



Star LAW analysis

Constitutional analysis of right to environment

S. M. MASUM BILLAH

IN our constitution there is no specific fundamental right dealing with environment. It has also not found a place in the fundamental principles of state policy. The pledge in the preamble for ensuring 'fundamental human rights and freedoms' and imposition of duty 'to protect public property' in Article 21 of our Constitution, has given a safeguard against degradation of environment. A combined interpretation of Article 31 and Article 32 is often said to form the basis of 'right to environment' under Bangladesh Constitution. Article 31 states that every citizen has the right to protection from action detrimental to the life liberty, body, reputation, or property, except in accordance with law. Article 32 envisages that no person shall be deprived of life or personal liberty, save in accordance with law. These two articles together incorporate the fundamental 'right to life'. The judiciary of Bangladesh has also widened the horizon of 'right to life' as an all encompassing right, 'right to healthy environment' being inclusive within it. Apart from this, Article 15 can be said to engulf the essence of sustainable development. It goes like this, "it shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people." Indeed, planned economic growth, constant increase and material standard of living are the ringing tune of sustainable development. With this essence of sustainable development in concentration, Bangladesh has already signed, ratified and acceded to almost 22 international conventions, treaties and protocols related to environment including the UNCCD. There are almost 200 laws in Bangladesh dealing with environment or having environmental connotations. The state owes a constitutional responsibility to carry out the statutory obligations and international law commitments.



to the soil, destruction of natural habitat of fishes, flora and fauna and creating a drainage problem, threatening human health and worsening sanitation and drinking water supplies. It was alleged that the project would create environmental hazards and ecological imbalance. Accepting the contentions of the Appellant and allowing the locus standi the Appellate Division held that any encroachment to fundamental rights including right to healthy environment is amenable to judicial scrutiny under Article 102 of the Bangladesh Constitution. Justice ATM Afzal declared rather emphatically, in the 'context of engaging concerns for the conservation of environment, irrespective of the locality where it is threatened any person' should be attributed a 'threshold standing' to have his grievance mitigated.

Justice B. B. Roy Chowdhury made it clearer when he said "Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life." The constitutional urge to assimilate international environmental

law within the domestic sphere was vivid in this landmark case.

Post-Mohiuddin Farooque: The FAP-20 case opened a new dimension of Public Interest Litigation in Bangladesh. This later has been coined as Public Interest Environmental Litigation. The post-FAP-20 case era is circumscribed largely by the environmental concerns and challenges. Bangladesh Environmental Lawyers Association (BELA) seems to lead from the front to this respect. In more than 40 cases having environmental concerns and implications BELA along with other sister organizations have challenged and obtained rule under the umbrella of FAP-20 case's interpretation and Article 32 of the Bangladesh Constitution. Commercial shrimp cultivation, vehicular pollution, unlawful construction of brick fields, industrial pollution, hill cutting, gas explosion in Magurchara, illegal lake fill up, removing tannery to out side Dhaka city, encroachment of rivers, Filling up Ashulia flood flow zone etc are a few to name among those.

Indian Constitution in parlance: Indian Constitution was originally bereft of any reference to environment. By the Constitution (Forty-second Amendment) Act, 1976, Article 48 A was introduced as a new Directive Principle of State Policy. Prior to this the Indian judiciary interpreted right to environ-

ment to be encompassing within right to life. According to Article 48-A "the State shall Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". Article 51-A in the form of "Fundamental Duties" was also incorporated by the 42nd Amendment, a provision of which reads as thus "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures". So the Indian Constitution speak about two-fold responsibilities. On the one hand, it enjoins the State to take steps for protection and improvement of the environment, and on the other hand it casts a duty on every citizen to help in the preservation of natural environment. In the case of Virender Gour v. State of Haryana (1995) 2 SCC 577 at p. 580, the Indian Supreme Court observed that the state particularly has a duty to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic government. The Indian constitutional jurisprudence may help us to enlighten our environmental law and to re-assess the constitutional recognition of this right, at least as a negative right within the ambit of Fundamental Principles of State Policy expressly.

