



LAW opinion

Obligation to Supreme Court in the Constitution and the lawyers

JUSTICE MOHAMMAD GHOLAM RABBANI

ARTICLE 112 of the Constitution of Bangladesh reads as follows: "All authorities, executive and judicial, in the Republic shall act in the aid of the Supreme Court."

A.T.M. Kamruzzaman Syed was then managing director of Sadharan Bima Corporation. He was arrested on 14.11.88 and was detained in the Dhaka Central Jail under the special Powers Act. Subsequently a Division Bench of the High Court Division passed order of releasing him

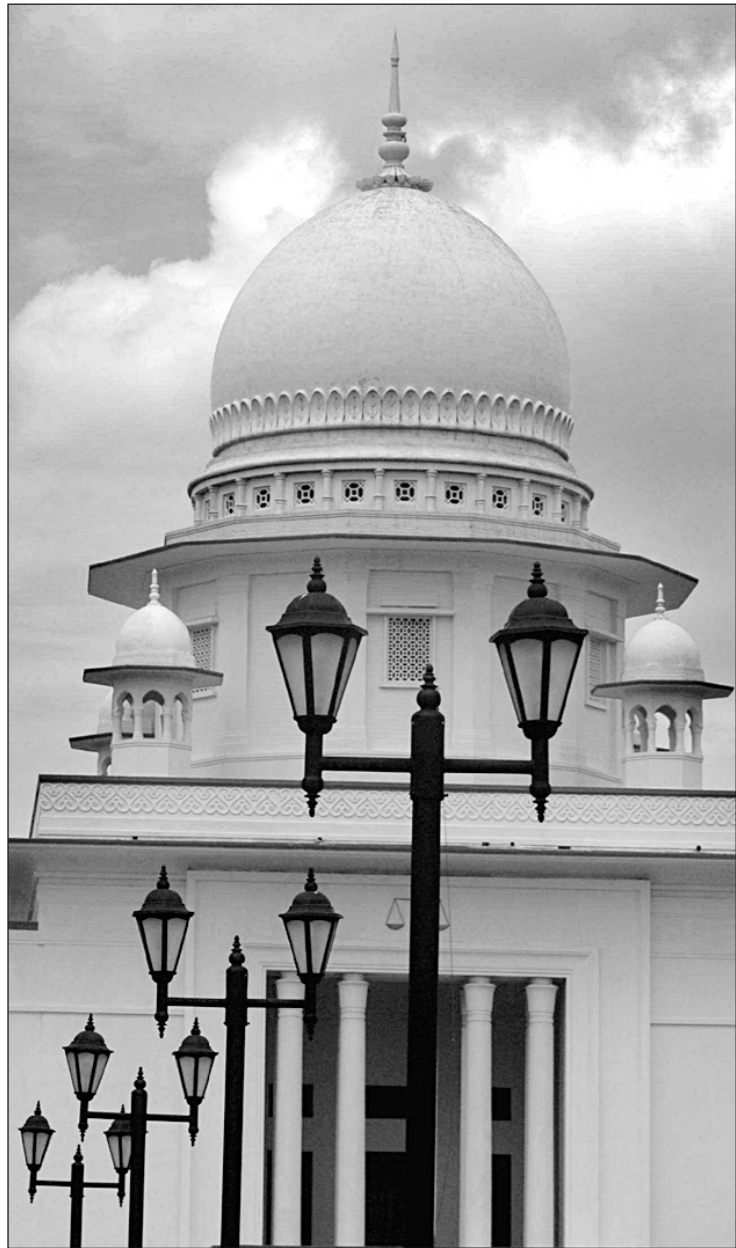
atonee. Jail authority received the order on 20.2.89, but did not release him because a fresh order of detention was served upon the detenee on the same date inside the jail. Division Bench declared the second order of detention as illegal and directed the detenee be released atonee. Jail authority received the order on 16.4.89, but did not release him atonee and so another fresh order of detention could be served on 17.4.89 when the detenee was under the custody.

