

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 4557 of 2013.

In the matter of:

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

And

In the matter of:

Advocate Golam Kabir Badal.

... Petitioner.

-Verses -

Bangladesh and another.

...Respondents.

Mr. Manzill Murshid, Advocate

.....for the petitioner.

Mr. Biswojit Roy, D.A.G. with

Mr. Swarup Kanti Deb, A.A.G. with

Mr. Jahangir Alam, A.A.G.

...For the Respondents.

The 27th November, 2014.

Present:

Mr. Justice Quazi Reza-Ul Hoque

And

Mr. Justice Abu Taher Md. Saifur Rahman.

Quazi Reza-Ul Hoque, J:

The instant Rule was issued on 06.05.2013 calling upon the respondents to show cause as to why the notification published in the official gazette on 05.03.2013 under S.R. O. No. 58/Ain/2012, to shift the Court of

Senior Assistant Judge from Barisal to Mehendigonj Uppazila, District-Barisal, without consulting the Supreme Court of Bangladesh and at the instance of an application filled by a political person, which is against the principal of separation of Judiciary (annexure- A), should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

The facts necessary for disposal of the Rule, as has been stated by the petitioner, in short, is that the petitioner being citizen of the country, challenges the shifting of Civil Court at Upazilla level under District-Barisal violating the spirit of the mandate “separation of judiciary” and without consulting the Supreme Court of Bangladesh and seeks to bring this application by invoking Article 102 of the Constitution as a public interest litigation in order to establish the authority and uphold the solemnity of the Supreme Court of Bangladesh (annexure- A).

A notification was published in the official Gazette on 05.03.2013 under S.R.O No. 58/Ain/2012 in which a Senior Assistant Judge Court has been shifted at Mehndigonj Upazila, District- Barisal. In the notification it was mentioned that the Court has been shifted as per provision of section 14(1) of the Civil Courts Act, 1887, where the judicial functions are exercised at Upazilla level but it was decided without consulting the Supreme Court of Bangladesh since in the Constitution of Bangladesh in Article 22 it has provided separation of judiciary from executive and accordingly a Gazette notification has been published, so there is no scope to alter or shift the seat of a Civil Court to any place without the permission of the Supreme Court of Bangladesh.

A letter was issued on 30.11.2011 by the respondent No. 2 and it was sent to the learned District Judge, Barisal, wherein it was stated that on the basis of an application filled by the General Secretary, Awami Shechashebok League, Central Committee, the Government has decided to shift the Senior Assistant Judge Court of Mehendiganj from Barisal to Mehendigonj, District- Barisal. The Government has decided shifting the Court at the sweet will of a political person. Such kinds of steps would jeopardize the impartial justice system because when the Court will sit at Upazila level there will be every possibility to influence upon the Court by influential political persons, which may cause serious interference to

the dispensation of justice and the rule of law may be frustrated (annexure-E).

It is stated that 157 learned Advocates of the Barisal Bar Association has filed an application to the petitioner upon taking resolution in a requisition meeting on the agenda of shifting the senior Assistant Judge Court from Barisal to Mehendigonj. The petitioner as Secretary of the Barisal Bar Association has submitted an application on 10.04.2013 to the Minister for Ministry of Law, Justice and Parliamentary Affairs and requested to cancel the decision for shifting the Civil Court from Barisal to Menendigonj. In the said application it was mentioned that the decision for shafting the Court is against the public interest and the lawyers are not able to perform their function in such interior and isolated area.

Some news papers published about the shifting and about the lawyers demanding the cancellation of the decision of shifting of the Civil Court from Barisal to Mehendigonj.

The petitioner through his learned lawyer served a Notice Demanding Justice on 22.04.2013 upon the respondents and requested to cancel/recall/revoke the SRO dated 05.03.2013, in which a Senior Assistant Judge Court has been shifted to Mehendigonj Upazila under the Barisal District.

