1 SCOB [2015] AD 17

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha, Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.73 OF 2012.

(From the judgment and order dated 04.5.2010 passed by the High Court Division in Writ Petition No.7942 of 2009.)

Government of Bangladesh, represented by the Secretary, Ministry of Home Affairs Bangladesh Secretariat, Dhaka and others: Appellants.

=Versus=

Md. Abdus Satter and others: Respondents.

For the Appellants: Mr. Murad Reza, Addl. A.G. (with Mr. Sheik Saifuzzaman, D.A.G.), instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

For the Respondents: Mr. Abdur Rob Chowdhury, Senior Advocate (with Mr. Rokanuddin Mahmud, Senior Advocate), instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Date of hearing: 10th March, 2015 and 11th March, 2015.

Date of Judgment: 11th March, 2015.

Article 102 and 117 of the Constitution of Bangladesh:
Clause (1) of Article 102 of the Constitution ordains that any person aggrieved may seek judicial review in the High Court Division for enforcement of fundamental rights conferred by Part III of the Constitution. Clause (5) of Article 102 puts an embargo to the seeking of such relief. It states that the person refers to in Article 102 includes a statutory public authority and any court or tribunal against whom such relief can be claimed, but it has excluded a court or tribunal established under a law relating to the defence services or a disciplined force or tribunal established in accordance with Article 117 of the Constitution. ... (Para 5)

Article 45 of the Constitution of Bangladesh:
The fundamental rights available in Part III of the Constitution cannot be invoked by a member of a disciplined force if any law prescribed a provision limited for the purpose of ensuring the proper discharge of his duty or maintenance of that force. ... (Para 6)

Writ petitioners did not challenge any disciplinary action taken against them by the Inspector–General of Police. The authority did not give the directions in accordance with the Police Act or the Bengal Police Regulations or the Ordinance of 1969. The writ petitioners also did not challenge the propriety of the imposition of black marks upon them. They have challenged the embargo imposed upon them by the Police Headquarter, which directly affected their right to be considered for promotion to the next higher post. Clause (5) of Article 102 does not stand in their way of making an application under Article 102(1) of the Constitution subject to the provision of Article 45 of the Constitution. ... (Para 9)

It appears from the impugned memo that it was issued from the Police Headquarters in the form of directives, of them, directive No.5 contains an embargo upon the promotion prospect in respect of those who have landed with three major punishments. In paragraph 6, it has been mentioned that the officers who have received less than three major punishments shall not be eligible for consideration for promotion before expiry of 3 years from the date of punishment. These are policy matters relating to the terms and conditions of service of a police officer and this power has not been given to the Inspector-General of Police by the Police Act or the Bengal Police Regulation or any other law. ... (Para 14)

The High Court Division has also directed to lift the curtain for enabling the writ petitioners to be considered for promotion. This cannot be done or declared by the court for, it is the police administration which shall consider as to whether or not under the prevailing laws the writ petitioners are eligible to be considered for promotion to the next higher post. ... (Para 15)

A legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from constitutional prohibition. Such a law is colourable legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field. ... (Para 17)

J U D G M E N T

Surendra Kumar Sinha,CJ:

1. This appeal by leave is directed from a judgment of the High Court division making the rule absolute in part directing the writ respondents to lift the obstacle with a view to enabling the writ petitioner Nos.3, 4, 6, 8 and 11 to be considered immediately, writ petitioner nos. 2, 5, 7 and 10 after 18 months, and the writ petitioner nos. 1 and 9 after 22 months for promotion.

2. Short facts are that the writ petitioners, Sub-Inspectors of Police, have been deprived of promotion by reason of imposition of three major punishments (black marks) in their service career. It is stated that on 7th September, 1986, it was decided in a police conference held at Police Headquarter that the police Sub-Inspectors would not be considered for promotion as Inspector within two years after receiving major punishment (black marks). This decision was modified on 28th September, 1997 and provision was made for consideration for promotion after three years instead of two years. They were included in the Range Approved List (RAL) and had passed three more years after their last major punishments, but they were not considered for promotion. The Assistant Inspector General of Police sent a letter vide Memo dated 11th October 2007 intimating to all the concerned Ranges and Districts including their names in the RAL for promotion between 1997 and 2002, but they were not considered for promotion for having 3 black marks/major punishments. On 8th April, 2009, the Assistant Inspector General of police sent Memo dated 18th October, 2009, to all concerned Ranges and districts to forward the ACRs, service books and service statements for those Sub-Inspectors who were in the RAL but the writ petitioners were not considered for promotion. By memo dated 5th September, 2009, the Police Headquarter, issued a letter to the effect that no Sub-Inspector of police would be considered for promotion who has three black marks or major punishment in his service career. This condition is not based on any law and thus arbitrary.

3. Appellants contested the rule and claimed that under rule 3 of the Junior Police Service Rules, 1969, no officer would be nominated for promotion unless he possesses a clean record on honesty and efficiency; that because of this provision, the writ petitioners would not pass the test of eligibility to be considered for promotion, as their service records were not clean enough; that the embargo on their promotion was placed to ensure the high degree of integrity and professionalism in the force, which is not unreasonable or non-conducive to the legal norms; that major punishments are awarded by following due process of law; that the writ petitioners were given sufficient opportunities to defend themselves before the punishments were imposed upon them and that the writ petitioners being members of "disciplined force', the writ petition was not maintainable.

