters and importers, do expect best transportation service at least cost and current intensity in competition offer them opportunity to cherry pick the service. THC or any other term used to recover local costs is a valid business action by carriers while we hope that, for the greater interest of our trade, more closure interaction between carriers and customers may bring more benefits than the size of THC in question and as a result our trade keeps growing. In whatever name or term, local costs incurred by carriers will have to remain recovered either in all-in rate or in an itemised bill.

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