It is mentionable here that in 1982 an Ordinance was issued namely Upazila Parishad and Upazila Administration Re- Organization Order, 1982 (Ordinance No. 59 of 1982) through which Upazila system was introduced. According to new administrative set up civil and criminal courts were established in every upazila, which seriously hampered the rule of law and demand was raised from the lawyers to abolish it and withdraw the Court from Upazila Level. After a long movement another Repeal Ordinance was issued namely Upazila Parishad and Upazila Administraion Re-Organization Repeal Ordinance, 1991 (Ordinance No. 37 of 1991) by which the Upazila system was abolished. Subsequently it was placed in the Parliament and passed Act No. 2 of 1992 after abolishing the Upazila system all the courts were closed and recalled from Upazila Level to its their respective seats in the District, as it is now.

Article 109 of the Constitution of Bangladesh provides exclusive control of the High Court Division over the lower judiciary so, question of

altering or shifting of the place of any Court must be done at the instructions of the High Court Division but the respondents issued notification for shifting the senior Assistant Judge Court from Barisal to Mehendigonj without consulting the Supreme Court of Bangladesh as per Article 116, which is violative of the provision of the Constitution, as well as, also *ultra vires* of the independence of the judiciary as enshrined in Article 22 of the Constitution.

It is stated here that shifting of the Senior Assistant Judge Court at Upazila level is against the spirit of the directives issued by the highest Court of the land in the landmark judgment of Masdar Hossain's case.

The respondents in exercising the executive power issued impugned notification shifting the Civil Court from Barisal to Mehendigonj ignoring the consultation provision with the Supreme Court and have simply shown utter disrespect to the highest Court of the land as well as the provision of Constitution of Bangladesh.

The respondent No. 1 contested the Rule by filing affidavit-in-opposition contending *inter alia* that on 31.10.2011 one Pankaj Debnath, General Secretary, Bangladesh Awami Swechasebok League, Central Executive Committee filed an application to the Minister of Ministry of Law, Justice and Parliamentary Affairs to transfer the Court of Senior Assistant Judge, the Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila (annexure- 2). Thereafter in pursuant to the said application the Government asked for a report from the District and Session's Judge Barisal as to whether there is infrastructural facility along with statistical data of Civil and Criminal cases to transfer the Court of Seniors Assistant Judge and Court of Senior Judicial Magistrate (annexure- 3).

Thereafter learned District and Sessions Judge Barisal sent a report on 17.11.2011, with a recommendation to transfer the Court of the Senior Assistant Judge and Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila (annexure- 4).

After receiving the said report the Government decided to transfer the Court of Senior Assistant Judge and the Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila exercising the power conferred by section 14(1) of Civil Courts Act, 1887 and

accordingly the impugned SRO was issued transferring the Court of Senior Assistant Judge from Barisal District to Mehendigonj Upazila after observing all the legal formalities.

It is stated that the Government need not to consult the Supreme Court in the exercise of power conferred by section 14(1) of Civil Courts Act, 1887 in transferring any Civil Courts from one place to another and thereby on different times the Government transferred different civil courts from one place to another exercising the said power (annexure- 5).

The Government only consults the Supreme Court in the appointment, promotion and posting of judicial officers in accordance with Article 116 of the Constitution of Bangladesh.

The petitioner filed this petition with the ulterior motive and have no scope and *locus standi* to file this petition, hence the Rule is liable to be discharged.

Mr. Manzill Murshid, the learned Advocate appearing for the petitioner submits that the shifting of Senior Assistant Judge Court at Upazila level is against the spirit and directives issued by our apex Court in the landmark judgment of Secretary, Ministry of Finance Vs. Masdar Hossain and others, 52 DLR (AD) 82 at paragraph 76 (7), 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 view and opinion of the Supreme Court shall have primacy over those of the executive.

Paragraph 84 further engulfs that...

That Article 116 speaks of vesting of control and discipline in the president of persons in the judicial service and Magistrate exercising judicial functions that too in consulting with the Supreme Court to safeguard independence of judiciary.

He again submitted that the respondents in exercising the executive power issued the impugned notification shifting the Civil Court from

Barisal to Mehendigonj ignoring the consultation provision with the Supreme Court and have shown disrespect to the highest Court of the land, as well as, violated the provision of the Constitution of Bangladesh.

