



Star LAW report

SECTION 6 OF 'DRUTO BICHAR AIN'

Equal protection of law is not violated

High Court Division (Special Original Jurisdiction)

The Supreme Court of Bangladesh
Muhibur Rahman Manik and others
... Petitioners

Vs

Bangladesh and others Respondent
Before Mr. Justice Md Hamudul
Haque and Justice Zinnat Ara
Date of judgement: May 21st, 2003

Background

Md Hamidul Haque J: These Rules were issued calling upon the respondents to show cause as to why section 6 of Druto Bichar Tribunal Ain, (Act No. 28 of 2002) and the Notification vide SRO No. 38-Law/2003 so far it relates to the petitioners concerned should not be declared to be unconstitutional and void. And also why the transfer of the cases of the petitioners to the Druto Bichar Tribunal should not be declared to have been done without lawful authority and is of no legal effect.

In these Rules facts are not very much relevant. The petitioners of these writ petitions are accused in some cases. Their cases were transferred from the trial Courts to Druto Bichar Tribunal which were set up in view of the provisions of section 4 of the above Ain.

Mr M Amrui Islam, the learned Advocate appeared on behalf of the petitioners of WP Nos. 2120 and 2189 of 2003 and Mr Abdul Baset Majumder, the learned Advocate appeared on behalf of the respondents of WP No. 1978 of 2003. Their submissions are almost the same. However, let us start with the submissions of Mr Amrui Islam. The gist of his submission is that section 6 of the above Ain does not provide any principle or guideline for exercise of the power given to the Government under that section. And as such, in the absence of such guideline or any objective criterion, there is ample scope of discrimination between same classes of people and also a scope of exercising the power arbitrarily in transferring cases to Druto Bichar Tribunal. He has given much emphasis on the fact that the section confers unfettered power upon the Government to "pick and choose" any accused of a case for harassment and political victimisation and this power violates the equality clause as guaranteed under Article 27 of the Constitution.

Next, Mr Islam has argued that transfer of the cases of the present petitioners to the Tribunal is mala fide. He referred to ground No. III of Writ Petition No. 2120/03 and has submitted that the petitioner was a lawmaker in the Awami League Government and, as such, his case was transferred at the behest of the interested quarters only to victimise and harass him.

The last submission of Mr. Amrui Islam is that right of transferring a case from one Court to another Court cannot be exercised by the Government or any executive authority. He has pointed out that such right has been given to the higher courts under different laws now in force. Next, he has given emphasis on the fact that it is the Government who chooses the cases, the Courts and the Judges. So, according to him, this unfettered power as given to the Government not only is violative of fundamental rights but it also amounts to interference with the connection of independence of judiciary.

Deliberation

We have perused the different sections of the Ain. Section 5 provides that only those cases which are

transferred by Gazette Notification to a Tribunal are to be tried by the Tribunal. And section 6 provides that cases relating to offences of murder, rape, firearms, explosive substances and drugs may be transferred by the Government in public interest by making a notification in the Gazette to a Tribunal from the Court of Sessions or Special Court or from a Court of Magistrate, as the case may be. So, from section 6 we find that a case which relates to the offences as mentioned in the section and pending for trial in the Courts as mentioned in the section may be transferred by the Government to a Tribunal.

Let us now consider the question whether petitioners will be treated differently from those accused of the same footing who will be tried by the Courts from which the cases of the petitioners were transferred to

petitioners. It is true that in subsection (1) of section 9, Chapter XX of the Code has been mentioned but the reference of Chapter XX cannot be considered as a departure affecting the rights of the petitioners. Moreover, we have noticed that in section 7 of the Ain it has been clearly mentioned that the Tribunal shall be deemed to be a Court of Session. When Tribunal shall be deemed to be a Court of Session it will act as a Court of Sessions. Section 17 clearly provides that the provisions of the Code of Criminal Procedure shall apply in respect of trial of a case in the Tribunal so far those are not inconsistent with any provisions of the Ain. The learned Advocate for the petitioners could not show any provision of the Ain which has in any way curtailed the right of the petitioners to get fair trial. Even we find from sub-section (3) of section 9 that the same procedure of granting bail which is applicable in the court

from which the cases are transferred shall continue to apply in the Tribunal if an application for bail is made before that Tribunal. So, we find that no stringent provision has been incorporated in the new law even regarding bail.