Thereafter the rule of contempt of court was issued against the Deputy Inspector General of Prisons, Dhaka Central Jail. Upon hearing a Division Bench held that allowing the detaining authorities to serve a fresh order of detention inside the jail had the effect of thwarting of the order of the High Court Division. In view of article 112 no other authority can delay, stay or set aside any order of the Supreme Court and unless this dictum is followed strictly in letter and spirit it will be the end of Rule of Law in this country. The contemner was convicted and sentenced to pay a fine of Tk 500/- (Ref: 41 DLR 508)

The expression "shall act in the aid of Supreme Court" also means that a court after disposing of a matter should allow sufficient time to the aggrieved party to take necessary and requisite steps for seeking relief in the Supreme Court. (Ref: 17 DLR 656)

It has been the century old practice that the contemners are asked to appear in person on the first date and are usually exempted from personal appearance on subsequent dates. In a case of contempt of court the judges who issued the rule are not the prosecutors, they are the judges to decide the issue of contempt in question while the attorney general is the prosecutor and the contemner is the respondent. Obviously in view of this legal position we do not find any case law in the law reports or journals where propriety of the direction to appear in person was the issue for decision. Probable another cause for such absence of case law is that no lawyer advised any contemner to file such a case or in other words, there were in those days lawyers including lawyers politicians, but no politician lawyers.

Justice Mohammad Gholam Rabbani is a retired Judge, Appellate Division, Supreme Court.



Star LAW report

YOUR HONOUR

Adverse possession can be enforced against a person who does not prove a better title

High Court Division
(Civil Revisional Jurisdiction)
Civil Revision No. 813 of 1999
Janab Ali Mondal and others
V
Md. Anwar Hossain and others
Mr. Justice Mirza Hussain Haider
Date of Judgment : May 28, 2003
Result : Rule discharged

Background

Mirza Hussain Haider, J: The defendant-petitioners obtained this Rule calling upon the plaintiff opposite party to show cause as to why the impugned judgment and decree dated 11.2.1999, passed by the learned Additional District Judge, 2nd Court, Jhenidah, in Title Appeal No. 78 of 1996 reversing those dated 23.4.1996 passed by the learned Subordinate Judge (now Joint District Judge), 1st Court, Jhenidah, in Title Suit No. 58 of 1986 should not be set aside and/or pass such other of further order or orders as may be deemed fit and proper.

The case of the defendant-petitioners in short, is that on 29.12.1980 the opposite party instituted Title Suit No. 1678 of 1980 for declaration of his title in the Court of Subordinate Judge, Jessore, against the present opposite party i.e. the heirs of Godai Molla. Thereafter when Jhenidah became a new district the suit was transferred to the Court of Subordinate Judge (now Joint District Judge), Jhenidah on 16.3.1986 and renumbered as Title Suit No. 58 of 1986. The plaintiff alleged that the suit property along with other properties originally belonged to one Kunjo Bihari Ghose under the Superior land lord Raja Bhushan Dev Roy Bahadur. Kunjo Bihari Ghose while possessing the suit land died leaving behind his only son Rashik Lal Ghose who inherited the same and subsequently settled 7.08 acre of land, orally, with the plaintiff on 10th Ashar, 1350 BS and since then the plaintiff has been possessing the same peacefully. The plaintiff also stated in his plaint that he entrusted one Godai Mollah to help him in recording his name in the SA record but the plaintiff came to know on 20th Chaitra 1386 BS corresponding to 3.4.1980 that instead of recording the plaintiff's name Godai Mollah got his own name recorded in respect of the suit land in the SA Record.

Deliberation

The present petitioner appeared and contested the suit by filing written statement denying all material allegations of the plaint contending inter alia that admittedly the suit land originally belonged to Kunja Bihari Ghose under Raja Promotha Bhushan Deb Roy Bahadur. But the said defendant claims that Kunja Bihari Ghose, while possessing the

suit property settled the same in favour of Godai Molla by oral settlement. Subsequently Kunja Bihari was chopped to death with dao, kodol and shavol, ornaments were looted, Sheoli, wife of deceased Tapan and Anima were gang raped. Even informant's minor daughter and elderly woman were not spared and subjected to dragging for sexual harassment.

It appears that Nari-O-Shishu Nirjatan Daman Ain, 2000 is a special law which has been enacted to curb the crimes on repression of women and child with heavy hand.