The World Commission on Environment and Development in its report in 1987 opined that (also quoted in FAP-20 case, at para 100) "[E]nvironmental protection and sustainable development must be an integral part of the mandates of all agencies of governments, of international organizations and major private sector institutions. These must be made responsible and accountable for ensuring that their policies programs and budgets encourage and support activities that are economically and ecologically sustainable both in short and longer terms." If the state becomes failure to vindicate these purposes, the lofty ideals of the Constitution would be a nugatory. Infringement of right to environment should not be restricted to the violation of defined fundamental rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth the socio economic rights are under phenomenal change. Now, rights are emerging which call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the four corners of our Constitution.

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FOR YOUR information

Human rights and the environment

A healthy environment is needed to guarantee peoples' human rights to health, food and an adequate standard of living. Human rights are violated when:

- water for drinking, bathing and cooking is polluted,
- contaminated or carries diseases;
- when a child or adult develops asthma from air pollution;
- when children go hungry because farm land can no longer be tilled because the land is too contaminated to plant in.

Irresponsible economic development by governments and corporations leads to environmental destruction and human rights violations: oil spills effect livestock, the soil, and surrounding waters; factories release pollutants into the air that contaminate rain waters and affect the climate; development projects wipe out forests, killing species of animals and undermining the livelihood of local communities.

- In order to protect the environment and human rights,
- People's rights to access information and
 - To participate in making decisions that affect the environment must be guaranteed.

The rights to free speech and freedom of assembly must also be protected for environmental defenders so they can speak out without fear of persecution.

Source: The Human Right to a Safe and Healthy Environment. Description of Human Rights Issues. People's Movement for Human Rights Education.

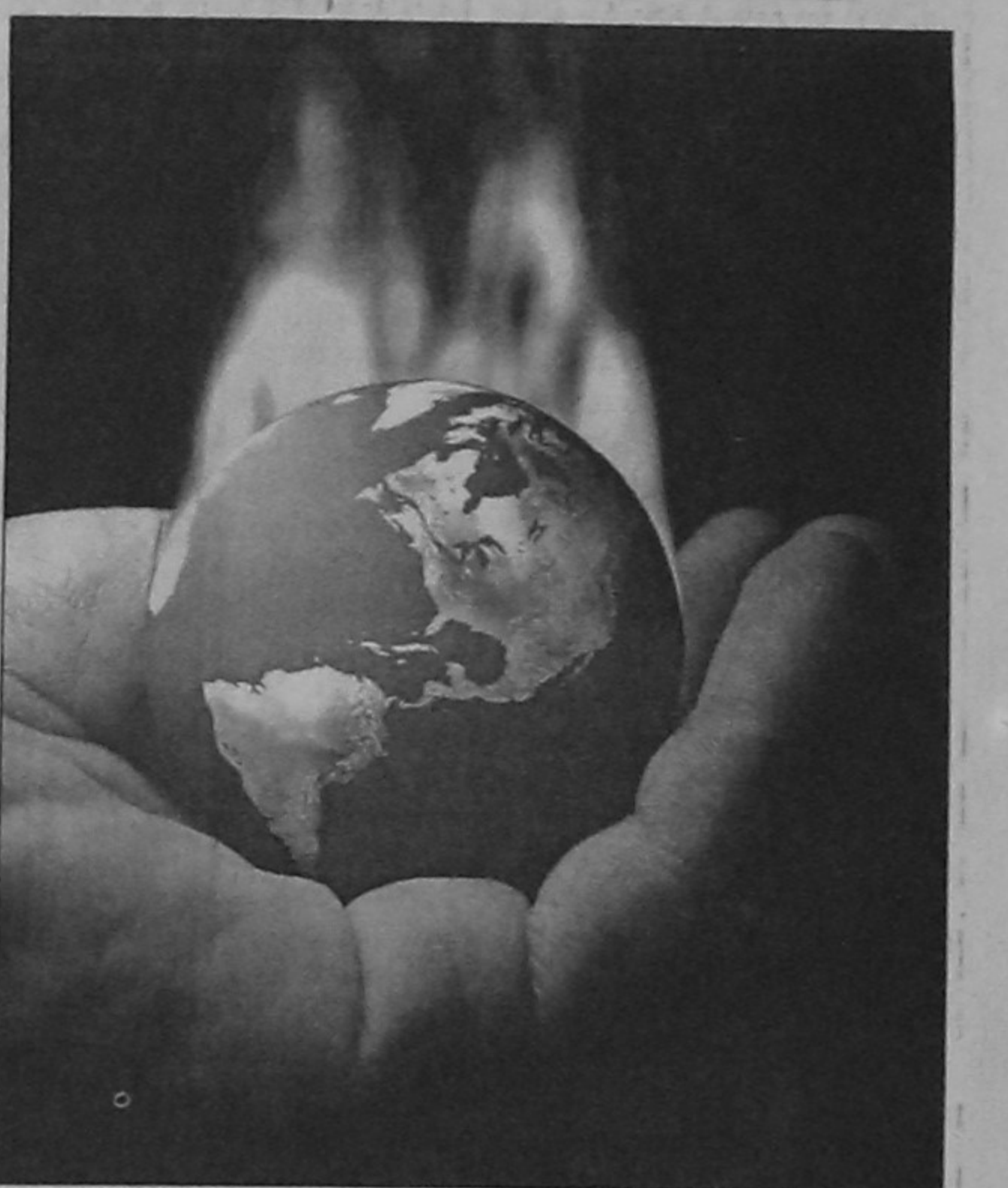
How do people access food?

