

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

Writ Petition No. 5560 of 2012

IN THE MATTER OF:

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

-AND-

IN THE MATTER OF

Human Rights and Peace for Bangladesh
(HRPB) and others.

.....Petitioner

-VERSUS-

Bangladesh, represented by the Secretary,
Ministry of Law, Justice and Parliamentary
Affairs, Bangladesh Secretariat, Dhaka and
Others

..... Respondents

Mr. Manzill Murshid Advocate

.....for the petitioner.

Mr. Md. Mokleshur Rahman, DAG

.....for the Respondent No.1

Heard on :10.11.2014 & 13.11.2014

Judgment on :16.11.2014

Present:

Ms. Justice Naima Haider

And

Mr. Justice Md. Jahangir Hossain

Naima Haider, J;

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned amendment of section 2(3) of *†Rjv RR I Aat`b Av`ij ZmgR Ges wefMkq we`kI RR Av`ij ZmgR (KgRZP I KgPviX) wbtqVM wevagij v, 1989*, and the amendment of section 2 (Q) of *RjwIkqj g`v†R†÷mx I †g†Uicij Ub g`v†R†÷mx Av`ij ZmgR (mqZv KgRZP I KgPviX) wbtqVM wevagij v, 2008*, in respect of provision to select a member of the selection committee (*evQvB Kugul*) from the post of Senior Assistant Secretary/equivalent post of Assistant Secretary, of the Ministry of Law, Justice Parliamentary Affairs (annexure B and B-1), should not be declared to be void and ultra virus to the Constitution as being violative of the principles of Independence of Judiciary and /or such other or further order or orders passed as to this Court may seem fit and proper.

The brief facts necessary for the disposal of the Rule are: The organization "Human Rights and Peace for Bangladesh" (HRPB) is a non profitable registered organization and the objects of the organization is to uphold the rights of the citizen and to work for the poor people, to give legal support to the helpless people and to build up awareness amongst the people about their rights etc. Moreover, the organization is also working to protect environment and take steps against the activities of destroying environment and take steps in cases of violation of law and works towards establishing Rule of Law.

The petitioners moved this public interest Litigation (PIL) before this Court as it involves great public importance.

For the purpose of the appointment to the post under the District and Sessions Judge, a rule namely, *†Rjv RR I Aat`b Av`ij ZmgR Ges wefMkq we`kI RR Av`ij ZmgR (KgRZP I KgPviX) wbtqVM wevagij v, 1989* was framed under the provisions of Article 140(2) of the Constitution of Bangladesh and was published in the official gazette on 07.03.1990. The authority for appointment was given under rule 2(ga) to the District Judge. As per the provision of the said rules, a selection committee was formed by the judicial officers. Another rule was framed in the name of *RjwIkqj g`v†R†÷mx I †g†Uicij Ub g`v†R†÷mx Av`ij ZmgR (mqZv KgRZP I KgPviX) wbtqVM wevagij v, 2008*, and the same was published as a notification on 03.08.2008. In the above mentioned rule, power to make appointment was given to the judicial officer as the appointment

authority in the lower judiciary is the District Judge and Judicial officer. Moreover, after publishing the notification of Independence of Judiciary, no administrative authority is allowed to take part in any activities in the appointment processes of judiciary. So, the amendment is illegal and without lawful authority.

The petitioners purports to challenge the vires of impugned amendment of section 2(0) of *†Rj v RR I Aat`b Av`ij Zmg# Ges uefVlMiq ue†kI RR Av`ij Zmg# (KgRZP I KgPvi x) ub†qVM uewagij v, 1989*, in which a Senior Assistant Secretary of the Ministry of Law, Justice Parliamentary Affairs has been selected as a member of the selection committee (*evQvB KigvU*) and the amendment of section 2(0) of *RyWlkqij g`v†R†÷mx I †g†Urcij Ub g`v†R†÷mx Av`ij Zmg# (mnqZv KgRZP I KgPvi x) ub†qVM uewagij v, 2008*, in which a Senior Assistant Secretary of the Ministry of Law, Justice Parliamentary Affairs has been selected as a member of the selection committee (*evQvB KigvU*). The amendments are ultra vires and beyond the scope of law and also violative of the judgment of the Masdar Hossain's case as well as against the sprit of Separation of Judiciary. After declaration of Independence of Judiciary, all new appointments in the Judiciary is under control of the Judiciary itself. Some interested persons in order to interfere with the authority of the Judiciary have amended the said provisions of section 2(0) and 2(0) and with a malafide intention. The respondents issued a notification as SRO No. 362-Ain/2011 and SRO No. 361-Ain/2011 and published in official Gazette on 01.11.2010. It is also provided in the amendment that a Senior Assistant Secretary of the Ministry of Law, Justice and Parliamentary Affairs or a person holding its equivalent post would be selected as a member of the selection committee (*evQvB KigvU*). It is also the petitioner's case that the amendment has not only undermined the authority of the judiciary conferred upon by the Constitution but also dared to challenge the provisions of Rule of law.

Being aggrieved by and dissatisfied with the amendment of section 2(0) of *†Rj v RR I Aat`b Av`ij Zmg# Ges uefVlMiq ue†kI RR Av`ij Zmg# (KgRZP I KgPvi x) ub†qVM uewagij v, 1989*, and the amendment of section 2(0) of *RyWlkqij g`v†R†÷mx I †g†Urcij Ub g`v†R†÷mx Av`ij Zmg# (mnqZv KgRZP I KgPvi x) ub†qVM uewagij v, 2008*, the petitioners have moved this Court and obtained the instant Rule Nisi.