On his connection it is to be noted that all offences under the Ain are non-bailable as provided under section 19 (2). Thereafter Sub-section-3 (subject to order provisions of the Ain) lays down certain condition and restriction and clause (Ka), (Kha) and (Ga).

Clause "Ka" to sub-section 3 provides that no person accused of any offence punishable under this Ain will be released on bail unless the informant party is given the opportunity of being heard. Cause (Kha) (Ga) enjoin that the court is to be satisfied there is a reasonable cause to find the accused guilty of the charge brought against of the accused him exists in case accused is woman or child being physically crippled, proper trial will not be hampered for his release on bail as preconditions.

Section 25 of the Ain provides that in the matter of lodging complaint of any offence, investigation trial and disposal the provisions of the Code of Criminal Procedure shall apply and the Tribunal constituted under the Ain shall be deemed to be a Court of Sessions and it will exercise all the powers of Court of Sessions in the trial of any offence under the Ain or any other offence pursuant thereto. From the above it is apparent that though the Tribunal and the High Court Division on appeal is empowered to grant bail under the general provision of the Code the power is limited and such power should be exercised subject to specific condition and restriction mentioned in section 19. This restricted power of bail prevails notwithstanding the general provision of section 25 of the Ain. No expressed provision is made for granting bail to any person accused of any offence punishable under this Ain only because bail has not been opposed by the informant or the informant party consents to bail.

Judgement

We are, therefore, of opinion that application filed by the informant praying for considering the bail of the accused is of no consequence in law in granting or refusing the prayer for bail.

In view of the nature of allegations we are not inclined to grant bail to the appellant.

In the result the appeal is dismissed.

Mr. Harendra Nath Nondy, Advocate, for the defendant-petitioners.
Mr. Nurul Amin, with Mrs. Sakila Rowshan, Advocates, for the opposite party.

FOR YOUR information

ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries

Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session entry into force 5 September 1991.



Some Basic Features of the Convention:

- λ Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of indigenous peoples and to guarantee respect for their integrity.
- λ Government shall responsible for promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
- λ Government shall assist the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.
- λ Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
- λ The social, cultural, religious and spiritual values and practices of indigenous peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals.
- λ Governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.
- λ Government shall establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.
- λ The indigenous peoples shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
- λ Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.
- λ In applying national laws and regulations to the peoples concerned, due regard shall be given to their customs or customary laws.
- λ Indigenous peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
- λ Indigenous people shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.
- λ The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.
- λ The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- λ Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
- λ Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - λ Social security schemes shall be extended progressively to cover the indigenous peoples and applied without discrimination against them.
 - λ Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
 - λ Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.
 - λ Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

READER'S queries



Your Advocate

Your advocate M. Moazzam Husain is a lawyer of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: I think u can help me about my problem so I am writing to you. Please help me. My name is Karim & I am 20 years old. I want to get married with a Hindu girl she is 18. I browse some site and found that male can only get married when they are 21. Is there is any way I can marry her. And what sort of problem I may have to face in future if her father takes any legal action about me. Please help me. I need your advice as soon as possible. Please help me. Karim, from E-mail.

Your Advocate: You are a Muslim boy of 20. You want to marry a Hindu girl who is 18. Your concerns are: a) you came to know that a male can marry only at the age of 21 b) if you marry her and her father goes into action against you what consequence may ensue and finally c) is there any way you can marry her.

Very legitimate concern for a young man. As human I have nothing to say against such an inherent natural urge. But as a lawyer it is difficult to give you such an easy go. Because law does not permit you to sail so straight.

As a Muslim you cannot contract a valid marriage with a Hindu. Nor a Hindu can marry a Muslim. Though not a complete taboo, there are restrictions in the personal laws in matters of inter-religious marriage of the kind. Added to it is the bar imposed by the Child Marriage Restraint Act, 1929, which, as you have heard, makes marriage between a male below 21 and a female below 18 punishable. Even the persons solemnizing and promoting such marriage are punishable under law. If Court is informed beforehand about the arrangement, marriage may be stopped by injunction. Therefore, father of the girl has legal weapons to fight against you should necessity arise.