There are different ways that people's access to the food they need to live can be guaranteed. One way is by ensuring that people have access to jobs and other resources, including government services, for money to buy food. This is how most people in the United States access food. A second way is by ensuring that people have access to land to grow their own food. There has to be enough land to grow food for all the people who need it, there has to be safe water to irrigate the land, and the soil itself has to have enough nutrients and has to be protected from pollution and development.

What happens when people cannot access adequate food?

When people cannot access food, they can suffer from:

- Hunger, which means that people are unable to consume enough food to meet their bodies' daily needs, leading over



- long periods of time to starvation;
- Malnutrition, which means that people do not consume enough nutrients and they become vulnerable to sickness and disease; and
- Food insecurity, which means that people do not have physical and economic access to adequate amounts of food at all times.

These are all violations of people's human right to food.

Source: Study Guide on Food and Water. Human Rights Education Associates (HREA), 2003. www.hrea.org/learn/guides/food.html.

The right to water

The right to water is closely related to the rights to life, health, food, work and an adequate standard of living. People need access to clean and safe water to drink, to bathe and to cook their food. In many parts of the world, people need clean water for their farmland and livestock so that they can grow food and raise animals to live. Communities in rural areas and major cities all need water to maintain public sanitation systems.

When local waterways and sources of drinking water are polluted or contaminated with disease, people's rights to life, to health and their livelihoods are threatened. The pollution of lakes, rivers and waterways can affect entire ecosystems that harm the environment and human beings. For example, polluted rivers, lakes and oceans can affect species of fish that farming communities rely on for food and for making a living.

Source: Right to Water Fact Sheet #2: Why a Human Right? Center for Economic and Social Rights. <http://cesr.org/health/environment/>.

Children's Right to Health

- Children must have access to medical facilities and treatment for illnesses and rehabilitation, as well as access to primary and preventive care. Mothers must also have access to appropriate pre-natal and post-natal health care.
- Governments must take steps to diminish infant and child mortality, and to combat disease and malnutrition by providing primary health care, adequate nutrition, clean drinking water and taking into consideration the dangers and risks of environmental pollution.
- Parents and children should have access to education and information about basic child health and nutrition, hygiene and environmental sanitation and the prevention of accidents. Guidance for parents and family planning education and services should also be available.

