

REVIEWING THE VIEWS

Can pardon be granted to a fugitive?

Granting pardon, respites or reprieves and/or remitting, suspending, commuting any sentence awarded by a court of law are some presidential prerogatives under the Constitution of Bangladesh (Article 49). Similarly, the Government has a statutory prerogative under Section 401(1) of the Code of Criminal Procedure 1898 to suspend or remit sentences, either in whole or part. There have always been confusions, academic and otherwise, surrounding these prerogatives. One of such confusions stems from the question as to whether pardon can be granted to a fugitive. A 2012 judgment handed down by the High Court Division (HCD), namely, *Sarwar Kamal v State* (reported in 32 BLD), is of relevance in this regard.

One Sarwar Kamal, as a petitioner, filed an application to the HCD under section 561A of the CrPC for quashment of the orders by an Assistant Sessions Judge (trial court judge in the case concerned). To briefly state the facts, the petitioner, along with two others were found guilty under sections 304/34 of the Penal Code and sentenced to suffer rigorous imprisonment for 10 years with fine of TK 10,000. Aggrieved by the order of sentence and conviction,



The President of Bangladesh remitted the sentence along with two others as passed by the trial court in exercising the power under Article 49 of the Constitution. The said order however was never communicated to the trial court judge, who then went on to issue warrant of arrest and conviction warrant against the petitioner. On coming to know about the said issuance of the warrant of arrest and warrant of commitment the petitioner filed an application in the Court of Assistant Sessions Judge for recalling the warrant of arrest and warrant of commitment in view of the order of remission of the sentence passed by the President submitting a copy of the same. The learned Assistant Sessions Judge, after hearing the said application and the respective parties rejected the application holding that the Court rightly and lawfully issued the warrant of arrest as well as the conviction warrant as the petitioner did not surrender before the trial court complying the direction of the HCD and after issuance of the warrant of arrest the petitioner became fugitive from law.

Two pertinent issues arose in connection with the said application. One whether pardon under Article 49 as well as section 401 was within

the pale of judicial review or not and second, whether the remission granted in the present case to a person who in fact was a fugitive from justice was duly granted or not. To the former question, the court answered in the affirmative and to the latter, it answered in the negative.

In answering the first question, the court referred to an array of judgments from Indian jurisdiction, which, though not binding, were of immense persuasive value and of relevance too. For instance, the court gave reference to the case, *Swaran Singh v state of UP* (1998) where it was observed that if the power of granting remission or pardon was exercised arbitrarily, manifesting mala fide intention or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to amend the situation.

Furthermore, the case of *Maru Ram v Union of India* (1980) was also mentioned where it has also been held that Considerations for exercise of power under Articles 72/161 (similar to our Article 49 of the Constitution) may be myriad but cannot be wholly irrelevant, irrational, discriminatory or mala fide. Upon revisiting these observations, the High Court Division

opined that it was unable to accept the submission that it had no power to examine or touch the order passed by the President exercising the power under Article 49 of the Constitution.

Then, the Court went on to examine whether the President or the Government can give pardon or remit the sentence of a fugitive in exercising extraordinary power under Article 49 of the Constitution or under section 401(1) of the CrPC, as the case may be.

To decide the said issue, the Court elaborately discussed the proposition of law enunciated by our Appellate Division with regard to fugitive. It is the consistent view of our Appellate Division that a man who seeks justice from the Court of law must come before the Court to agitate his grievance and must surrender first to the process of justice, otherwise he remains to be fugitive from justice and therefore, cannot seek aid or assistance of the process of justice in order to claim right of audience against the process of the Court issued against him.

Furthermore, the Court referred to the case of *Anti-Corruption Commission v Dr. HBM Iqbal Alamgir*, reported in 15 BLC where it has been observed by the Appellate Division that Court would not act in aid of an accused person who is a fugitive from law and justice.