He further submitted that the action of the respondent in shifting the Civil Court from Barisal to Mehendigonj has defied the authority of our Constitution and also have challenged the authority of the Supreme Court of Bangladesh, which is mandated under Article 116 of the Constitution, hence the impugned notification shifting the alleged Court should be declared to have been done without lawful authority and is of no legal effect.

Mr. Murshid, again submitted that in case of shifting the Senior Assistant Judge Court to any Upazila level, the executive must comply with the opinion of the Supreme Court since the supervisory and controlling power over all courts subordinate to it vests with the High Court Division under Article 109 of the Constitution, so shifting the Civil Court without the permission of the Supreme Court is illegal and without lawful authority.

He again submitted that sifting the senior Assistant Judge Court at Upazila level in defiance of the opinion of the Supreme Court would simply undermine the image and prestige of the highest Court of the land and under no circumstances that should be allowed to stand without being attended and scrutinized by the Court.

Mr. Murshid, further submitted that in shifting the civil Court at Upazila level the respondents have not only undermined the authority of the Supreme Court conferred by the Constitutions but also have dared to challenge the provisions of the Rule of law, hence it is liable to be declared to have been done without lawful authority and is of no legal effect.

He again submitted that after publishing the Gazette notification for separation of judiciary there is no scope to take any decision by the executive for shifting any civil Court from Barisal to Mehendigonj Upazila. It may be mentioned here that officially judiciary has been separated and it means it is no more within the control of the executive. So, any question of transfer of Court or judge is totally vested upon the Supreme Court of Bangladesh.

Mr. Biswajit Roy, the learned Deputy Attorney General appearing for the respondents submitted that on 31.10.2011 one Pankaj Debnath, General Secretary, Bangladesh Awami Sechchashebok League, Central Executive Committee filed an application to the Minister of Ministry of Law, Justice and Parliamentary Affairs to transfer the Courts of Senior Assistant Judge and the Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila (annexure- 2). Thereafter, the Government asked for a report from the District and Sessions Judge, Barisal, as to whether there is infrastructural facility along with statistical data of civil and criminal cases to transfer the Court of Seniors Assistant Judge and the Court of Senior Judicial Magistrate to Mehendiganj (annexure- 3).

He again submitted that thereafter, the learned District and Sessions Judge, Barisal sent a report on 17.11.2011 with a recommendation to transfer the Court of Senior Assistant Judge and the Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazil (annexure- 4). After receiving the said report the Government decided to transfer the Court of Senior Assistant Judge and Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila exercising the power conferred by section 14(1) of Civil Courts Act, 1887 and accordingly the impugned SRO was issued transferring the Court of Senior Assistant Judge from Barisal District to Mehendigonj Upazila after observing all the legal formalities.

He again submitted that the Government need not to consult the Supreme Court in the exercise of power conferred by section 14(1) of Civil Courts Act, 1887 in transferring any civil Court from one place to another and on different times the Government transferred different civil courts from one place to another exercising the said power conferred upon it (annexure-5).

He further pointed out that the Government is only to consult the Supreme Court for appointment, promotion and posting of the judicial officers in accordance with Article 116 of the Constitution of Bangladesh. The petitioner filed this petition with an ulterior motive and *locus-standi* to file this petition, hence the Rule is liable to be discharged.

On perusal of the submission of the learned Advocates of both the sides, the writ petition and the annexed documents, it appears that the petitioner being citizen of the country have challenged shifting of a civil Court at Upazilla level under District- Barisal violating the spirit of the separation

of judiciary and without consulting the Supreme Court of Bangladesh and brought this application by invoking Article 102 of the Constitution as a public interest litigation in order to establish the authority and uphold the solemnity of the Supreme Court of Bangladesh (annexure- A).

The shifting of Senior Assistant Judge Court at Upazila level is against the spirit of the directives issued by the highest Court of the land in the landmark judgment of Secretary, Ministry of Finance vs. Masdar Hossain and others, 52 DLR (AD) 82, (*ibid*).

