



Star LAW report

Audi alteram partem:

Hear the other side

Appellate Division (Criminal Appellate Jurisdiction)
The Supreme Court of Bangladesh
Khurshida Begum and another

V
Golam Mustafa and others
Before Mr Justice Mahmudul Amin Chowdhury, Chief Justice; Mr Justice Mainur Reza Chowdhury, Mr Justice Md. Ruhul Amin and Mr Justice Mohammad Fazlul Karim
Criminal Appeal No. 21 of 1999
Judgement: December 11, 2001
Result: Appeal allowed

As against the order of the Magistrate refusing permission to exhume the dead body of Ahmed Chowdhury, respondent no. 1 preferred Criminal Revision No. 416 of 1996 before the Court of Sessions Judge, Chittagong and the same was heard by the learned Additional Sessions Judge, in-charge, 1st Court, Chittagong who by the order of 2 June 1999 dismissed the Criminal Revision. Thereupon respondent no. 1 filed an application under Section 561A of the Code of Criminal Procedure before the High Court Division and the same was numbered as Criminal Revision No. 352 of 1999. The learned Judges of a Division Bench of the High Court Division without issuing rule and that also without hearing respondents no. 3-9 as the State disposed of the application on 15-6-1999 granting full relief sought in the revisional applica-

Deliberations

While the High Court Division was moved by respondent no. 1 by that time 4 years 4 months and 19 days passed since the date of death of Ahmed Chowdhury. The High Court Division without considering the important aspect that because of lapse of time exhumation would serve no purpose summarily made direction to the Magistrate to exhume the dead body. This clearly shows that the High Court Division without applying its mind to the said aspect of the matter passed the order to exhume the dead body.

The other noticeable aspect of the order under appeal is that the High Court Division granted full relief sought in the revisional application in summary manner without hearing respondents no. 3-9 and the State. The age-old concept of law is that in a proceeding by an order of the Court, if the respondent is going to be affected then he requires to be heard before making the said order. This Division on number of occasions disapproved the practice of granting full relief without hearing the respondent or respondents, since such action of the court is violative of the principle of natural justice or in other words the age-old maxim audi alteram partem. The High Court Division in making direction to the Magistrate to exhume the dead body un-wittingly transgressed a basic principle of adjudication 'hear the other side'. The High Court Division in passing the order under appeal was totally unmindful of the practice of not granting the entire relief without hearing the other side. In the instant case, from the very beginning the matter of exhumation of the dead body was opposed by the appellants and that fact was also considered by the Magistrate while rejecting the permission that was sought by the officer-in-charge of the Satkania PS for exhumation of the dead body. This Division in explicit language expressed its view, "Practice of granting relief summarily without issuing any rule is held to be illegal and unfair."

The provisions in Section 151 of the Code of Civil Procedure and Section 561A of the Code of Criminal Procedure do not empower or authorise the court to make an order affecting the other party in the proceeding without hearing him or in other words in disregard of the time old maxim audi alteram partem.

Decision

Since the order of the High Court Division was made without affording opportunity to the parties who from the earliest point of time were opposing exhumation as allowed by the said Division and that also being violative of the principle 'hear the other side' the same is not sustainable in law.

In view of the discussions made herein above the appeal is allowed.

Mr Serajur Rahman, Advocate-on-Record for the Appellants. Mr AKM Zahurul Huq, Advocate, (appeared with the leave of the Court) instructed by Mr Md Nawab Ali, Advocate-on Record for respondent no. 1. Respondents no. 2-9: Ex parte.



tion making direction to the Magistrate to take necessary steps for exhumation of the dead body.

The appellants, wives of late Ahmed Chowdhury, being aggrieved by the order of the High Court Division sought leave to appeal and thereupon leave was granted primarily to consider the correctness of the order of the High Court Division granting full relief sought for in the revisional application in a summary manner without issuing any rule upon the appellants or upon the State which is against the principle of natural justice.

Background

Md. Ruhul Amin, J: This appeal, by leave, has arisen from the judgment and order dated 15 June 1999 passed by the High Court Division in Criminal Revision No. 352 of 1999.

