



Star LAW report



Lawyers' must be diligent and discreet

**High Court Division
(Special Original Jurisdiction)
Contempt Petition No. 24 of 2001
Islamia Automatic Rice Mills Ltd.
Vs
Bangladesh Shilpa Rin Sangstha and others
Before Mr. Justice Syed Amirul Islam
and Mr. Justice Hussain Haider
Date of judgement: 21.07. 2002**

Background

Syed Amirul Islam J: This Rule was issued calling upon the opposite parties to show cause as to why a contempt proceeding should not be drawn up against them for willful disobedience in handing over the delivery of the machinery despite order of stay granted by this Court on 5-11-97 passed in Writ Petition No. 3285 of 1996 or such other or further order or orders passed as to this court may seem fit and proper.

The short facts relevant for the purpose of disposal of the Rule are that, the petitioner company took loan from Bangladesh Shilpa Rin Sangstha (hereinafter called "the BSRS") for establishment of its factory for which a loan was granted and an amount of Taka 51.89 lakh were given till 3-12-86. The petitioner company also took a loan from the Agrani Bank, Abdul Hamid Branch, Pabna and on its failure to repay the loan the Agrani Bank instituted Money Suit No. 14 of 1996 against the petitioner company for recovering a sum of Taka 27,31,236.15. In that Money Suit the BSRS was impleaded as proforma respondents No. 3. In that suit the Agrani Bank filed an application for attachment of the project properties before judgment which was allowed and against that order of attachment the petitioner company filed Writ Petition No. 3285 of 1996 wherein the impugned orders dated 18-4-1996 and 21-4-1996 passed by the learned Subordinate Judge and Artha Rin Adalat was stayed till disposal of the Rule and the Division Bench also directed the respondents to unlock and hand over the possession of the Mill to the petitioner company immediately and further proceedings of the aforesaid Money Suit was stayed till disposal of the said writ petition.

It further appears that the BSRS by a notice dated 12-10-92 asked the petitioner company and its directors to pay company's loan liabilities amounting to Taka 1,70,26,000 as on 31-7-92 but the company and its directors did not pay any money. Whereupon on 13-4-96 BSRS advertised in the daily Inqilab a Public Notice for sale of the first mortgaged properties of the Company. Against that public notice the petitioner company as plaintiff filed Title Suit No. 2 of 1996 in the 2nd Commercial Court, Dhaka, challenging the validity and propriety of the Public Notice for sale of the said mortgaged properties. In that suit the BSRS filed an application under Order VII rule 11 of the Code of Civil Procedure for rejection of the plaint.

It appears that BSRS also instituted Miscellaneous Case No. 588 of 1998 in the Court of District Judge, Dhaka for recovery of Taka 432.33 lakh on 1-7-98 and the same was duly decreed against the present petitioner and its directors. Against the aforesaid decree the present petitioner company and its directors filed Miscellaneous Appeal No. 145 of 2000 before the High Court Division but in that Miscellaneous Appeal a Division Bench of this Court did not pass any order of status quo or any other prohibitory order. It appears that on 28-1-2001 a Division Bench of the High Court Division heard an application for maintaining the status quo in respect of the machinery involved in the case till the disposal of the appeal in Civil Rule No. 47 (FM) of 2001d and the BSRS was asked to show cause why the order of status quo in respect of the concerned machinery should not be granted.

During the pendency of that proceedings the present petitioner company filed contempt petition No. 99 of 1997 against the Subordinate Judge and the Branch Manager, Agrani Bank, Pabna and accordingly, Rule was issued upon them. But BSRS was not a party in the aforesaid Contempt Petition No. 99 of 1997. Subsequently, the BSRS Board in its 226th meeting held on 27-12-1998 decided to sell the machinery of the plant to the highest tender at a price of 6 lakh and pursuant to the decision of the Board BSRS issued Sale Certificate under rule 9 of the (Direct Sale of Mortgaged Property) Rules 1981 as the rule requires the BSRS to issue a sale certificate when the full sale price of the mortgaged property has been deposited under rule 8. In this state of affairs on 30-11-2000 BSRS sought for legal opinion from its adviser Mr AKM Nazrul Islam, Barrister-at-Law, Senior Advocate of the Supreme Court to give his valued opinion as to whether during the pendency of so many cases including contempt and writ petition relating to the company, it is advisable to hand over the machinery of the company to the buyer. The legal adviser i.e. the present opposite party No. 3, gave his opinion to the effect that BSRS should deliver the machinery to the buyer as soon as possible. He further opined that Article 34 proceeding regarding the sale and transfer of the project land and building, etc should be kept in abeyance for some time and in the meantime, steps should be taken for hearing of the pending matters in the High Court Division.

