



## 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: Many different questions peep into my mind about law, lawyers and legal profession. I am a student and hope to study law in due course of time. But before I finally decide my career I need to have clear idea about legal profession, its nature, technicalities and future prospect. With this idea in mind may I ask you at this moment some of my questions that cross my mind:

1. Once a lawyer obtains licence to practice in the High Court Division can he appear in the District level courts?

2. Is there any hierarchy in the legal profession? Is there any difference between barristers and advocates?

3. Does higher degrees help one to become a good lawyer?

Hasibul Hussain.

Shahabazar, Rajshahi.

**Your Advocate:** These are very common questions that dwell in the mind of the lay people. Not to speak of you, that is a student planning to study law I have come across many highly educated people not connected with law and legal profession who are not clear about what actually are the duty of a lawyer. Let me put it in the words of Robert Hezzell, Editor of one of the contributors to "The Bar on Trial" a book on the English Bar. He said "Many members of the public have no very clear idea of what barristers do." So this is not the peculiarity in our country only. This is true of the lay people everywhere. The profession and the area of activity are so technical that people not connected with the justice administration system hardly can afford to be free from question about them.

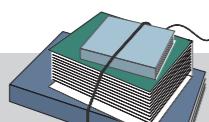
Thank you for your questions about my profession which you also wish to take up as yours in future. I really relish to answer those questions but unfortunately in the short span of this column it is difficult adequately to address them. I am just trying to address your queries with utmost brevity.

As to the first question, the reply is, yes, a lawyer enrolled as an Advocate of the High Court Division of the Supreme Court of Bangladesh is entitled to appear in all the courts subordinate to the High Court Division.

To your second question the reply is- there is no hierarchy in the legal profession in the sense it is understood in the Govt. or other services. But there are hierarchies in the profession recognised and respected by the members of the Bench and the Bar. One generally has to start his career at the Bar as an Advocate of the Judges' courts. Having finished at least two years of practice at the district Bar he acquires eligibility to apply for being enrolled as an Advocate of the High Court Division if he not otherwise disqualified. One who has completed at least five years practice in the High Court Division can apply for being an advocate of the Appellate Division of the Supreme Court and if he is found competent on the basis of the recommendations of the judges of the High Court Division he is allowed to practice in the Appellate Division. And finally from among the Advocates of the Appellate Division some may be recognised as 'Senior Advocate' on the basis of his standing at the Bar. So hierarchically there are Advocate of the Court, Advocate of the High Court Division of the Supreme Court, Advocate of the Appellate Division of the Supreme Court and the Senior Advocate of the Supreme Court. So far as the legal status is concerned there is no difference between an Advocate and a Barrister. The Barristers as well as the law graduates of Bangladesh are required to appear before the Bangladesh Bar Council and go through certain formalities to obtain license for practicing in any court in Bangladesh. Once they are granted license they become Advocates. When the Barristers appear in any court in Bangladesh they appear as Advocates not as Barristers. But the term 'Barrister' meaning member of the British Bar carries with it some kind of appeal to the lay clients and certainly paves the way to success at the Bar.

In reply to your third question I must say, higher degree like LL.M. Ph.D. should be of use in building up your professional career. If there is scope for higher degree you must avail it. There is no alternative of knowledge and experience. But career at the Bar is so saddled with peculiarities that one cannot be sure of his success by virtue of higher degrees alone. It is merely a means to an end. There need be harmonious interplay of many different factors for a success at the Bar.

## LAW lexicon



## Sentence

The punishment given to a person who has been convicted (i.e. found to be guilty) of a crime. It may be time in jail, community service or a period of probation.

## Sequestration

The taking of someone's property, voluntarily (by deposit) or involuntarily (by seizure), by court officers or into the possession of a third party, awaiting the outcome of a trial in which ownership of that property is at issue.

## Servient tenement

The land which suffers or has the burden of an easement. The beneficiary of the easement is called a dominant tenement.

## Servitude

From Roman law, referring to rights of use over the property of another; a burden on a piece of land causing the owner to suffer access by another. An easement is type of servitude as is a profit a prendre.

## Settlor

The person who actually creates a trust by donating property to be managed and administered by a trustee but from which all profits would go to a beneficiary. The law books of some countries refer to this person as a "donor."

## Sexual harassment

A term used in human rights legislation and referring primarily to harassment in employment situations, related to sex or gender, which detrimentally affects the working environment. The most overt variation of sexual harassment is the quid pro quo offer of work-favor in exchange for sexual favor.