As regards section 16, we may say that the section only empowers that Tribunal to admit such evidence. In the Evidence Act or in the Code of Criminal Procedure, there is no bar to admission of such evidence. Moreover, from the proviso to section 16, it is clear that such evidence cannot be the basis for conviction.

So, on perusal of the Ain itself we find that an accused whose case is transferred to the Tribunal will get similar opportunities to defend himself like an accused facing trial in the other Courts from where the cases were transferred to the Tribunal. However, we find that there is a departure in respect of time-frame as given in the Ain from the time-frame given in the Code. Under section 339 of the Code, a Magistrate is required to conclude the trial of the case within 120 days and a Sessions Judge within 360 days. Here, in this Ain, the Tribunal is to conclude the trial within 135 days, this is evident from section 10 of the Act. So, the only difference we find is that in the Ain time limit is reduced to 135 days. We find no reason how this reduction of the time limit will affect the petitioners when the other conditions relating to trial remains the same. Here comes the application of Article 35 of our Constitution. The learned Advocate of both the sides has submitted that there is no Article in the Indian Constitution, which is similar to clause (3) of Article 35 of our Constitution. Clause (3) of Article 35 clearly provides that a person accused of a criminal offence shall have the right to a speedy trial. This aspect of a constitutional guarantee of getting speedy trial was not discussed in any of the cases cited by Mr Amrui Islam.

When our Constitution itself provides that a person accused of an offence shall have a right to get a speedy trial, it is the duty of the Parliament to enact the law to

ensure such right. The learned Attorney-General has explained that the instant Ain was enacted with that end in view. We have no doubt in our mind that the principles laid down in the cited cases could be applied in the instant cases before us if it could be found that accused persons of the same footing or standing are being tried in separate forums under separate procedures of trial. Obviously, in that case, that would have been violation of equality clause of Article 27. We have found that an accused tried by the Tribunal and an accused tried by the other Courts as mentioned in the Ain are being tried under the same procedure. Moreover, we find that the enactment was made in consonance with the provisions of the Constitution itself. Someone has said long ago that "justice is like a train that's nearly always late." Now it is a universal demand that such bad name should be erased and we find that the new Ain is one step towards that goal.

Mr Islam has given much stress on the fact that there is no guideline in the Ain itself to transfer a case and, as such, the Government has the opportunity to transfer cases on "pick and choose" basis. It is not fully true that there is no guideline in section 6 of the Ain. We find that at least there are three guidelines -- first, only those cases which are pending for trial can be transferred, because in the section the word has been used. Next, guideline is that only cases which involve five kinds of and thirdly, such transfer can be made only in public interest. In Anwar Ali's case, Hon'ble Judges took exception as to the constitutionality of the provisions of section 5 of the West Bengal Special Courts Act mainly on the ground that class or classes of offences are not mentioned in the Act. Here, in section 6 of the Ain, class or classes of the offences are clearly mentioned.

The last argument of Mr Islam was that the Government chooses the cases, Tribunals and also the Judges and in this way the Government has unfettered power to influence criminal justice and to cause harassment to political rivals. Perhaps Mr Islam was not fully informed of the fact as to the appointment of Judges in those Tribunals. The Judges were appointed in consultation with the Supreme Court vide Notification No 624-Bichar-3/1A-2/2002 dated 13-11-02. So, it is not true that judges have been appointed by the Government according to its choice.