It is alleged by the petitioner that by handing over the machinery to the highest bidder the present opposite parties have committed contempt of this court by violating the order dated 5-11-97 passed by the Division Bench in Writ Petition No. 3285 of 1996.

Deliberation

In this case an important question as to the liability of an advocate has been raised. Therefore, we would like to address that 'legal aspect'. It has been settled for a century in England that a Barrister cannot be sued by his client for breach of contract because the fees he receives are an honorarium and there is no contractual relationship between a barrister and a client. This position continued until Hedley Byrne was decided by the House of Lords (1964) AC 465. In 1963 unanimously House of Lords held that in principle there was no difference between physical loss and financial loss and that a duty to take care in making statements existed whenever there was a special relationship and there had not been a disclaimer of responsibility. The said point was also emphasised.

In Rooks Vs Barnard (1964) AC 1129, Hedley Byrne affirmed and extended the principle that a duty to be careful as distinct from a duty to be honest may exist in situations other than those in

which there is a contract between the parties. But there was doubt as to the Barrister's liability in negligence as a result of Hedley Byrne. These doubts were nearly all quieted when in Rondel Vs Worsley (1969) AC 191, the House of Lords unanimously held that an Advocate could not be sued by his client in respect of alleged negligence in the conduct of a criminal trial. It should be remembered that Rondel Vs Worsley does not lay down the rule that a Barrister cannot be sued for negligence by his client. The case, in fact, lays down that as between Barrister and client there is a special relationship giving rise to a duty of care unless the Barrister can bring himself within the exceptional immunity of an Advocate. This immunity is quite distinct from the rule that there is no contractual relationship between the Barrister and client and is justifiable for a number of reasons on grounds of public policy because there is a general public interest in a free and independent Bar and a Barrister owes a duty to the court for the true administration of justice, or because an action for negligence against a Barrister would inevitably involve the re-trial of the original proceeding or because the Barrister shares in general immunity which as given to all those taking part in the judicial process.

But the law Lords in Saif Ali Vs Mitchell and Co. (1980) AC 198, cut down the extent of immunity holding that a Barrister was liable when he carelessly failed to advise re-settling the plaintiffs claim so as to add another defendant. So, there might well be liability for an opinion given in chambers on point of law or for paperwork which was unconnected with litigation. But it by no means follows that there is a liability in negligence if an error takes place outside the area of immunity if a Barrister is careful in doing his professional works. So, in order to avoid liability outside the area of immunity a Barrister must be careful; he need not be right.

This principle is said to be founded on the principle that a person who undertakes to do work which requires special skill holds himself out as having that skill, the lack of it is blameworthy: *imparitia culpa adnumeratur*. It must be remembered that the obligation to exercise that skill does not depend on any contract or undertaking but based on the ground that of a reasonable man. As a necessary corollary the standard of care required is the degree of skill which is normally shown by a person doing that kind of work. The test is the standard of ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. See (1957) 1 WLR 582 at 586. Lord Haldane LJ said in *Nocton Vs Ashburton* (Lord), the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him" See (1914) AC 932 and (1953) Ch. 280. It must be borne in mind that what applies to a solicitor, applies to a lawyer in Bangladesh.

Besides, our statutory law also makes it clear that a lawyer may be reprimanded, suspended or removed from practice if he is found guilty of professional or other misconduct. In Bangladesh an advocate can also be proceeded against for breach of contract if he is negligent in discharging his professional responsibilities. Therefore, the lawyers of this country are under the obligation to act reasonably and carefully in discharging their professional duties except so far it relates to actual advocacy in a court of law otherwise he will be liable to his client either in negligence for breach of contract or in tort.