Source: Convention on the Rights of the Child, Article 24.

LAW news



Star JUDGMENT review



Indigenous forum calls for consultations on patents

A United Nations conference on indigenous affairs wrapped up its two-week gathering today, making a host of recommendations, including the worldwide establishment of a mechanism requiring patent offices to publicize the origins of products derived from indigenous knowledge when exclusive rights to the design are requested.

The Declaration, a landmark text adopted in 2007, outlines the rights of the world's estimated 370 million indigenous people and outlaws discrimination against them. It sets out rights to culture, identity, language, employment, health, education and other issues.

The Eighth Session of the UN Permanent Forum on Indigenous Issues also called on States and corporations to involve indigenous people in all negotiations relating to the entry of mining industries, infrastructure projects and other development schemes into their communities.

One of the texts approved by the Forum, a subsidiary of the UN Economic and Social Council (ECOSOC), called on the international community to ensure the application of culturally relevant, gender-balanced and gender-based analysis and gender budgeting as critical elements of economic and social development, consistent with the UN Declaration on the Rights of Indigenous Peoples.

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The 16-member Forum which drew around 2,000 indigenous representatives from all regions of the world, as well as representatives of Member States, civil society, academia, some 35 UN entities and other intergovernmental organizations approved a provisional agenda for next year, including a half-day discussion on North America.

Source: UN News Centre.

Live with or marry anyone

ZAHIDUL ISLAM BISWAS

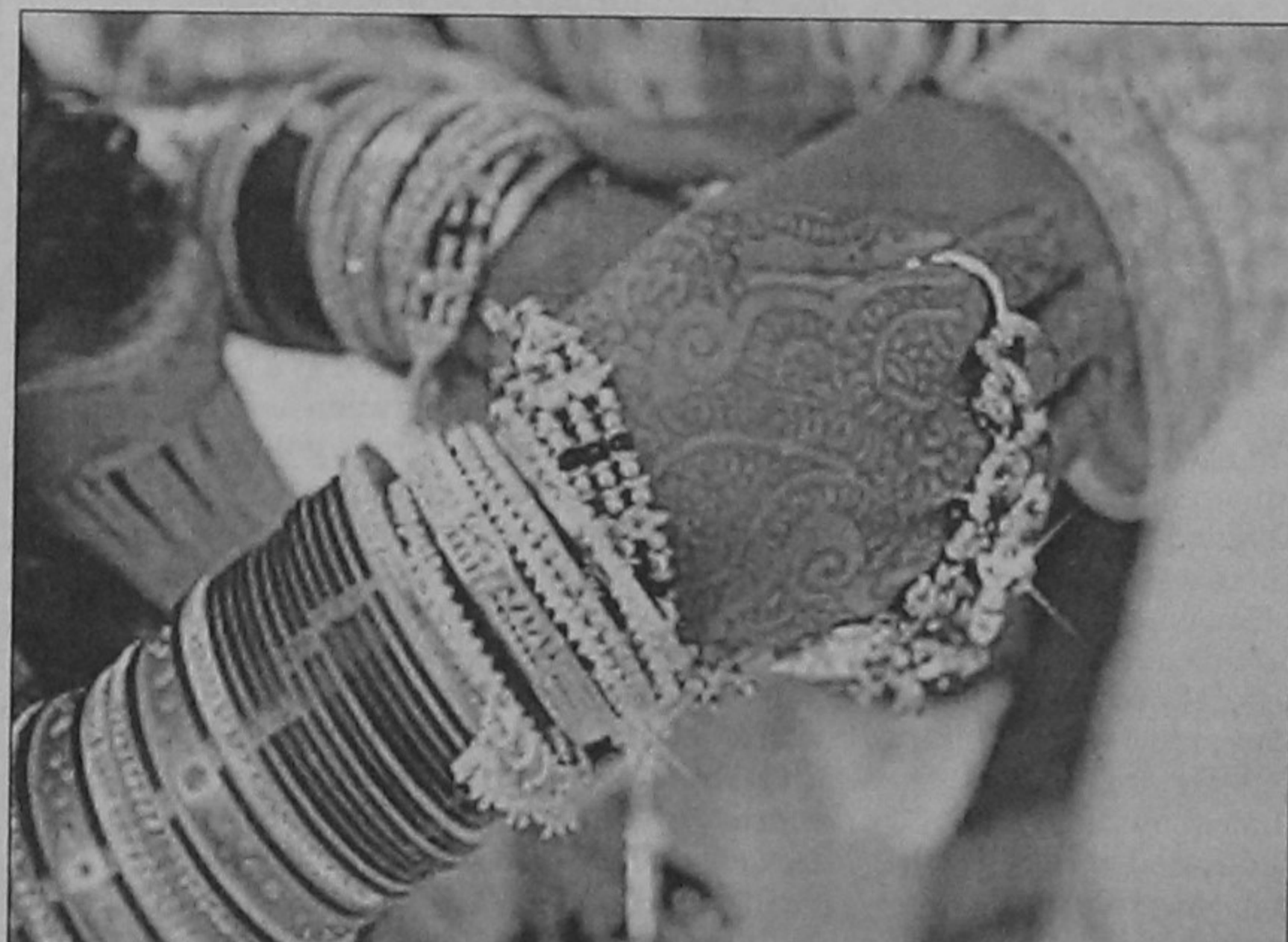
THIS is all about a young woman's right to choose her partner. The Indian Supreme Court in a recent judgment (written judgment delivered on 21st May 2009) observed that girls above 18 years of age can live with or marry anyone of their choice. Unhappy parents could at best sever their ties with her and dare not harass or torture her taking law into their hands, it warned.

