

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. OF 2009.

IN THE MATTER OF:

An application under Article 102 read with Article 44 of the Constitution of People's Republic of Bangladesh.

AND

IN THE MATTER OF:

Public Interest Litigation(PIL)

AND

IN THE MATTER OF:

1. Human Rights and Peace for Bangladesh (HRPB) Represented by it's Secretary Advocate Asaduzzaman Siddique, Hall No. 2, Supreme Court Bar Association Bhaban, Dhaka, Bangladesh.

2. Advocate Sarwar Ahad Chowdhury, Organizing Secretary, Human Rights and Peace for Bangladesh (HRPB) of 3/14 Bashbari Bosila Road, Mohammadpur, P.S.: Mohammadpur, Dhaka.

3. Advocate Md. Aklas Uddin Bhuiyan Publicity Secretary of Hall No. 2, Supreme Court Bar Association Bhaban, Dhaka and 33 Abdul Hadi Lane, Police Station Kotwali, District- Dhaka, Bangladesh.

.....Petitioners.

-V E R S U S-

1. Bangladesh, represented by the Cabinet Secretary, Cabinet Division, Bangladesh Secretariat, P.S.: Ramna, District: Dhaka.

2. The Secretary, President Secretariat, Bangabhaban, P.S.: Ramna, District: Dhaka.

3. The Secretary, Secretariat of the Prime Minister's Office, Tejgaon , P.S.: Tejgaon, District: Dhaka.

4. The Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat P.S.: Ramna, District: Dhaka.

5. The Secretary, Bangladesh Jatiya Sangsad Secretariat, Bangladesh Secretariat, P.S.: Ramna, District: Dhaka.

....Respondents.

G R O U N D S

I. For that the impugned amendment of section 145 and 147 of the Code Of Criminal Procedure, 1898, made by Act 32 of 2009 inserting the words "District Magistrate, or an Executive Magistrate specially empowered by the Government in this behalf" substituting the words "Metropolitan Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class" being ultra

vires and beyond the scope of separation of judiciary and against the spirit of the Judgment passed in Masder Hossain Case.

II. For that by the impugned amendment of the provisions of section 145 and 147, the adjudication power has been changed and given to executive magistrate. By way of this amendment the right of the citizen to get justice from a judicial officer has been seriously effected. Not only that the spirit of the separation of judiciary has been frustrated. Hence the impugned amendment is illegal.

III. For that the impugned amendment of section 145 and 147 of the Code Of Criminal Procedure, 1898, made by Act 32 of 2009 inserting the words "District Magistrate, or an Executive Magistrate specially empowered by the Government in this behalf" substituting the words "Metropolitan Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class" is against the principle laid down in Masder Hossain case and violation of the Article 22 of the constitution of Bangladesh.

IV. For that as per the provisions of Constitution of the Peoples Republic of Bangladesh as well as principles laid down by the Appellate Division in Masder Hossain Case Judicial function can not be done by the executive authority. Though under section 145 and 147 of the Criminal Procedure Code the learned Magistrate take evidence decide the possession, grant interim injunction, appoint receiver, restore possession and competent to pass an order for permanent injunction until the case is decided by civil court, so the function of this section is a judicial in nature. Such kinds of adjudication power can not be given to executive magistrate. Hence the amendment is not within the scope of law and ultra vires to the judgment passed in Masder Hossain Case.

V. For that as per definition of 4(m) of the Criminal Procedure Code "Judicial Proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. That in the case of dispute arises out of possession an application under section 145 of Cr.P.C entertained by the Magistrate on oath of the petitioner. Thereafter in the course of disposal of the case again the Magistrate took evidence on oath of the both side. So it is a judicial proceeding as well as a judicial function. Hence it can not be performed by the Executive Magistrate.

VI. For that as per section 4A (2)(b) of the Code of Criminal procedure "where, under any law for the time being in force other than this code, the functions exercisable by a Magistrate relate to matters- which are administrative or executive in nature, such as the granting of a license, the suspension or cancellation of a license, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an executive Magistrate". It is clear that only the functions known as administrative in nature that will be performed by the Executive Magistrate. But in the proceeding under section 145 and 147 of the Cr.P.C. the function performed which is judicial in nature, so the Executive Magistrate has no authority to deal with such kinds of judicial proceeding. Hence the amendment, in which Executive Magistrate has given power to deal with such kinds of judicial proceeding, is liable to be declared illegal and ultra vires.

Wherefore, it is most humbly prayed that Your Lordships would graciously be pleased to:-

a) Issue a Rule Nisi calling upon the Respondents to show cause as to why the impugned amendment of Section 145 and 147 of the Code of Criminal Procedure, 1898, inserting the words "District

Magistrate, or an Executive Magistrate specially empowered by the Government in this behalf” substituting the words “Metropolitan Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class” and why the impugned amendment of Section 36 of the Criminal Procedure Code inserting the words “Judicial and executive Magistrate” in stead of District Magistrate, Sub Divisional Magistrate and Magistrate of first, second and third classes and why the Amendment of schedule III (10 of VI) in giving power to District Magistrate to make orders etc. in possession cases under section 145 and 147 and in schedule IV (D of VI) giving power to an Executive Magistrate to make orders under section 145 and 147, named as “Code Of Criminal Procedure (Amendment) Act, 2009, made by the Act 32 of 2009 published in official Gazette on 08.04.2009, should not be declared to be void and ultra virus to the constitution as being violative of the constitution and judgment passed in Masder Hossain Case.

Present Status

The case was filed and moved by Advocate Manzill Murshid, President, HRPB. After hearing the parties the Hon’ble Court issued Rule Nisi upon the respondents. The matter is pending before the Hon’ble High Court Division.