Decision

In the present case we have found that the legal opinion tendered by Mr Nazrul Islam is in accordance with law and, in fact, there has been no contempt of this court for violation of the order dated 5-11-96. In spite of that the petitioner has initiated this proceedings impleading the high officials of the BSRS including their adviser and it appears to us that Mr Nazrul Islam has rightly submitted that this attempt on the part of the petitioner company is nothing but an attempt to unduly delay the payment of the BSRS dues and to delay the disposal of the pending legal proceedings in different courts. It is a unique case wherein a Senior Advocate of this court has been unnecessarily harassed by initiating this contempt proceeding and such unholy attempt must be nipped in the bud. Therefore, the petitioner should be saddled with a cautionary cost of Taka 25,000 to be paid to respondent No. 3.

In view of our aforesaid discussions we do not find any substance in this Rule and accordingly, the Rule is discharged with a cost at Taka 25,000 to be paid by the petitioner to the respondent No. 3 within 3 (three) months from date.

Advocate Ozaire Farooque, for the petitioner. Advocate AKM Nazrul Islam with Abdullah-Al-Mamun, for the respondents.

READER'S queries



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests

Q: I refer to your valued reply vide The Daily Star "Reader's queries-Your Advocate" column of 14/12/2003 issue, last paragraph captioned "Correction" wherein I quote, "Section 4 of Muslim Family Law Ordinance 1961, 2(Two) daughters will receive the entire property of the deceased to the exclusion of others" un-quote. My husband was assassinated on 12/09/01 & in a locally held salish/arbitration on 09/09/2002 by 3 Ward Commissioners, agreement was reached to pay me Tk.4 Lacs as stipulated in my Kabinama & allowances etc.,. Unfortunately, my powerful & notorious in-laws refused to pay a single poisha. Above all else the relevant (1) ward commissioner for obvious reason(s) refused to furnish me with the original said salish agreement. My question is in various banks about tk.3 lacs balance of my late husband, blocked by the bank(s). So, my only daughter now around 18 months of age, being only a minor is she also entitled to the entire bank balance? This is the only tangible balance that, exists as my late husband's other properties, my in-laws manipulated in their names for the past 2 years.

Rokeya K Putool,
Firozsha Colony, Chittagong.

Your Advocate: I gave you some guidelines and advice in my earlier reply published on 27 July, 2003. That was also on the ordeal of your widowhood faced in your matrimonial home particularly in respect of your and your daughter's various entitlements. Your present question is more specific. That is your late husband has in his name Tk.300000/- in various Bank accounts. Your in-laws have stopped their operation so that you cannot withdraw the amount. Your attention is now attracted to a recent opinion given by me on somebody else's problem with reference to Section 4 of the Muslim family Laws Ordinance, 1961. The section says - "In the event of death of any son or daughter of the propositus before opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive." You are now dwelling on the impression that your daughter being the only child left behind by your husband is entitled to the entire amount lying in your husband's bank account. No, this is a mistaken analogy because your case is different. The opinion you have referred to is about the entitlements of the grand children to their grandparent's property on the event of death of their parents before the grand parents. Here it is the question of daughter's entitlement to her father's property which is in question. So section 4 of the Muslim Family Laws Ordinance, 1961, is not applicable to your daughter's case.

As for the bank accounts, generally the account holder is required to nominate anyone for avoiding complications in disposing of the money on the event of the depositor's death. It is customary with the bankers to pay the amount of deposit to the nominee appointed by the depositor. A minor also may be appointed as the nominee. Please check with the Bank accounts whether there is any nominee appointed by your husband. It seems more likely that either your or your daughter's name is there as nominee. If you are so appointed you can withdraw the entire amount and the Bank cannot prevent you from withdrawing the money. If your daughter's name is there please check whether the depositor has authorized you to receive the money on behalf of your minor daughter. Such authority also gives you the right to withdraw the money deposited in banks. If nothing of the kind is there you will have to go by the share indicated in a succession certificate to be procured from court.

LAW week



SJC completes inquiry

The Supreme Judicial Council (SJC) has completed the inquiry into allegation of corruption against an additional judge of the High Court, Justice Shahidur Rahman. Barrister Rokonuddin Mahmood, president of the Supreme Court Bar Association on 1 October alleged that a High Court judge had recently taken Tk. 50000 from an accused in a woman's repression case to help him get bail by persuading a fellow judge. Chief Justice K.M. Hasan initiated a primary investigation into the allegations by issuing a letter to Rokonuddin Mahmood, requesting the Supreme Court Bar Association president to submit a written statement along with documents to substantiate his claim. After receiving approval from Prime Minister and the President a 3 member Supreme Judicial Council headed by Chief Justice was formed. The Council will soon submit its findings to President. - *Law Desk*.