Facts leading to the filing of this appeal, in short, are respondent no. 1's father Ahmed Chowdhury of village Laturdi in Police Station Motleb, District Chandpur was a devotee of Mirzakhil Darbar Sahrif in Satkania, Chittagong. On 17 January 1995 said Ahmed Chowdhury along with one Hasan Ali Mollah from village Laturdi went to visit Darbar Sharif. There he died on 26 January 1995. He was laid in the grave in a place to the west of the house of respondent no. 3, Sajjanashin of the Darbar Sharif. On 18 March 1995 respondent no. 1 filed petition before the Court of Magistrate, 1st Class, Chittagong alleging that on 17 January 1995 his father Ahmed Chowdhury and another went to visit Darbar Sharif and there respondents no. 3-9 beat him and thereby caused his death and to destroy evidence of cause of death, the said respondents instead of sending the dead body of his father to village Laturdi laid him in the grave hurriedly in a place to the west of respondent no. 3's house. The Magistrate 1st Class, Sadar Court No. 3 by the order dated 18 March 1995 sent the petition of complaint to the Satkania Police Station with a direction to treat the same as FIR and to submit report. On receipt of the petition of complaint, Satkania PS Case No. 4 dated 14-4-1995 was registered under sections 302/201/34 of the Penal Code against the respondents no. 3-9. On that very officer-in-charge of the Satkania PS prayed for permission of the Magistrate for exhumation of the dead body of Ahmed Chowdhury and thereafter on different occasions permission was sought for exhumation of the dead body, but ultimately the Magistrate by the order of 28 July 1996 refused to grant permission for exhumation of the dead body for the purpose of post mortem examination, since it would not be possible because of lapse of time to hold the post mortem examination for ascertaining the cause of death. It may be mentioned that permission sought for exhumation of the dead body of Ahmed Chowdhury was opposed by his wives (two) on the ground of sacrilegiousness.

READER'S queries



Your Advocate



Your advocate is **Mr. Probir Neogi** of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

Q: My father died last year. He didn't nominate any one for his bank account. We filed a case to get succession certificate. We got the verdict, but to get it in writing we have to deposit court fee. Now my lawyer is saying that the court fee has been raised from 1% to 2% of the deposited amount in succession case. Is it correct? Please advise.

Fakhru Islam
islami@dhaka.net

Your Advocate: According to section 379 (1) of the Succession Act, 1925 every application for succession certificate shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870 in respect of the succession certificate.

Row number 11 under title "Ad valorem Fees" in Schedule 1 of the Court-fees Act, 1870 provides that when the amount or value of any debts or securities specified in the succession certificate exceeds Tk. 20,000/- but does not exceed Tk. 1 lakh, court-fees payable is 1%, and when the amount or value exceeds Tk. one lakh, court fees payable is 2%. Finance Act, 2002 has not brought about any change in this regard. So, there has been no increase of court-fees for succession certificates in this fiscal year.

You wrote: "We filed a case to get succession certificate. We got the verdict, but to get it in writing we have to deposit court fee." In this respect it may be relevant to let you know the provision of section 379(2) of the Succession Act which contemplates that if the application for succession certificate is allowed, the amount deposited by the applicant under section 379(1) shall be expended, under the direction of the judge, in the purchase of the stamp to be used for denoting the fee payable. Section 379(3) of the Succession Act provides that the amount deposited under section 379(1), if not expended under section 379(2), shall be refunded to the person who deposited it.

Erratum: The word immovable of line 34 published in this column on 21 July has to be read as movable.

Corresponding Law Desk

Please send your mails, queries, and opinions to: post-Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk; interactive email lawdesk20@hotmail.com

LAW letter

Superintendent of police responses

I have been pained to read the letter from Sub-Inspector Nazmur Rahman, published in your esteemed newspaper at page 6, column 3 in the issue of July 21, 2002 under the heading "A Sub-Inspector of police speaks". This letter has opened a new dimension to my thoughts on the subject. I am very eager to share my pain and resolve the problems experienced by the S.I. and with this in view I would like to contact with Mr. Nazmur Rahman

Khan Sayeed Hassan, PPM
Superintendent of police, Bogra.

Sub-inspector of Police speaks...

I refer to the Law letter of Mr. Nazmur Rahman published on 21 July 2002 in Law and Our Rights section. If he was trying to win sympathy for his 'plight', I am afraid I would disappoint him. I will quote him and try to respond some of his assertions. We are in fact still under the bourgeois democracy. Has the role of Police changed from the time of Lord Cornwallis to 21 July 2002? How much and what appropriate changes Mr Rahman wants for? "Caste based system within the police must be removed." That is his ultimate prescription. However, how placing of the SPs "under direct control of district magistrate to assist the independent investigation" would be done is not clearly understood. When an IO is entrusted to investigate a case, does the SP create obstacles? The only purpose of that investigation is to bring out the facts, not to decide the guilt. So, what is the role of Magistrate at this stage?

Unable to bear your family expenditure with the poor income you were advocating for increasing the salary. Were you not aware of your duties, responsibilities, prospects and facilities when you accepted the job? Were you forced into this 'slavery'? If not, why are not you looking for an alternative? There could be only two reasons, either you are not competent for another job or you had your eyes locked on the invisible

income.