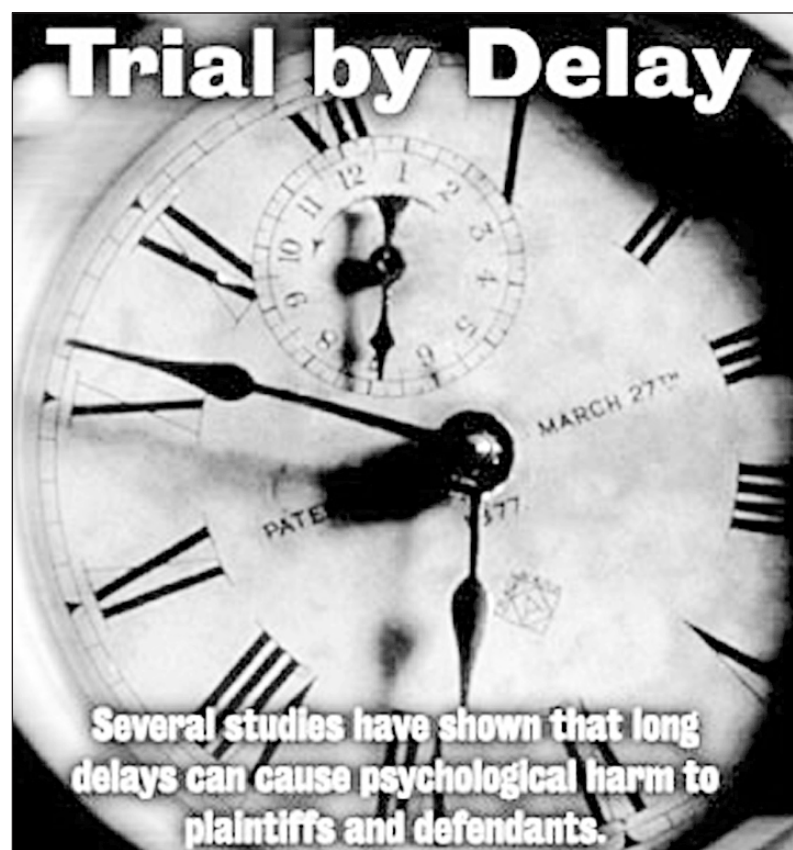
As regards the argument of accountability of the Judges we find that this is also not correct. Section 15 provides that a Tribunal is to send a report to the Supreme Court if it cannot conclude trial within the specified time. So, the Tribunal is accountable to the Supreme Court not to the Government. It is provided that only a copy of the report is to be forwarded to the Government. However, sub-section (2) of section 15 provides that the Public Prosecutor and the concerned police officers will be required to submit report to the Government and in that case, copy shall be forwarded to the Supreme Court. Sub-section (3) provides that after perusal of the reports, the authority concerned may take necessary action against the person responsible for not concluding the trial within the specified time. In case of a Judge, the concerned authority, obviously, is the Supreme Court, not the Government.

Decision

In view of our discussion made above, we find that provision of section 6 of the Ain do not in any way infringe the right of getting equal protection of law.

In the result, the Rules are discharged without any order as to cost. The orders of stay granted earlier are vacated.

AF Hasan Ariff, Attorney General with Abdur Razzaque, Additional Attorney-General, Gasuddin Mithu, Assistant Attorney-General, Zaman Khatir, Assistant Attorney-General and Kamrunnessa, Assistant Attorney-General for the Respondents, Barrister Amrui Islam and Advocate Basit Mojumder for the Appellants.



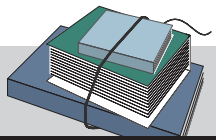
the Tribunal. If we find that there are major departures from the procedure of trial followed in those Courts, then the question of differential treatment will arise. We made a query to Mr Islam to point out what departures he could find. Mr Islam has pointed out three departures. With reference to section 9, he has pointed out that as regards the trial of the cases that section provides that the procedure as laid down in Chapter XX of the Code shall be followed whereas the same procedure relates to trial by Magistrates. He has also pointed out that sub-section (2) of section 9 provides that if the punishment does not exceed imprisonment for more than 7 years, the accused may be tried summarily under the provisions of Chapter XXII of the Code. Next, he has pointed out that photographs taken at the time of the occurrence or the recorded conversation have been made admissible in evidence under section 16 of the Ain.

We have perused the whole Ain and we have found that even the departures as pointed out by Mr Islam have not in any way affected the rights of the present

trial of the case within 120 days and a Sessions Judge within 360 days. Here, in this Ain, the Tribunal is to conclude the trial within 135 days, this is evident from section 10 of the Act. So, the only difference we find is that in the Ain time limit is reduced to 135 days. We find no reason how this reduction of the time limit will affect the petitioners when the other conditions relating to trial remains the same. Here comes the application of Article 35 of our Constitution. The learned Advocate of both the sides has submitted that there is no Article in the Indian Constitution, which is similar to clause (3) of Article 35 of our Constitution. Clause (3) of Article 35 clearly provides that a person accused of a criminal offence shall have the right to a speedy trial. This aspect of a constitutional guarantee of getting speedy trial was not discussed in any of the cases cited by Mr Amrui Islam.

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LAW lexicon



Prescription

A method of acquiring rights through the silence of the legal owner. Known in common law jurisdiction as "statute of limitations." When used in a real property context, the term refers to the acquisition of property rights, such as an easement, by long and continued use or enjoyment. The required duration of continued use or enjoyment, before legal rights are enforceable, is usually written in a state's law known as "statute of limitations."