## Star LAW report



## TRADE MARKS ACT, 1940

## Registrar of Trade Mark can rectify his own error

High Court Division  
(Civil Statutory Appellate Jurisdiction)  
Trade Mark Appeal No. 4 of 1996  
Md. Sukkur Miah  
Vs  
Md. Shamsuddin Khan and another  
Mr. Justice Syed Amirul Islam and Mr. Justice AKM Shafiuddin  
Date of judgement: July 12, 2003

## Background

This appeal filed under section 76 of the Trade Marks Act, 1940 against the decision dated 16.6.1996 passes by the Registrar of Trade Mark canceling the earlier order dated 18.4.1996 by which he accepted the application of the appellant for advertisement in the Trade Marks Journal.

The appellant filed an application being No. 40725 in class-24. After receipt of the application the third party respondent filed an application before the Registrar bringing to his knowledge that the same mark has already been registered under No. 40201 and that mark is identical in all respects with the mark applied for by the appellant. On a perusal of the record of the registry it appears that thereafter a notice was issued to the appellant to show cause why his application shall not be rejected but he failed to do so within the prescribed time whereupon the application was treated as abandoned by the Registrar. Against that order they filed TM-56 on the ground that they could not reply to that show cause as they received the show cause on later date. In TM-56 it has been categorically stated that they had replied on 13.1.1995 and as such applied for allowing TM-56 but unfortunately they replied dated 13.1.1995 is neither in the record of the Registrar nor a copy of the same could be produced by the appellant.

Thereafter the Registrar asked the appellant to deposit requisite fees for publication of the mark in the Trade Mark Journal, whereupon the owner of the Registered Mark No. 40202 again brought to the notice of the Registrar that the mark applied for has already been registered. Thereafter the appellant was notified by the Registrar in this regard and after hearing both the parties by the impugned order he cancelled the earlier order dated 18.4.1996 for advertisement in the Trade Mark Journal of the Trade Mark application of the appellant being No. 40725 in class-24 and set aside all actions taken pursuant to the application.

## Deliberation

The learned advocate appearing for the appellant has pressed four grounds. On a perusal of all these four grounds it appears that the main submission of the learned Advocate for the appellant is after the acceptance of the application of the appellant for advertisement and after taking request fee along with the block, the Registrar had no authority whatsoever in law to set aside the earlier order and the Registrar most illegally recalled the earlier order in flagrant violation of the provision of law. The learned Advocate for the appellant in support of his contention cited the decision in the case of David Vaughan Racklin V Deputy Registrar of Trade Marks, Karachi, 1986 MLD 1666 reported in the Annual Law Digest, 1986, 2959 Part IV.

On a perusal of the impugned order it appears that the Registrar has refused the application only on the ground that the mark applied for by the appellant has already been registered i.e. the appellant is disentitled to get the mark registered in his name.

We have examined the provisions of the act and the rules framed and it appears that, no doubt, when a proceeding is initiated by way of an application for Registration of a mark the matter remains confined within the applicant and the Registrar and with that and in view certain legal duties has been cast upon the Registrar to satisfy himself about the registerability of the mark before acceptance of any application for advertisement in the Trade Mark Journal under Section 15. If the mark applied for offends any of the provisions of the Act particularly the provision of section 8(a) or 10 of the Act, the Registrar will refuse the registration and that is why rule 23 enjoins a duty upon the Registrar to cause a search amongst registered marks and the handing applicants for the purpose of ascertaining whether they are on record in respect of the same goods any marks identical with the mark sought to be registered and the Registrar may cause the search to be renewed at any time before acceptance of the application.

The contention of the appellant is that the Registrar could suo motu make the search and reject the application but he had no authority to allow a third party to enter appearance in the matter at that preliminary stage. On a perusal of the Rules it appears that the rule does not provide for the appearance of a third party. But a definite duty is cast upon the Registrar to make a search to see if such mark has already been registered or not. In the present case the Registrar failed to discharge that legal obligation and the respondent No. 1 by filing an application simply brought to the notice of the registrar that the mark applied for by the appellant is already registered and he is the owner of that registered mark. At this stage the registrar could himself reject the application by himself after hearing the appellant. But without doing that what he did is that after issuing a show cause to the appellant he rejected the application of the appellant after hearing both the parties.

Now the pertinent question is if the Registrar has committed any substantial error of law by allowing the third party to enter appearance. The appellant could not refute the allegation of the respondent No. 1 that the

mark applied for by the appellant is identical with the registered mark of the respondent No. 1 and it is not denied by the appellant. On this ground alone the appellant is not entitled to get the registration as it offends the provision of section 10 (1) of the Act and it was the primary responsibility of the Registrar to address that aspect of the case. But for reasons best known to him, he failed to discharge his duties properly. It appears that the registrar awoke from his long sleep and realised that by accepting the application for advertisement he has committed an illegality. It was also found that the respondent No. 1 had already served a legal notice upon the appellant for copying their registered mark.