While deciding the case of Sarwar Kamal, the Court held that the order dated 12.04.1993 remitting the sentence of the petitioner in exercising the power under Article 49 of the Constitution and section 401(1) of the Code of Criminal Procedure has vitiated on the reasons that include, among others, the petitioner was a fugitive from law when the order of pardon was made; the petitioner without surrendering to the process of the Court, as per direction of the High Court Division succeeded to procure the order of pardon; and the alleged order is a mechanical one and product of party favouritism, extraneous and mala fide factors and also not fair, reasonable and rational; which is against the spirit of the rule of law.

The most significant observation in this case was that "It is well settled that the Court cannot direct the President how he is to exercise the power under Article 49 of the Constitution. Similarly, the Court also cannot direct the Government how they exercise the power under section 401 of the Code of Criminal Procedure. But the action of the President or the Government, as the case may be, must be based on some rational, reasonable, fair and relevant principle which is non-discriminatory, and it must not be guided by any extraneous or irrelevant considerations." The judges further observed that "It is well settled that all public power including constitutional power shall never be exercisable arbitrarily or mala fide and ordinarily, guideline for fair and equal execution are guarantors of the valid play of power and when the mode of power of exercising a valid power is improper or unreasonable, there is an abuse of power."

In order to avoid controversy, criticism and misuse of power under section 401 of the CrPC, the Court observed that "for fair, proper and bona fide exercise of the above power, the government may frame rule and guideline or even amend the Code, as has been done in one of our neighbouring countries."

Lastly, the Court also observed that the petitioner is at liberty to file fresh application for pardon, complying the observations made in this judgment, and the President or the Government may reconsider the prayer of pardon of the petitioner in the light of the relevant materials in accordance with Constitution and law. This judgment, according to the Court, would not be a bar for such reconsideration.

FROM LAW DESK, THE DAILY STAR.

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he preferred a criminal appeal before the HCD. While the appeal was pending, the petitioner was enlarged on bail. Eventually, a Divisional Bench of the HCD affirmed the conviction under sections 304/34, modified the sentence from 10 to 8 years, and directed the petitioner to surrender to the trial court. The petitioner without complying with the said order, went on to pursue pardon.

GLOBAL LAW UPDATES

Uber drivers are 'workers', not self-employed contractors

UK Supreme Court decides



In a recent judgment by the UK Supreme Court, it has been decided that Uber drivers are workers and not self-employed contractors providing transport services. The ruling was preceded by hearings before the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeals, all of which ruled against Uber.

In determining whether Uber drivers are workers, the Court took into consideration the following factors: (1) Uber set the fare which meant that they dictated how much drivers could earn (2) Uber set the contract terms and drivers had no say in them (3) Request for rides is constrained by Uber who can penalise drivers if they reject too many rides (4) Uber monitors a driver's service through the star rating and has the capacity to terminate the relationship if after repeated warnings this does not improve. These factors led to the conclusion that Uber drivers were indeed in a position of subordination to Uber and had to work longer hours to ensure better wage.

The judgment has significant legal

implications and will entitle the drivers to benefits under the applicable employment laws. The court ruled that Uber should treat the drivers as employees from the moment they sign into the app till the moment they log out. The UK Supreme Court's judgment sets a precedent that deserves paramount importance as ride-sharing apps and courier and delivery service apps commonly referred to as 'gig economy' gain popularity across the world.

The judgment also bears significance in relation to Uber's responsibility of paying VAT on fares. Although Uber had maintained that it is a booking agent which hires self-employed contractors that provide transport and is not a transport provider. In the context of the recent judgment, Uber anticipated that it would have to pay VAT as a transport provider and also incur significant additional expenses in paying the drivers for compensation and other benefits.

COMPILED BY LAW DESK (SOURCE: WWW.BBC.COM).

YOUR ADVOCATE

This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise in commercial law, family law, employment law, land law, banking law, constitutional law, criminal law, and IPR.