In spite of all these impediments I do not feel like telling you anything that tend to defeat the emotional development between or desire of a young boy and a young girl intending to found family. With that end in view let me see within my knowledge if there is at all any way out for you.

Firstly, you can wait until you are 21 and meanwhile propose the girl to embrace Islam and if she is found agreeable, fine, as soon as you attain age let her be converted into a Muslim and marry each other in accordance with Muslim sharia. In this case there would be no legal complications but some social hazards may crop up which you must have courage to confront.

Secondly, taking the advantage of controversy of Muslim law that a marriage between a Muslim man and an idolatress i.e., a Hindu or with a fire worshipper is merely irregular and not void you can have a civil marriage after you attain marriageable age. Consequence would be your children would be legitimate but the marriage will not create mutual right of inheritance between you and your wife. Of course, she will be entitled to dower.

And finally if you are ready to take venture both of you can renounce your respective faith and declare that you don't profess any religion and thus having secularized yourselves sit for marriage in accordance with the provisions of the Special Marriage Act, 1872 that too after attaining age.

LAW week

HC stays case against Haji Selim

The High Court on Sunday stayed for three months all proceedings in a murder case against former Awami League lawmaker. A High Court bench of Justice Joydul Abedin and Justice Sharifuddin Chaklader also issued a rule nisi on the government to show cause within three weeks why the transfer of the case to the Speedy Trial Tribunal from the metropolitan additional sessions' judge's court of Dhaka would not be declared to have been done without lawful authority. It also asked the government to explain why two sections of the Speedy Trial Tribunal Act empowering the government to transfer cases to Speedy Trial Tribunals for trial would not be declared illegal. *Prothom Alo, 2nd August.*

Kaptai killing case

Police did not record any case in connection with the killing of Mong Mong Marma at Boropara village in Kaptai, the victim's wife, Sui Jung Crui, told a group of newsmen during a visit to her house. Male members of the village inhabited mostly by Marma tribesmen are fleeing homes as forest department officials filed a case against 300 villagers terming them 'illegal loggers'. Twenty-five year old Mong Mong was killed when army opened fire to quell clashes between forest department men and illegal loggers in the village in a remote hilly area. Mong Mong was not involved in the clashes, his wife and other villagers claimed. *Daily Star, 3rd August.*

Prisoners without trial HC asks govt to free them on bail

The High Court yesterday asked the government to free on bail thousands of detainees languishing in jails without trial in violation of their constitutional rights to get quick justice. It directed the attorney general and the principal secretary to the prime minister to initiate the process in this regard considering merits of the cases. "It is very unfortunate and shocking as well," the court observed about 7,409 detainees in jails without trial for years. The verdict came following a public interest litigation filed by Bangladesh Legal Aid and Services Trust (BLAST) on December 24 last year on the basis of a news item 'Behind bars sans trial for years' run by The Daily Star. The High Court division bench comprising Justice Abdul Matin and Justice Tariq Ul Hakim also asked the government to send juveniles, if any, to correction centres, as they should not be tried with adults. Apart from the directives, the court also asked the government to submit a report in six months specifying initiatives to implement its earlier 8-point directive regarding juvenile detainees. The directives include immediate transfer of 1,233 child prisoners from jails to correction centres and withdrawal of cases against under-12 prisoners. *Daily Star, 4th August.*

Writ of 10 terminated BB staffs dismissed

The High Court yesterday dismissed the writ petition filed by 10 terminated officers and staff of Bangladesh Bank. The court discharged the rule issued earlier with the observation that the petitioners are at liberty to seek remedy in the Administrative Tribunal within four weeks from the date of the order of this court. A division bench comprising Justice Mohammad Abdul Matin and Justice Tariqul Hakim delivered the judgement after hearing the writ petition. Bangladesh Bank terminated the services of 10 officers and staff on October 30 last year for their alleged unlawful activities within the premises of the head office of the central bank. They challenged the termination order before the High Court. *BSS, 4th August.*