The judgment and order was passed by a vacation Bench comprising Justices Markandey Katju and Deepak Verma while protecting one Fiaz Ahmed Ahanger of Jammu and Kashmir from harassment at the hands of the police on the basis of a complaint lodged by the parents of his wife, a Hindu girl.

The girl, with an infant in her lap, stood before the Bench, braved questions and was unflappable in her resolve to live with her husband. But, there was an urgent plea from her to save her husband from harassment at the hands of the police and threats from her parents and brothers who did not agree to the inter-religious marriage.

Convinced that she had attained majority, the Bench put it down in writing: "India is a free country where girls after attaining the age of 18 years have the freedom to live with or marry anyone they like. Parents, if not happy, could at the worst sever their ties with her but cannot threaten, coerce or torture her."

The girl converted to Islam and acquired a Muslim name Mehvesh Anjum to marry Fiaz, a teacher in



Ramban district in J&K in December 2007. On coming to know about their daughter's marriage, her parents forcibly brought her back and got her married off to a Hindu. But she escaped and got reunited with Fiaz.

Seething with anger, the parents and the second husband lodged a case of kidnapping against Fiaz. The police harassed the couple, who moved the Jammu and Kashmir High Court to seek stay of the police investigation. The HC passed an order in May 2008 refusing to stay the police probe following which the couple appealed to the Supreme Court.

The SC offered police protection to the couple and stayed their arrest. "We direct nobody will threaten, harass or commit

any violence or unlawful act against the petitioner (Fiaz), the girl or the petitioners' family members," the Bench said, though it refused to stay the police probe into the case.

This Indian Supreme Court judgment has become a matter of headache for many conservative Indian families. On the other hand, the human rights organizations, especially women rights groups have hailed the judgment. The have termed the judgment as a big step towards women's empowerment in India.

The writer is an advocate of the Supreme Court of Bangladesh. He is currently with the Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi.