

LEX/BDAD/0103/2001

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**IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)**

Civil Appeal No. 189 of 2000

Decided On: 18.06.2001

Secretary, Ministry of Finance and others **Vs.** Mr. Md. Masdar Hossain and others

Hon'ble Judges/Coram:

Mahmudul Amin Chowdhury, C.J., Mainur Reza Chowdhury, Mohammad Gholam Rabbani, Md. Ruhul Amin and Mohammad Fazlul Karim, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mahmudul Islam, Attorney General, instructed by Sufia Khatun, Advocate-on-Record

For Respondents/Defendant: Md. Aftab Hossain, Advocate-on-Record

JUDGMENT

Mohammad Fazlul Karim, J.

1. This appeal by leave arises for review of the judgment and Order dated 02.12.1999 passed by this Division in Civil Appeal No. 79 of 1999 on two grounds, namely, first, the writ petitioners being members of the service of the Republic, Article 140 of the Constitution is applicable in their case as well and Article 137 of the Constitution having conferred power on Parliament and the President to determine the number and composition of public service commission, this Hon'ble Court having no power under the Constitution to dictate (except in the case of constitutional or legal violation) the manner of exercising the power, the Hon'ble Court committed an error of Law apparent on the face of the record in giving direction No. 4 regarding Judicial Service Commission and secondly, the High Court Division having found the power of parliament and the contingent power of the President under Article 133 of the Constitution in respect of pay and the terms and conditions of service other than the appointment, dismissal and suspension in respect of judicial officers and magistrates exercising judicial functions, it is for the Parliament or the President to determine how, in which manner and at what size the pay and other benefits of the judicial officers and magistrates exercising judicial functions will be fixed from time to time and the recommendation of a commission, if and when appointed, is to be considered by the Parliament or the President and no Rule can be fixed to the effect that the "pay etc" of the judicial officers and magistrates exercising judicial functions "shall follow the recommendations of the Commission", the Hon'ble Court committed an error of Law apparent on the face of the record in giving direction No. 6 relating to formation of judicial pay commission and the status of its recommendation. This Division by the said judgment and Order in Civil Appeal No. 79 of 1999 while allowing the appeal in part passed orders on the following, amongst other, directions with the operative part of the judgment reflecting summary thereof.-

4. The appellant and the other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article

115 to implement its provisions which is a constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh Judicial Service. They are further directed that either legislation or by framing Rules under Article 115 or by executive Order having the force of Rules a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate Courts for recruitment to the judicial service on merit with the objective of achieving equality between men and women in the recruitment, and

6. The impugned, orders in the writ petition dated 28.2.94 and 2.11.95 are declared to be ultra vires the Constitution for the reasons stated in the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continue one. The pay etc. of the judicial service shall follow the recommendation of the Commission.

2. Mr. Mahmudul Islam, the learned Attorney General for Bangladesh, has argued that the judicial officers and magistrates exercising judicial functions having been found to be members in the service of the Republic, it cannot be held that Article 140 of the Constitution is inapplicable in their case and it is for the Parliament or the President to determine whether there shall be a separate judicial service commission under Article 137 of the Constitution and in that view of the matter the direction given by this Court in what manner the power shall be exercised is not the contemplation of the Law and as such the direction for establishment of a separate judicial service commission for the recruitment of the judicial officers is inconsistent with the Constitutional conferment of powers on respective authorities. The learned Attorney General further submitted that the Parliament has power and the President has contingent power under Article 133 of the Constitution to make Law or Rules in respect of pay and the terms and conditions of service other than the appointment, dismissal, and suspension in respect of Judicial Officers and Magistrates exercising judicial functions and thus it is for the Parliament or the President to determine the pay and other benefits of the judicial officers and magistrates exercising judicial functions to be fixed from time to time inasmuch as no Rule can be made to the effect that the "pay etc." of the judicial officers and magistrates exercising judicial functions "shall follow the recommendations of the Commission", thereby submitted that High Court Division committed error of Law apparent on the face of the record in giving direction Nos. 4 and 6 relating to formation of Judicial Service Commission and Judicial Pay Commission.

3. The judicial service as part of the service of the Republic has been distinctly treated in the aforesaid Articles, the nature and character of their function are different and moreover. Article 22 has emphasized on separation of the judiciary from the executive. Sub-paragraph (6) of paragraph 6 of the Transitional and Temporary provisions of the Fourth Schedule mandates compliance of chapter II of Part VI of the Constitution which in effect requires all concerned to maintain, preserve and protect the independence of judiciary and also to enhance the separation of the judiciary from the executive and preserves the then arrangement as a temporary and transitional one.

4. Articles 114, 115, 116 and 116A of the Constitution clearly and unequivocally demonstrate that persons in the judicial service exercising judicial functions are not

only distinct but also separate from the civil executive and administrative personnel.

5. Thus there is no doubt that the independence of the Judiciary is the basic feature of our Constitution and in the case of *Anwar Hossain Vs. Bangladesh*, BLD 1990 (Special Issue) 1 it has been held in clear terms that the independence of judiciary is a basic structure of our Constitution.