The respondent exercising the executive power issued impugned notification shifting the Civil Court from Barisal to Mehendigonj ignoring the consultation provision with the Supreme Court and have simply shown utter disrespect to the highest Court of the land, as well as, the provision of Constitution of Bangladesh.

The action of the respondents in shifting the Civil Court from Barisal to Mehendigonj has defied the authority of our Constitution and also have challenged the authority of the Supreme Court of Bangladesh as mandated under Articles 109 and 116 of the Constitution.

In the case of shifting the Senior Assistant Judge Court at the Upazila level the executives must comply with the opinion of the Supreme Court as it is better aware about the performance, integrity and functionalities of the subordinate judiciary, it is not the executive but the Supreme Court have the supervisory and controlling power over all the Courts subordinate to it under Article 109 of the Constitution, so shifting the Civil Court without the permission of the Supreme Court is illegal and without lawful authority.

In shifting the Civil Court at upazila level the respondents have not only undermined the authority of the Supreme Court conferred by the Constitutions but also have dared to challenge the provisions of the rule of law.

Since passing of the judgment in Masdar Hossain's case, the observations made therein are binding as per article 111 of the Constitution. Officially judiciary has been separated and it means it is no more within the control of the executive, so, any question of transfer of Court or judge is totally vested in the Supreme Court of Bangladesh and therefore the impugned notification is made without lawful authority and is of no legal effect.

A Court does not mean only a building with some table and chairs. A Court certainly primarily embraces a Judge, who would preside over the Court, and pass the verdicts. Shifting a Judge's right of audience and to hear the cases is the pivotal function, it is not where he sits. Mere shifting of the place of hearing is meaningless unless the Judge is also dismantled from his set place of right to audience, which is vested only upon the Supreme Court to decide. So, shifting the place of hearing certainly means shifting the Judge from his usual place, which is contrary to Articles 109 and 116 of the Constitution.

On 31.10.2011 one Pankaj Debnath, General Secretary, Bangladesh Awami Swecehasebok League, Central Executive Committee filed an application to the Minister of Ministry of Law, Justice and Parliamentary Affairs to transfer the Court of Senior Assistant Judge of Mehendigonj, Barisal, and the Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila (annexure- 2) and in a follow through the Government asked for a report from the District and Session's Judge, Barisal as to whether there is infrastructural facility along with statistical data of Civil and Criminal cases to transfer the Court of Senior Assistant Judge and the Court of Senior Judicial Magistrate (annexure- 3). The learned District and Sessions Judge Barisal sent a report on 17.11.2011, with a recommendation to transfer the court of Senior Assistant Judge and Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazil (annexure- 4). The learned District Judge ought to have consulted the Supreme Court prior to conducting and sending the report to the executive authority of the ministry.

After receiving the said report the Government decided to transfer the Court of Senior Assistant Judge and Court of Senior Judicial Magistrate from Barisal District to Mehendigonj Upazila exercising the power conferred by section 14(1) of Civil Courts Act, 1887 and accordingly the impugned SRO was issued transferring the Court of Senior Assistant Judge from Barisal District to Mehendigonj Upazila, which is nothing but a political exercise and colourable exercise of power by Pankaj Debnath and the Ministry and the District and Session's Judge bowing down to his wishes under the disguise that the Government need not to consult the Supreme Court in the exercise of power conferred by section 14(1) of Civil Courts Act, 1887 in transferring any civil courts from one place to

another, is nothing but showing audacity to the Supreme Court and Articles 109 and 116 of the Constitution.

It is the Supreme Court that would decide as to whether the seat of a Judge is required to be shifted. It is not the will of a politician, who would influence the executive authority of the ministry and the District Judge to shift the seat of a civil and a criminal Court, which vests under the supervision and control of the Supreme Court.

In the premises set forth above, we find merit in the Rule.

In the result, the Rule is made absolute and thereby the notification published in the official gazette on 05.03.2013 under S.R. O. No. 58/Ain/2012, to shift the Court of Senior Assistant Judge from Barisal to Mehendigonj Uppazila, District-Barisal, without consulting the Supreme Court of Bangladesh is hereby declared to have been done without lawful and authority and is of no legal effect.