Now it is to be seen if the Registrar has the power to rectify his own error. On a perusal of the provisions of the Act it appears that even after the acceptance of an application the Registrar may still refuse the registration on the ground that the application has been accepted in error. This power is vested in the Registrar under sections 14(3) and 16(1) of the Act and there is no dispute between the parties on this point. On a perusal of section 14(3) of the Act it appears that the Registrar has been given the power to rectify any error committed by him earlier. Similar power has been given to him under section 16(1) as well. This power vest with in the Registrar is akin to the power vest with conferred upon a Civil Court under section 151 of the Code of Civil Procedure.



On a perusal of the Act it appears to us that the Registrar has ample power to rectify or correct any error committed by him by revising or setting aside the earlier illegal order. In the instant case we find that the registrar most illegally accepted the application and accepted the same for advertisement in the Trade Mark Journal and that error of the Registrar was brought to his notice by respondent No. 1 when the Registrar after hearing both the applicant and the owner of the Registered mark passed the impugned order.

## Result

Since admittedly the Registrar is invested with the power to rectify an error, he did not commit any illegality in the instant case in correcting his earlier mistake after hearing both the interested parties. In the facts and circumstances of the case the presence of the respondent No. 1 did not vitiate the impugned order and the appellant has not been prejudiced in any way as he had all the opportunities to place his case and admittedly the mark applied for by the appellant is identical to the registered mark of the respondent No. 1. The result of the above discussions should be that the appeal should be dismissed. Accordingly the appeal is dismissed with a cost of Tk. 5,000/- only.

Advocate Mr. Md. Ismail Miah and Advocate Mr. Md. Zahirul Islam for the appellant. No one for the respondent.

## LAW letter

## The first constitution of Bangladesh

A constitution is the identity of a state. It is the most important criteria of a state to be recognised as a state to the other states of the world.

On the 26th March 1971, independence of Bangladesh was announced on behalf of Bangabandhu Sheikh Mujib. Our people were fully confident of Independence. The elected representatives (Members of National Assembly and Members of Provincial Assembly) of the erstwhile East Pakistan who could flee to India assembled in Calcutta. With their prompt initiative, a formal proclamation of Independence was drafted and adopted on 10th April 1971 with retrospective effect from March 26, 1971. And an 17th April, a government in exile was formed. We have already said that a constitution is called the governing wheel of the state, of the government of the state. So which is the constitution for the new government of the state? Was the Proclamation, a constitution. Before talking about that, let us discuss about the features of a constitution. In a constitution, there must be a description about the nature of the state to which it is subject. It must say about the organisation and form of the administration of government of the state. It must show the functions, powers and mutual relations of different organs of state. It must assure the rights of people of state. Now we shall discuss about the proclamation. This proclamation had outlined the nature of the state. In the 12 Para of the declaration, Bangladesh is described as a sovereign 8 peoples republic and affirmed the announcement of Independence. This proclamation said about the form, functions and mutual relations to other organs, of government. In the 13th para, it was said that the form of government would be presidential. In 14th Para, the president was declared as the Supreme Commander of all armed forces. In 15th para, the President had given power to exercise all the executive and legislative power in 16th para, the president had given power to appoint ministers. In 17th para the President has given the power to levy taxes and expend monies. In 18th para the president had given power to summon and adjourn constituent Assembly. In the 11th para this proclamation assured the rights of people and in the 20th para, declared to abide by the Charter of United Nations.

Thus we may say that the proclamation had satisfied most of the features to be a constitution. Though it had given the president, dictatorial power, there was nothing about judicial system or no clear idea about constituent assembly. But it was nothing unusual or undemocratic since it was a war time- a special circumstance, which is met by special laws to enable the government to handle the affairs of the state effectively. Therefore it is called the first interim constitution of Bangladesh also. This proclamation gained significant importance from the historical point of

view and the constitutional point of view.

Shabir Ahmad Mukim  
Student of 2nd year, Department of Law, University of Dhaka.

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## Lethargy of our democracy

The present globalised democratic environment drives the governments to uphold a structural framework in the action of democratic politics. The deficiency of good governance is adverse to the democracy and not helpful to the betterment of the civilians. It is flagrant that still the governments of most of the democratic countries of the world is failing to ensure good governance for their people and as a result, a messy political atmosphere has been kept breeding. But the developing country like Bangladesh cannot meet the expense of this sort of blunder in the sense that it affects the socio-economic foundation of the state and relaxes the pace of development.