6. Article 137 of the Constitution provides that there should be Law for establishing one or more public service commissions for Bangladesh, each of which shall consist of a Chairman and such other members as shall be prescribed by Law. In view of the said provision of Article 137 the direction to establish another public service commission for judicial and magisterial services is not contrary to the provision of the Constitution inasmuch as upon establishment of a judicial public service commission for recruitment of persons to be employed for judicial services and magistracy exercising judicial function in accordance with the provision of Article 140 of the Constitution is the contemplation of the Constitution of Bangladesh inasmuch as the same being distinct and separate for recruitment of persons to be employed in the judicial and the magisterial service is in consonance with the spirit of Article 22 of the Constitution. The same is also in consonance with the provision of Article 115 of the Constitution which provides that the appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with Rules made by him in that behalf. From the above, Article 137 provides setting up of one or more public service commissions for Bangladesh as and when necessary but the same may not be full fledged one and there is no impediment in the Constitution for setting up of a separate public service commission which shall conduct tests and examination for the selection suitable persons for appointment to the judicial service of the Republic and advise the President on any matter in which the commission is consulted under clause (2) of Article 110 or on any matter connected with its function which is referred to the commission by the President and such other functions as may be prescribed by Law. The main judgment sought to be reviewed has exhaustively discussed about the necessity of Judicial Public Service Commission. The President may make Rule in Order to implement the direction regarding formation of Judicial Public Service as and when necessary which may not be a full fledged one. But there is no impediment in the Constitution as to formation of a Judicial Public Service Commission for judicial and magisterial service. From direction it does not mean that the President or the Parliament would be denuded of their plenary Constitutional powers but the recommendation of judicial public service commission shall form the basis of their consideration. That is whet the judgment meant by the words "shall follow the recommendation of the Constitution".

7. The main judgment further held that,

There are two other essential conditions of judicial independence in the special context of Bangladesh the first of which judicial appointment has already been touched upon by us. Judicial appointments should normally be permanent. When contract appointment is inevitable it should be subject to appropriate security of tenure free from arbitrary interference by the executive. Recruitment to the judicial service shall be made by a separate judicial services commission with a majority of members from the senior judiciary and with the objective of achieving equality between men and women. Judicial vacancies should be advertised. Recommendations for appointment on merit should come from the commission.

8. The said setting up of the separate judicial service commission is not contrary to the provision of Article 133 of the Constitution which provides that subject to the provision of this Constitution parliament may by Law regulate the appointment and conditions of service of persons in the service of the Republic. The power of the Parliament and the President under Article 133 of the Constitution to make Law, Rules in respect of terms and conditions in regulating appointment and. the condition of service as Article 133 of the Constitution are applicable to the members of the judicial service as a class apart from the executive and administrative civil service of the Republic they are to be treated a class apart from other services of the Republic as a distinct entity, never be treated alike or merged or amalgamated with any other service, except with a service of allied nature. In view of the above their pay and allowances ought to be determined separately by a separate judicial public service commission. Article 133 cannot be invoked for the judicial officers as there are separate provision for their in Articles 115 and 116 of the Constitution- Judicial officials are not persons in the service of the Republic for the purpose of Article 133 and hence Rules regarding their appointment and condition of service cannot be framed under Article 133.

9. Articles 133 and 136 are general provision but Article 115 is a special condition. This power of the President cannot be obliterated when Parliament makes or exhausts its exercises under Article 136. The President is not empowered to Act under the proviso to Article 133 when he is required to do under Article 115. The Parliament in exercise of its power under Article 136 cannot usurp the primary Rule naking power of the President under Article 115. Article 136 will always have to be read keeping in view the fact that the reorganization of the services can not be allowed by amalgamating or unifying the judicial service with any civil administrative executive services. Article 133 or Article 136 does not authorize the Parliament or the President to minimize the independence of the subordinate judiciary resorting to subordinate legislation or Rules. Security of salary and other recommendation of the members of the judicial service is ensured through the financial independence of the judiciary and as such there should be a completely different pay commission to determine the grade, scale of pay of the members of the judicial services.

10. In that view of the matter the original judgment has held, inter alia,

The second essential condition of judicial independence is security of salary or other remuneration and, where appropriate, security of pension..... It is desirable that the right to salary and pension of the subordinate judiciary be established by Law and there should be no way in which the executive could interfere with that right in a manner to affect the independence of the subordinate court judges.

Their pay and allowances ought to have been investigated into separately by a separate judicial pay commissions as an essential prerequisite of their independence and their pay and allowances ought to have been notified separately as a class apart from the executive and administrative civil service of the Republic. Chapter II of Part VI of the Constitution was in the nature of a clarion call upon the executive branch of the Government to change their mind-set and to come to regard the judicial service as a separate class and entity within the service of the Republic.

In view of the exhaustive discussions in the main judgment and for the reasonings given above, Article 137 and 140 and the contingent power under Article 133 of the Constitution do not stand in the way of implementing direction Nos. 4 and 6 of the main

judgment. The grounds for review are the subject-matter of the main appeal.

A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies where an error apparent on the face of the record exists. It is not a re-hearing of the main appeal. Review is not intended to empower the Court to correct a mistaken view of Law, if any, taken in the main judgment. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected by the leave but does not include the correction of any erroneous view of Law taken by the Court. Since this Court in its judgment dated 2.12.1999 has considered the grounds of this appeal and since we find that there is no error apparent on the face of the record we do not find any reason to reconsider direction Nos. 4 and 6. Even reconsideration of points wrongly or rightly considered in an appeal decided by this Division without any error apparent on the face of record is no ground for review of a judgment. Reference in this regard may be made to the case of G.M. Jamuna Oil Company Ltd. Vs. Chairman, Labor Court, 53DLR(AD)28. This Court has on an interpretation of the relevant provisions of the Constitution given the impugned direction which are commensurate with the clear, unambiguous and unequivocal provisions of the Constitution and the directions are in fulfillment of a Constitutional mandate which is obligatory for all, parliament, executive and the judiciary, to follow and implement.

The appeal is accordingly dismissed. No costs.

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