Prima facie

(Latin) A legal presumption which means "on the face of it" or "at first sight". Law-makers will often use this device to establish that if a certain set of facts are proven, then another fact is established prima facie. For example, proof of mailing a letter is prima facie proof that it was received by the person to whom it was addressed and will be accepted as such by a court unless proven otherwise. Other situations may require a prima facie case before proceeding to another step in the judicial process so that you would have to at least prove then that at first glance, there appears to be a case.

Principal

An agent's master; the person for whom an agent has received instruction and to whose benefit the agent is expected to perform and make decisions.

Private law

Law which regulates the relationships between individuals. Family, commercial and labour law are examples of private law because the focus of those kinds of laws is the relationships between individuals or between corporations or organisations and individual, with the government a bystander. They are the counter part to public law.

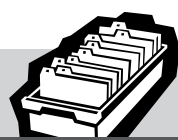
Public law

Those laws which regulate (1) the structure and administration of the government, (2) the conduct of the government in its relations with its citizens, (3) the responsibilities of government employees and (4) the relationships with foreign governments. Good examples are criminal and constitutional law. It can be distinguished from private law, which regulates the private conduct between individuals, without direct involvement of the government. For example, an unsolicited punch in the nose would constitute a crime for which the government would prosecute under criminal law but for which there would also be a private legal action possible by the injured party under tort law, which is private law although governments can be held responsible under tort law. As you can see, the line is often hard to draw between public and private law.

Probation

A kind of punishment given out as part of a sentence which means that instead of jailing a person convicted of a crime, a judge will order that the person reports to a probation officer regularly and according to a set schedule. It is a criminal offence not to obey a probation order and is cause for being immediately jailed. If someone is "on probation", that means that they are presently under such a Court order. These orders may have special conditions attached to them such as not to leave the city, drink alcohol, consume drugs, not to go to a specific place or contact a certain person.

FACT file



Sex workers deserve better deal from society

MAHFUZA MOSLEHI

She has been a sex worker for several years. At 16 she still carries with her the childhood dream: to become a doctor or a social worker. Forced into the profession and never easy in it, the young woman yearns to quit, but finds no way out. So she continues and dreams of her

favourite dream. Years ago when she was a schoolgirl she was abducted by a man whose marriage proposal she turned down. Her abductor raped her before leaving her on the street. She was afraid of returning home and instead travelled to Dhaka city where she took her first job: a housemaid.

"I wanted to forget all that had happened to me," says she. "But

bad luck was not ready to leave me alone." A new attack came from the head of the family where she worked as a maid. She fled to another house and took another job at a garment factory where she was allegedly raped by her employer.

"This is the harrowing tale of my becoming a sex worker. I'm here for the rest of my life. There is no escape," whispers the woman who wished to be anonymous. She has spoken for most of the sex workers in Bangladesh. Not many of them have come willingly.

Poverty, deception and sexual attacks often force many helpless women to this hated profession. Once they are into it many try to defend their work. They want to add some level of acceptance to it. Consider how Safia -- not her real name -- how she looks at her profession.

"When I was starving and passed day after day in hunger there was one in the society to help me. I had to accept this work to survive," shouted she. "Who are our customers? Most of them are married and some are educated. Leaving their wives they come to us and enjoy us. If our clients still remain gentlemen why they call us fallen women?"

"We are not fallen women. We are also human beings living off working like the normal people do," she insists.

Says Roekya Kabir, Executive Director of Pragati Nari Sanghata: "First of all we don't want to see any woman in this work. But once they are into it they should not be deprived of their human rights. We must accept the fact that poverty

has forced these women to take up this work as a profession. They have also every right to carry on with their lives."

She argues that mere eviction of the sex workers would not solve the problem. Instead, they should be provided with skill training so they can find alternatives.

Those who oppose eviction of sex workers from brothels do not necessarily support their profession. What they want is that all concerned should consider their profession with sympathy and compassion. Their work does not necessarily mean that they should be exploited by all and sundry.

But sex workers, especially the street hookers, have many complaints. They say that there are men who will enjoy in a group of four and five and then will refuse to pay. They say many policemen harass them and force them to pay money. One sex worker claims that they donate money to build places of worship. "If they accept pour donation why we are so badly treated?"