Determining salary scales in a newly formed company

QUERY

We have formed a new Company and just started recruiting employees. Now, we are determining their salary scales. As we know that in order to ascertain pay scale of an employee, tax issues need to be taken into account. So, it would be a great help if you provide us with the general ideas about the important components that we need to be cognizant of in order to determine the salary structure.

Md. Ashfaque Mirpur, Dhaka

RESPONSE

Thank you for your query. Basically, salary comprehends every payment, due or received, by an employee from an employer or former employer on account of services rendered.

Firstly, let me take the opportunity to give an overview of the fact that in our country there is no generalised minimum wage requirement in order to pay the salaries to the employees rather the same is sector based. Accordingly, in order to determine salary scale first of all you are required to check whether there is any minimum wage requirement in your sector. However, if your sector does not have any minimum wage requirement as such, then you are free to decide the salaries of the employees as per the market analysis.

It is also to be noted that as per Bangladesh labour Act, 2006 there is no legal requirement to breakdown the salary into any component and even such legal requirement of breakdown is also not required by Income Tax Ordinance, 1984 (hereinafter referred to as "ITO"). But, as per tax laws and regulations of Bangladesh, tax rebate or tax benefits which are related with the salary depends on the components of the salary. Therefore, it is always suggested to determine the salary components based on the same.

Generally, salary often includes different allowances, bonuses, pension, commission,



profit sharing and other benefits. Employees' salary incomes are subject to tax on salary and all other benefits. For example, as per Rule 33(2)A of Income Tax Rules, 1984 (hereinafter referred to as ITR) the total amount of basic salary in a year is fully taxable. In this regard the yearly increment should also be taken into consideration. Rule 33A of ITR deals with house rent allowance which states that when the house rent is received in cash, amount exceeding 50% of the basic salary or TK. 25,000.00 per month whichever is the higher shall be added with salary as taxable income. Rule 33I of ITR states about medical allowance where TK. 120,000.00 per annum or 10% of basic salary, whichever is lower is exempted from tax. Rule 33C of ITR states that TK. 30,000.00 per annum (cap per year) is exempted from tax where no conveyance facility is provided by the employer.

Additionally, there are other allowances i.e., festival bonus, overtime allowance etc. which are fully taxable. However, apart from the aforesaid allowances there are other components mentioned in Rule 33 of ITR more elaborately where tax is exempted or fully taxable. Moreover, if you decide to establish provident fund scheme in the Company and if you get the scheme recognised from the National Board of Revenue (NBR) then both the employer and the employees shall obtain such tax benefits and the same rule applicable for gratuity as well.

Income tax rate varies and is accordingly

charged to individuals based on different taxable income slabs. The slabs of total income and corresponding tax rates are changeable as per the nation budget passed in every fiscal year known as the Finance Act. In the national budget 2020-2021, the slabs of paying income tax have been revised to the benefit of the tax-payer. These are: on first Tk. 3,00,000.00 of taxable income, the tax rate is nil (for women the threshold is Tk. 3,50,000.00; for disabled person Tk. 4,50,000.00 and for injured gazette freedom-fighters it is fixed at Tk. 4,75,000.00). After

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the respective threshold is crossed, on next Tk. 1,00,000.00 of taxable income, the tax rate is 5%, on next Tk. 3,00,000.00 the tax rate is 10%, on next Tk. 4,00,000.00 the tax rate is 15%, on next Tk. 5,00,000.00 the tax rate is 20% and on the remaining amount it is 25%. As a company, you are required to deduct applicable income tax from the taxable income from the salaries of the employees while disbursing the salary and deposit the same with the government exchequer. You should be aware of filing the returns under section 108 and 108A of the ITO in relation to the salary taxation.

Hope this general analysis shall help you in order to consider the pay structure and restive taxes of the employees. We would still like to suggest you to consult a tax lawyer or law firm before determining the salaries/taxes of employees of the Company.