School of Law at Brac University

BRAC University has added a School of Law which will offer a four-year undergraduate degree in law (LL.B.). The classes for the LL.B. programme start this semester. Dr. Shahdeen Malik is over-seeing the process of setting up and running the law programme at BRAC University. Law students at BRAC University School of Law, in addition to the normal law courses and subjects, will have to take a number of social science and humanities subjects and courses. The new School of Law will also introduce the Socratic Method of teaching law of North America Universities. Instead of memorising text and sections of laws, students will primarily study case law and judgements for understanding the principles, rationale and logic of law. Internship with law chambers, law and human rights related NGOs, and even courts will be essential components of the undergraduate law programme at the School of Law. With students of all other departments of BRAC University, the law students will also spend their first semester at BRAC's Training Centre in Savar for a residential programme to enhance their general skills in computer, English, Bangladesh Studies and other compulsory subjects, common for all students. The Admission Test for the School of Law is scheduled for the 23rd January and classes begin on the 8th February. - *Law Desk*.

Stringent electronic media law planned

The government is considering a stringent legislation to bring the electronic media, especially the satellite channels, under a guideline in an apparent bid to control them. The information ministry has finalised a draft of the law, Private Broadcast Media (Radio and Television) Bill 2004. After approval of the Cabinet, the bill will be placed in the upcoming Jatiya Sangsad session for passage. The draft law says the channels already on air will require fresh licences under the new law. Under the draft, the government will invite applications from people interested in setting up radio and TV channels and a committee will issue the licence. Broadcast of news, special programmes and advertisements by private channels will also be controlled by the act. Violation of some articles of the proposed law will be considered as crime. For the first-time offence, offenders will be fined Tk 10 lakh and in default will have to serve a three-month jail term. Each offence after the first one will carry a fine of Tk 20 lakh and six months of jail in default. Failures to pay any outstanding amount for a broadcast licence, transfer of more than 50 percent shares without permission and violation of any term will result in cancellation and suspension of licence. -

Daily Star, 11 January

HC asks for report on foreign prisoners

The High Court Division of the Supreme Court has asked Inspector General of Prisons to submit a report within 3 weeks regarding the present status of 11 foreign prisoners languishing in the jail after serving out their term. The High Court Division Bench comprising Justice Abdul Matin and Justice Syed Refat Ahmed passed the order following a writ petition by a human rights organisation. The foreign prisoners are in the jail custody over the years. It is reported that all of them have served the sentence passed against them, but still rotting in the jail. - *Observer, 12 January*.

Accused threatens cop with death

A police inspector in a murder case has been threatened with death by the accused on the court premises. Zahid Hasan Aslam, accused in a number of murder cases, threatened Inspector Nabi Hossain, Investigation officer (IO) of a murder case in Rugganj of Narayanganj with death. Russell Bhuiyan, an industrialist of Rugganj who was bullet hit on August 26, 2002, died at Dhaka Medical College Hospital the following day. The then officer-in-charge (OC) of Rugganj Police Station Inspector Nabi Hossain, investigated the murder and pressed charges against the killers. Aslam, now free on bail, also threatened Public Prosecutor in the case Advocate Nurul Iman Babul with life. - *Law Desk*.

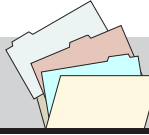
Fined for false writ

The High court Division has asked one Badruzzaman Mamun, accused of 3 cops murder at Sathkhira, to pay 25000 Tk. for filling a frivolous writ petition challenging the chargesheet of the case. The High Court Division Bench of Justice Syed Mahmud Hossain and Justice Tariqul Hakim passed the order. The policemen were killed on 4 February 2002. A case was filed in this connection without mentioning any name. After investigation chargesheet was submitted Badruzzaman mamun and others. Challenging the inclusion of his name in the chargesheet, he filed a writ petition before the High Court and the High Court issued a rule nisi upon the government to show cause on the matter and also stayed proceeding of the case. The High Court after hearing both the parties discharged the rule and asked the writ petitioner to pay 25000 Tk. as cost. Observer, 12 January.