Before asking, "How will we dedicate ourselves for providing security to the people" you should have honourably resigned from your job. You don't have to buy the posting if you believe in six qualities of POLICE, (P-Politeness, O-Obedience, L-Loyalty, I-Integrity, C-



Commitment, E-Equality), and you should be equally at ease whether at Bandarban or at Jatrabari. But most of the police officers are not; so they go ahead and buy postings with an ulterior motive. It is a noble job where you entered voluntarily. So, you should respect it.

Bilou Gaharpur
Dhanmondi, Dhaka

LAW lexicon

De facto & De jure

De facto is a Latin term which means "as a matter of fact"; something which, while not necessarily lawful or legally sanctified, exists in fact. A de facto government is one which has seized power by force or in any other unconstitutional method and governs in spite of the existence of a de jure government.

De jure is opposite to de facto which means "of the law." The term has come to describe a total adherence of the law. For example, a de jure government is one which has been created in respect of constitutional law and is in all ways legitimate even though a de facto government may be in control.

Res sub judice & Res judicata

Res sub judice mean matters that are still under consideration of courts. Section 10 of the Code of Civil Procedure prohibits proceedings of cases which are res sub judice. You will hear of politicians declining to speak on a certain subject because the subject matter is "sub judice".

Res judicata mean matters which have already been conclusively decided by competent courts. A matter once decided by a competent court can not be tried again. Section 11 of the Code of Civil Procedure bars the trial of a suit or an issue which has already been adjudicated upon in a previous suit.

Status quo & Status ante quo

Status quo is a Latin term which means the situation that currently exists.

Status ante quo means the situation that existed before something else (being discussed) occurred.

Audi alteram partem

Audi alteram partem is a Latin term literal meaning of which is 'hear the other side'. It is a principle of natural justice which prohibits a judicial decision that affects upon individual rights without giving all parties in the dispute a right to be heard. The main theme of this principle is that no body should be condemned unheard. It also includes the right to receive notice of a hearing and to be given an opportunity to be represented or heard.

Rule nisi (ni-si)

Rule nisi means a court's rule that will become absolute unless the adversely affected party shows the court, within a specified time why it should be set aside. Nisi is Latin term which means "unless". Rule nisi is an ex parte ruling or grant of relief having validity unless the adversely affected party appears and shows cause as to why it should be withdrawn.

Writ of Habeas corpus

Habeas corpus is a Latin term which means "that you have the body". Writ of habeas corpus is a writ employed to bring a person before a court (in Bangladesh the High Court Division), to ensure that the party's imprisonment or detention is not without lawful authority or in an unlawful manner. Article 102(2) (b)(i) of our Constitution contemplates provisions for writ of habeas corpus.

Source: The Lectric Law Library's Lexicon, Duhaime's Law Dictionary & Black's Law Dictionary

LAWSCAPE

Lawyer: "Now that you have been acquitted, will you tell me the truth? Did you steal the car?"

Client: "After hearing your amazing argument in court this morning, I'm beginning to think I didn't."

What do you call a lawyer with poor IQ?

Your Honour.

A diminutive lawyer, appearing as a witness in one of the courts, was asked by the opposing lawyer, who was a six-foot giant, what he did for a living. The witness replied that he was a lawyer.

"You? A lawyer?" said the huge lawyer, "I could put you in my pocket."

"Very likely you could," replied the other. "But if you did, you'd have more law in your pocket than you ever had in your head."

LAW week



Sub-registers' power curbed

The Government has redefined market price of installations by curbing the power of the sub-registers. Under the government order issued on 23 July whatever the seller claims about the price of an apartment, installation or any building, it will be deemed as the average market price and the sub-register can not make any question whether the land is under valued or not. Which means if a person shows the price of an installation even hundred times lower than its real price the sub-register will have no power to question the under valuation or refuse the registration of the purchase. The order came just a month after the Government had given its 476 Sub-registers the power to refuse any kind of registration that shows the valuation lower than the average market price. Under the order issued by the Inspector General of Registration (IGR), the seller need not even show any documents verifying the actual price of the installation. - *The Financial Express*, 31 July.

High Court's rule to stop special drive

A High Court Division Bench comprising Justice Shah Abu Nayeem Mominur Rahman and Justice Arayes Uddin has issued a rule nisi asking the Secretary of the Ministry of Home Affairs and the Director General of Bangladesh Rifles (BDR) to show cause as to why the intrusion of the BDR personnel in houses of common people as well as subsequent arrest, torture, searching and damaging belongings should not be declared illegal and violation of constitutional rights and why they should not be directed to compensate. The Court also ordered them to refrain from arresting and harassing any person till disposal of this writ petition. The order was given pursuant to a writ petition filed by Ain O Shalish Kendro (ASK), Bangladesh Legal Aid and Services Trust (BLAST) and Sammito Samajik Andolan. It is noted that the BDR personnel were deployed in the country with the police force to curb terrorism as well as to bring the law and order situation under control. However, allegations are there that they usually entered houses of common people without any reasonable suspicion and arrested, tortured and harassed people indiscriminately. Shohel, a fish trader of Sawarighat in Dhaka, died after torture by BDR personnel few months ago. - *Law Desk*.

Arrest under section 54 increased

Arrest under section 54 of the Code of Criminal Procedure has increased in Chittagong Port City. More than 900 people were arrested under the section during the last 6 months but most of them were released, as there were no specific charges against them. About 963 people were reportedly arrested under section 54 in 626 cases, of them 478 were released. During this time 218 cases were disposed of in the Chief Metropolitan Magistrate Court in Chittagong where 349 accused were acquitted. While most of the accused are being released due to lack of specific charges, common people are regularly being subjected to arrest and harassment under this section. However, the Law Commission, in pursuance of request from the Government, made some recommendations to prevent abuse of section 54 and torture in police remand. The Commission recommended that person arrested under section 54 has to be released if police fail to file a specific case against him within 72 hours of arrest. In case of section 167 which provides rules for police remand, the Commission suggested that an individual under police remand must be produced before the court in every 48 hours so as to ensure that he is not being tortured. It also recommended amendment of section 344 of the Code of Criminal Procedure and suggested that the police officer in charge should be held responsible for any form of torture of the detainee. The Government is still to comply with the recommendations of the Commission. - *Law Desk*.

Rape in industrial sector raised

At least 51 working women in different industrial sectors and services were raped, of them 5 were brutally killed after being raped, in the first six months of the year. A survey conducted by Bangladesh Institute of Labour Studies (BILS) reveals. Of the victims 31 were garments workers and 10 were domestic workers. Most incidents occurred at late night work hours and on the way while the victims were returning home from working places. Such incidents could take place due to lack of official transportation facilities and security of working women, according to the survey report. - *Daily Star*, 6 August.

Counterfeit salt sold openly

The counterfeit salt of Shama Salt Packaging Ltd. has been sold in the market openly which was banned by the Bangladesh Standard Testing Institute (BSTI) earlier. A service team of BSTI while inspecting a market at Pallabi in Dhaka, seized salt of the said company, banned it and asked people not to use it. However, salt of this company was marketed again, reportedly, by bribing some officials of BSTI. - *Manavzamin*, 18 July.

Deteriorating law and order situation in south western districts

The overall law and order situation in the southwestern districts of the country has deteriorated alarmingly again as killing, extortion, hijacking, dacoity and free movement of the armed cadres of different outlawed parties have increased. About 36 persons have been killed in 10 districts of Khulna division in the month of July. Jessore topped the list with 18 killings. The number of brutal killings are intensifying due to unabated terrorism, extortion and the activities of the underground parties. Failure of police as well as other law enforcing agencies to nab the criminals and lack of chain of command among them are also the reasons for the threatening situation. It is reported that Jessore has been going without police superintendent for the last six months. During this month killings committed in other districts of this division as available from different sources are, 10 in Bagerhat, 7 in Magura, 5 in Kushtia, 4 in Chuadanga, 5 in Jhenidah, 6 in Satkhira, and 3 each in Narail and Meherpur. - *News Today*, 6 August.

Violation of child rights

Violation of child rights in the month of July increased alarmingly. Children have become exposed to various types of torture including rape, murder, acid throwing, kidnapping, trafficking etc. A report prepared by the Bangladesh Shishu Adhikar Forum (BSAF) has shown that 36 female children were subjected to rape. Besides, 55 children were killed by different ways, 42 have committed suicide, 58 were killed by road accident, 109 were subjected to unnatural death, 41 were drowned and 42 were injured by bomb blast. More than 4 children fell victim to acid throwing while 30 were kidnapped and 47 fell victim to trafficking. - *Daily Sangbad*, 3 August.

Fate of Vested Properties Return Act, 2001 uncertain

Fate of Vested Property Retention Act, 2001 has become uncertain, as it is not published in the gazette notification even after 500 days have passed. Though the law itself provides 180 days for its publication in gazette notification, the unreasonable delay has reasonably created doubt whether the government is sincere or not about implementation of the law. The law was enacted by Awami League government in April, 2001. The Vested Property Retention Act, 2001, which was a result of growing demand from conscious people of the country, had come to light, after a prolonged discussion by the Parliamentary Standing Committee on Land. The Committee included two BNP lawmakers. Although BNP, then the main opposition party, was not in the parliament, its lawmakers finalised the draft bill attending the meeting of the Parliamentary Standing Committee. The Awami League Government took initiatives for its implementation by establishing a "Vested Property Monitoring Cell" in Ministry of Land and all the Deputy Commissioners of the country were ordered to make a list of vested property and to send it to the ministry. But due to transfer of the concerned officials by the Caretaker Government, on the eve of the October general election, the process stopped and the stalemate exists till today. - *Janakantha*, 6 July.