Book piracy

Eminent writer Prof Humayun Azad yesterday filed a fraud case with the Chief Metropolitan Magistrate's Court, Dhaka against a printing press owner who pirated his novel 'Paksar Zamin Sadaq'. After a hearing, Magistrate Emdadul Haq took the case into cognizance and issued a warrant of arrest for Mohammad Iqbal Hossain, proprietor of MS Press at Sutrapur. In his complaint, Prof Azad said the Agami Publisher published his novel last year and it became instant best-seller. But few months later, some scrupulous businessmen pirated his novel, which caused a great loss to the writer and the publisher. Advocate Ayet Ali Patwary appeared on behalf of the writer. *Prothom Alo, 4th August.*

Writ petition challenging caretaker govt rejected

The High Court on Wednesday summarily dismissed a writ petition against the provision of non-party caretaker administration during national elections under the 13th amendment to the constitution. "The provision of the caretaker government during national elections is a unique concept and the amendment is an unprecedented legislation," observed the three-member full bench of the court in its judgement. The court, however, certified that the case involved a substantial question of law as to the interpretation of the constitution, paving the way for the petitioner to file an appeal with the Appellate Division without seeking a leave to appeal.

"Experience shows that political governments influence the state machinery to bring the election results in their favour," the court observed in its judgement as it detailed the historical background that led to introduction of caretaker government during national elections. The full bench of Justice Joydul Abedin, Justice Md Awlad Ali and Justice Mirza Hussain Haider delivered the judgement in three days starting on July 28. "Democracy is the basic feature of the constitution and free and fair election is its heartbeat," said the court. *New Age, 5th August.*

HC sets aside graft case against Nasim

The High Court on 4th August set aside a graft case against former home and telecommunications Minister Mohammad Nasim MP. The Bureau of Anti-corruption filed the case after his party Awami League had fallen from the power. Nasim was accused of awarding contract to MK Bazul Rahman of BTB for setting up a public handy set (PHS) telephone exchange in the city without floating tender by abusing his official power and thus sustaining a financial loss to the public exchequer. Division bench comprising Justice Syed Mohammad Dastagir Husain and Justice AKM Fazlur Rahman delivered the verdict after hearing both sides. The prosecution failed to satisfy the court for continuation of the case pending in the lower court. *New Age, 5th August.*

Camel jockey: 3 get life for trafficking children

Two tribunals in Dhaka yesterday sentenced three people to life for trafficking children to Dubai. Judge Justice Tribunal for Prevention of Women and Children Repression-3 sentenced a 55-year-old man to life in jail for trafficking two children and a woman on August 17, 1996. The high commissions of the two countries concerned helped recover the victims. In a separate case, Judge Kanis Akhter Nasrina Khanam of the Special Tribunal for Prevention of Women and Children Repression-4 sentenced two brothers to life imprisonment for trafficking a woman and her two and a half-year-old baby boy. *Daily Star, 6th August.*

Verdict in tax case against Ershad adjourned

A Dhaka court yesterday adjourned the judgment in the income tax corruption case against former president HM Ershad. Judge Rezaul Karim Khan of the Special Court for Dhaka Division adjourned the judgment following a time petition filed by the defence. Earlier the defence counsel, filed the time petition as a rationale behind that Ershad could not appear before the court, as he was busy distributing relief in the flood-hit areas. On hearing both the sides, the judge granted the adjournment and fixed September 8 for delivery of the judgment. Ershad's counsellors had also filed a criminal appeal with the High Court for transferring the case to some other court. In the petition they stated that their client would not get justice from the court. The High Court, however, had directed the divisional court to dispose of the case. The Bureau of Anti-corruption filed the corruption case accusing Ershad and three tax officials on July 27, 1992. *Daily Star, 6th August.*

6 suspected extrimists charged sheeted

5 The Barguna police on Wednesday framed charge against six out of 33 accused Islamic extremists, arrested from Shiala mosque in Barguna sadar upazila on June 30. Twenty-seven others were dropped from the charge sheet and released by the upazila magistrate. Court sources said sub-inspector Shahidul Islam filed the charge sheet as investigation officer under section 448, 342, 379 and 301 of the CrPC. Shahidul also prayed for acquittal of 27 others as no specific charges were found against them. *New Age, 6th August.*

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