Call to check dowry

Participants at a discussion titled 'Action agenda for a dowry-free Bangladesh' has emphasis on the creation of employment opportunities and eradication of poverty to free the society from the curse of dowry. They said campaign against dowry has to be initiated from the grassroots level to create a social awareness against the system. The participants also called for inclusion of negative implications of dowry in the academic curriculum with a view to create awareness about its harmful effects. Chief guest of the meeting Law, Justice and Parliamentary Affairs Minister Moudud Ahmed said unless unemployment issues are resolved in rural areas, poverty would persist allowing dowry in the society. He added that the government will try to include negative impact of dowry in school and college curriculum from the next year after discussing the matter with the education ministry. He also said the enforcement of law, a massive awareness at the grassroots level is a must to stop this malpractice. Daily Star, 9 January.

LAW letter



Is it freedom of religion !

Every right corresponds to a duty. As the existence of rights without a corresponding duty is meaningless. So our constitutional right to express thought freely and to observe religion without any interference similarly corresponding to a duty i.e. the duty of the state is to preserve and ensure those rights. And that duty rightly enjoined upon the govt. by the constitution itself. So the govt. is bound not only to ensure those rights but also to show due respect to the belief and sentiment practised and nurtured by every individual. The provision of freedom of religion enshrined in our constitution includes the right to profess, practice and propagate the belief possessed by one and the word 'propagate' means the right to communicate ones thought and belief with another. Therefore, constitution clearly indicates to uphold the faith of minority in the society where majority belongs to another faith. But the govt's recent move against the Ahmadiya Muslim Jamaat shows the opposite scenario. Of late, the govt. has banned all the publications of (A.M.J) in line with the demand of a group religious bigot mainly backed by the Islami Oikya Jote, which is one of the partners of the ruling alliance. Defending the move the govt. argues, those publications 'hurt or might hurt' the sentiment of the majority Muslims and may create public disorder. But the excuses put forward by the govt. entirely lacks its objectivity and the decision directly goes against the provisions of the constitution where the enjoyment of freedom relating to thought, speech and religion are guaranteed. So the govt. cannot uphold and preserve ones faith by suppressing the other. And it also ultra vires of the constitution where the provisions of equality before law and equal protection of law have been rightly incorporated.



Md. Kamal Hossain Meahzi
LLB (Hons), University Of Chittagong

Recently the government has banned all publications of the Ahmadiya Muslim Jamaat Bangladesh allegedly under pressure from religious bigots. According to the newspaper reports the ban was imposed in view of objectionable materials in such publications which hurt or might hurt the sentiments of the majority Muslim population of Bangladesh. For the last few months, religious bigots represented mainly by Islami Oikya Jote launched a campaign to force the government to declare the sect non-Muslim. They issued an ultimatum to the govt. to declare the Ahmadiyas as non Muslim. It seems that the move is the first step towards declaring Ahmadiyas of the country non-Muslims.

As per the Constitution, Bangladesh is a democratic country where

every one is free to profess and practice the religion of his own choice without hurting other's religious believe. The govt. simply imposed the ban labelling them as 'may hurt the sentiments of the majority Muslim population'. This explanation of the govt. is not satisfactory. It clearly violates freedom of religion (Article 41), non-discrimination on ground of religion (Sub-article 3 of Article 28) and freedom of speech, thought and conscience (Article 39) of the constitution. The order also reneges on the right to equal protection of law and the right to be treated in accordance with the law and equality before law.

The government should not be in the business of banning any religious books or any religious sect. This action may instigate religious fanaticism in the country. So, I request the government to withdraw the order to prove that Bangladesh is truly democratic country where everyone can exercise his religious rights without any

restriction.
Mizanur Rahman,
Advocate, Dhaka Judges Court.

The present government every now and then claims that Bangladesh is a moderate Muslim country. Constitutionally Bangladesh is not a Muslim country even though Islam is the state religion. The Law of Quran and Sunnah do not administer Bangladesh. So every religious community has the right to enjoy his/her religion according to their belief as guaranteed by Article 41 of our Constitution. So government should not interfere with the fundamental right of Ahmadiyah community. It is unwise to ban the Ahmadiyah's publication. Government should withdraw this ban immediately and give the chance to the Ahmadiyah community to profess and practice their faith.

Md. Zillur Rahman,
Gandaria, Dhaka.