Sex workers also demand that the government should recognise their work as legal. Salma Ali, Executive Director of Jatiba Mohila Ainjibi Samity, however, has a different opinion. She argues legalising the profession will encourage more poor women to come to it and it will lead to more trafficking of women and children. "What, however, is needed is to create alternative jobs for the sex workers," she says.

NewsNetwork.

READER'S queries



Your Advocate



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

Q: We have two storied building built by our parents where we all brothers and sisters born and brought up. As time went on we educated and got job and started living in our work place except our second eldest brother who started business and was living with our parents in the same house. Our parents lived in that house till their death. When the question of division raised our second eldest brother claimed that since he is living in that house; so the division of our land property should be in such a way that he gets the building. It is to mention worthy that all the house hold chores and the building is purchased and built by our parents. Moreover he purchased all the portion of our other siblings' part which they are supposed to get as inheritor. But I would like to retain my parents' last memento. My questions are, A) How can our parental building could be shared or divided legally? B) Can he claim that building as he desires? C) How can I stay in my parental house while I need to visit my home town legally; since parental property has not yet been divided? D) Can any body wish to and get the lucrative portion of any parental land property even though it is divided by law? I seek your legal advice upon this circumstances. (PI. do not advice to contact with a civil law expert, I do not have that much money to retain a legal adviser.)
M Asadullah, 9/3, Kalabagan, Dhaka.

Your Advocate: Let me start with your last sentence. You have requested me not to advice you to approach any lawyer because you do not have enough means to engage one. Is it not like asking a doctor not to refer to medical tests as the patient has no money? You are now in a problem which calls for legal action for a redress. Legal actions can be taken only by a lawyer. If you really mean remedy there is no choice for you but to engage a lawyer. Well, if you have serious monetary constraint you need not feel helpless. Nowadays there are legal aid organisations both in Govt. and non-Govt. levels. If you are found fit from their point of view they will offer you legal aid totally free of costs.

As for your problem, I have gone through the same carefully. There are factual inconsistencies in your narrative enough to make it difficult for a lawyer to give a specific legal opinion. For a specific advice or guideline from a lawyer there need be disclosures of necessary facts and materials. Your queries contain sentences with contradictory meanings that lead to confusion about the real state of facts. You have written that you want your share in the building left behind by your father. But your second eldest brother as he has been living in the building for a long time demands the entire building leaving for you and other heirs of your father the vacant land around. This suggests that your father died leaving the building unsold. Your fifth sentence i.e., "Moreover he purchased all the portion of our other siblings' entitled part which they are supposed to get as inheritor," contradicts the sense and makes things unclear as to the status of the building, that is, whether the building was already sold to your second eldest brother or not. If your brother can successfully show that your father had sold out the building to him you have nothing to inherit or retain as memento.

Taking cue from your words occurring later -- "since paternal property has not yet been divided" let me suppose that the building was not disposed of by your father in any manner and you have subsisting heritable interest in it. In that case the legal position is every co-sharer of a property is entitled to every inch of it. But as it is impracticable to divide land or building inch by inch law provides for realistic and equitable division of the same among the co-sharers. Your remedy lies in a suit for partition. The court is competent to pass a decree earmarking the shares of the co-sharers on legal and equitable basis. If it is practicable to effect partition of the building you can have your portion therein.

LAWSCAPE



A dog ran into a butcher shop and grabbed a roast off the counter. Fortunately, the butcher recognized the dog as belonging to a neighbor of his. The neighbour happened to be a lawyer.

Incensed at the theft, the butcher called up his neighbor and said, "Hey, if your dog stole a roast from my butcher shop, would you be liable for the cost of the meat?"

The lawyer replied, "Of course, how much was the roast?"
"\$7.98."

A few days later the butcher received a check in the mail for \$7.98. Attached to it was an invoice that read: Legal Consultation Service: \$150.

The day after a verdict had been entered against his client, the lawyer rushed to the judge's chambers, demanding that the case be reopened, saying: "I have new evidence that makes a huge difference in my client's defense."

The judge asked, "What new evidence could you have?"
The lawyer replied, "My client has an extra \$10,000, and I just found out about it!"

A new client had just come in to see a famous lawyer.

- : Can you tell me how much you charge?
- : Of course, I charge \$200 to answer three questions!
- : Well that's a bit steep, isn't it?
- : Yes it is, and what's your third question?

Corresponding Law Desk

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