Respondent no.1 entered appearance by filing an affidavit in opposition. The case of respondent no.1 is that the amendment of

section 2 (0) of *RR I Aat`b Av`vj Zmgn Ges wfvMiq wtkl RR Av`vj Zmgn (KgRZP I KgPvi x) wbtqVM wewagij v, 1989*, and the section 2 (0) of *RwMkqj g`vRt`mx I tqtUvcij Ub g`vRt`mx Av`vj Zmgn (mnqZv KgRZP I KgPvi x) wbtqVM wewagij v, 2008*, for the inclusion of Senior Assistant Secretary in the selection committee has been made with a view to bringing transparency in the appointment of support staffs of the Judgeship and Judicial Magistracy. The selection and appointment of the support staffs of the Judgeship and Judicial Magistracy are of administrative nature and not judicial. So, the alleged amendment of the two Bidhimala for making provisions for the inclusion of a Senior Assistant Secretary into the Selection Committee for the appointment of support staff of the Judgeship and Judicial Magistracy cannot be declared ultra virus to the Constitution and against the sprit of the independence of the Judiciary. The amendment was not made with the malafide intention to interfere into the selection process. The alleged amendment has been done within the ambit of law and settled principles of law.

Mr. Manzill Murshid, learned Advocate appearing on behalf of the petitioners at the outset submit that the amendment is violative of the mandate of the Constitution in respect of independence of Judiciary. He further submits that the amendments are against the spirit of the directives issued by the highest Court of the land in the landmark judgment of Masdar Hossain' s case reported in 52 DLR (AD) 82. He next submits that the respondents are the experienced public servants and very much aware of the rules and law of the land and are aware about the duties vested upon them but failed to perform their duty. He further contends that the Supreme Court has the supervisory and controlling power over all Courts subordinate to it under Article 109 of the Constitution. He lastly submits that the control of the Supreme Court is exercised at the field level through the District Judge but through the amendment, the administrative authorities are interfering and have taken overall control over in matters of appointment.

Mr. Md. Mokleshur Rahman, learned Deputy Attorney General on behalf of respondent no.1 submits that the writ petition has been filed with false representation. He further submits that the petition cannot be entertained as public interest litigation as the public interest in no way can be jeopardized by the alleged amendment and as such the Rule is liable to be discharged. He lastly submits that the alleged amendment of the two Bidhimala for making provisions for the inclusion of a Senior Assistant Secretary into the Selection

Committee for the appointment of support staff of the Judgeship and Judicial Magistracy cannot be declared ultra virus to the Constitution and against the spirit of the independence of the Judiciary.

We have considered the submissions made on behalf of the contending parties, perused the writ petition, its annexures and affidavit in opposition filed by respondent no.1.

The moot question to be decided in this petition is whether the alleged amendment of the two Bidhimala for making provisions for the inclusion of a Senior Assistant Secretary into the Selection Committee for the appointment of support staff of the Judgeship and Judicial Magistracy is ultra virus to the Constitution and against the sprit of the independence of the Judiciary.

The Supreme Court has the supervisory and controlling power over all Courts, subordinate to it, under Article 109 of the Constitution. The control of the Supreme Court is exercised at the field level through the District Judge. But through the amendment in question, the administrative authority is more likely to interfere with the overall administration.

We are constrained to hold that the amendment of section 2(0) of *RR I Aat`b Av`ij ZmgR Ges uefiMiq ue+kI RR Av`ij ZmgR (KgRZP I KgPvix) ubtqvl uewagvj v, 1989*, and the section 2 (0) of *RyWkqij g`vRt÷mx I tqtUvcij Ub g`vRt÷mx Av`ij ZmgR (mqZv KgRZP I KgPvix) ubtqvl uewagvj v, 2008*, in which a Senior Assistant Secretary of the Ministry of Law, Justice Parliamentary Affairs has been selected as a member of the selection committee (*evQvB KigvU*) is nothing but an attempt to interfere into the judiciary. We have no hesitation to hold that the respondents purport to use such power in the name of Rules which is not permitted under the scheme of the law of the Constitution.

The impugned amendments are also against the sprit of the directives given by our Apex Court in the landmark judgment of Masdar Hossain's case reported in 52 DLR (AD) 82 which reads as follows:

"It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have prima face over those of the Executive".

We are not unmindful of the fact that the amendment and, indeed, the contemplation in which a Senior Assistant Secretary of the Ministry of Law, Justice Parliamentary Affairs has been selected as a member of the selection committee (*evQvB KugwU*) in some cases can be misused or abused and turned into an engine of oppression which has caused considerable anxiety in our mind and we hold that the amendment has undermined the authority of the Judiciary conferred upon it by the Constitution.

A feeble attempt made by learned Deputy Attorney General in the end to show that the selection committee has been made with a view to bring transparency in the appointment of support staffs of the Judgeship and Judicial Magistracy does not hold good and devoid of any substance.

In view of the observations made hereinbefore, we find merit in this Rule.

Accordingly, the Rule is made absolute.

The impugned amendment of section 2 (0) of *†Rjv RR I Aat`b Av`vj Zmgr Ges wfvMiq wtkl RR Av`vj Zmgr (KgRZP I KgPvi x) wbtqVM wewagvj v, 1989*, and the amendment section 2 (Q) of *RwMkqij g`v†R†÷mx I †g†Urcij Ub g`v†R†÷mx Av`vj Zmgr (mnqZv KgRZP I KgPvi x) wbtqVM wewagvj v, 2008*, in respect of provision to select a member of the selection committee (*evQvB KugwU*) from the post of Senior Assistant Secretary/equivalent post of Assistant Secretary of the Ministry of Law, Justice Parliamentary Affairs as evident from Annexure B and B-1 are declared to be void and ultra virus of the Constitution and therefore, they are declared to be without lawful authority and of no legal effect.

There is no order as to costs.