All our current crumples in maintaining law and order are the sectors where we strongly feel that the lack of good governance has caused the problem. When the government tries to disregard the system of good governance and instead, make an effort to express tender emotions by being too egoistic approach, then it is a down-to-earth logic that it will spread a dark shadow on the sphere of law and order. Good governance is such a system where insignificant political interest above country is highly discouraged and which boosts the governments to go by the book without having to mull over the political record of the criminals. But, as we spot in Bangladesh, this fashion has almost been missing and we are providing stimulants to criminal perpetration. We must have to figure out that there is a real big difference between an operation of a country and a running of a political party. Political parties are very much keen for persuading people to get their support in favour of them while the operation of the country implies the idea that the framework will act for the people of all walks of lives of the country forgetting who is standing by whom. But, sadly, our political parties become blind to this philosophy and show off their coldness to the people of that voters or area where they have been voted down. And they go on board on taking political vengeance upon them, which is unfamiliar to the principles of good governance. Thus, the law and order situation has been worsened and we have been frozen in putting a full stop to it.

Julius Valentine Gomes  
BBA, BRAC University.

BBA, BRAC University.

## LAW week



## Judiciary separation takes 6 years

Complete separation of the judiciary from the executive will take six years. This was said by Law, Justice and Parliamentary Affairs Minister Moudud Ahmed. He said that the government will need the time to replace some 600 magistrates, now exercising judicial functions, by judicial officers. Legal instruments for the process will, however, be put in place within the next three months. The judicial service commission rules have been formulated and the commission has also started functioning. Besides, drafts for three more rules and amendment to the Code of Criminal Procedure have also been prepared. The minister said the government would update the law related to contempt of court and the laws would not be as harsh as they are now after the amendment, adding that an amendment bill has already been drafted. - *New Age*, 07 June.

## Dhaka not to pay Tk 31cr fine

The government has decided not to pay Tk 31 crore in fine and compensation, ordered by a Dutch court, for cancelling a controversial deal with one Netherlands firm for supply of 10,388 computers to Bangladesh under an Education Ministry project. Terming the Dutch court judgement "one-sided and unjust," the high-powered Cabinet Committee on Economic Affairs at a meeting on Monday asked the ministries of Education, Foreign and Law, as well as the Economic Relations Division to prepare a position paper for fighting diplomatic and legal wrangling officials said. Simultaneously, the government would also try to negotiate an "out-of-court settlement" with the Amsterdam-based company Tulip Computers International NV that allegedly managed last year's domestic court judgement against - *New Age*, 08 June.

## Registration (Amend) Bill placed in JS

A bill has been placed in the parliament seeking to make registration of all kinds of instruments of transfer of property mandatory with the authorities. Law minister Moudud Ahmed tabled the bill. The minister said that the passing of the bill would make the land management system adequate and effective. The bill proposed to amend Section 17 and introduce five new sections through amending the Registration Act, 1908. The bill proposed that contract for sale shall be registered within 30 days from the date of execution failing which the contract shall stand void. The bill said every instrument of transfer required to be compulsorily registered under this Act should be written clearly and briefly with particulars necessary to convey the intention of the parties along with the description of the property and nature of the transaction. The law minister also placed two other bills -- the Transfer of Property (Amendment) Bill, 2004 seeking to bring about momentum in the existing land management system. The three bills were referred to the standing committee on law, justice and parliamentary affairs ministry for scrutiny. - *Law Desk*.

## Cabinet hands case withdrawal

The cabinet has approved in principle a bill seeking to amend the criminal act of 1958 to empower the proposed independent Anti-Corruption Commission (ACC) to withdraw a graft case, currently vested with the government. According to the Criminal Law Amendment Act, graft cases can be tried by a magistrate's court or special judge's court. The amendment proposes that those cases will be tried only by a special judge's court, to make it consistent with the ACC Act. - *New Age*, 08 June.

## Naogaon SP, two others served notice

Three senior police officials of the Rajshahi division have asked to explain why they should not be punished for their failure to arrest Jagrata Muslim Janata leader Bangla Bhai and his associates, sources in the police department said. The police headquarters has recently served show-cause notices on Naogaon police superintendent Fazlur Rahman, additional superintendent Harun-ar-Rashid and assistant superintendent Yakub Ali. The police headquarter has already suspended the officer-in-charge of the Ranagar police station for 'negligence'. - *New Age*, 08 June.

## Higher allocation for police

Higher budgetary allocation on the ministry of home affairs was proposed in the budget for the fiscal 2004-2005 to make police and other law enforcing agencies stronger and more effective, equipping them with adequate logistics. This was stated by Finance and Planning Minister M Saifur Rahman in his budget statement in the Jatiya Sangsad on Thursday, 9 June in which he announced higher allocation on the home ministry by Tk 473 crore for the