4. The High Court Division was of the view that the writ petitioners who were castigated with 3 black marks should be allowed to come out of the cloister for consideration for promotion without delay; that those who had four black marks involving no charge of corruption should earn their freedom after 18 months and that those who received black marks for corruption must wait for 22 months. It has been further held that the prohibition is to be exercised ordinarily, not invariably; and that the said restriction is discriminatory in that some officers got promotion despite getting marks.

5. The main contention of the learned Additional Attorney General is that the writ petition is not maintainable, inasmuch as, the writ petitioners being police officers are disciplined force within the meaning of Article 152(1)(b) of the Constitution and in view of clause (5) of Article 102, they are debarred from seeking judicial review of any decision taken by the authority. There is no dispute that the writ petitioners being police officers are disciplined force within the meaning of Article 152. Now the question is whether a member of any disciplined force can file a writ petition against any decision taken by the authority detrimental to his right or interest. Clause (1) of Article 102 of the Constitution ordains that any person aggrieved may seek judicial

review in the High Court Division for enforcement of fundamental rights conferred by Part III of the Constitution. Clause (5) of Article 102 puts an embargo to the seeking of such relief. It states that the person refers to in Article 102 includes a statutory public authority and any court or tribunal against whom such relief can be claimed, but it has excluded a court or tribunal established under a law relating to the defence services or a disciplined force or tribunal established in accordance with Article 117 of the Constitution.

6. There are two parts in clause (5) Of Article 102 - the first part contains inclusionary provision and the latter part contains exclusionary persons against whom such rights cannot be claimed. This clause has not debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal but it has impliedly debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal established under a law relating to the defence services or any disciplined force or a tribunal established under Article 117 of the Constitution. Such member of a disciplined force can be an aggrieved person and may seek judicial review in the High Court Division subject of the condition attached by Article 45 of the Constitution. The fundamental rights available in Part III of the Constitution cannot be invoked by a member of a disciplined force if any law prescribed a provision limited for the purpose of ensuring the proper discharge of his duty or maintenance of that force. Article 45 read:

"45. Nothing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force."

7. It states that part III of the constitution shall not apply if a disciplinary law provides any provision to the disciplined force for the purpose of ensuring the proper discharge of its duties or the maintenance of discipline to which they are members of that force. Or in the alternative, if any law relating to a disciplinary force provides a provision for proper discharging duties or the maintenance of discipline of such disciplined force, no member of that force can claim any fundamental rights. In Col. Md. Hashmat Ali V. Government of Bangladesh, 47 DLR(AD)1, Col. Md. Hashmat Ali was placed at the disposal of Ministry of Health and Family Planning. He was promoted to the post of Director General of Family Planning to the rank and status of Joint Secretary. Thereafter by an order of Ministry of Defence, the government gave approval to the proposal for his compulsory retirement from the military service under section 16 of the Army Act and rule 12 of the Rules respectively. The maintainability of the writ petition was challenged on behalf of the government. This Division on construction of clause (5) of Article 102 was of the view that this provision does not stand in the way in entertaining a writ petition, inasmuch as, clause (5) does not define any 'aggrieved person' nor does it exclude a member of any disciplined force from being an aggrieved person and therefore, a member of any disciplined force will not be entitled to any remedy under Article 102 if he is aggrieved '(i) by any decision of a court or tribunal established under a law relating to the defence services unless that decision is *coram non judice* or malafide; or (ii) by an order affecting his terms and conditions of service passed by or by order of the President; or (iii) by any violation of fundamental right resulting from application of a disciplinary law for the purpose of ensuring the proper discharge of his duties or the maintenance of discipline in the disciplined force.'

8. In Bangladesh V. Md. Abdur Rob, 33 DLR(AD) 143, the respondent, a police officer, was dismissed from service for exercising abuse of power and corruption. His dismissal order from service was declared unlawful by the High Court Division in exercise of its writ jurisdiction. The High Court Division's propriety in entertaining the writ petition was questioned in this Division. This Division was of the view that a court or tribunal set up under a law to deal with any matter relating to a disciplined force cannot be directed under Article 102(5) nor can any act done or proceeding taken by a court or tribunal to be declared to have been taken without lawful authority. The exclusion of a 'person' is a bar to the maintainability of an application under Article 102(1) of the Constitution, though such person might otherwise claim to have come under the expression 'any person aggrieved' but his locustandi is gone due to the ouster clause in Article 102(5). It was argued on behalf of the police officer that his dismissal order having been made by the Screening Board, it cannot be termed a court or tribunal set up under a law relating to a member of the defence services or of any disciplined force - it does not come under the expression 'person' used in clause (5) of Article 102. This Division met the point as under:

'As the law which has set up the Screening Board permits it to exercise jurisdiction in relation to a member of any disciplined force, it must be considered a court or tribunal under a law in relation to a disciplined force, though such law is not meant exclusively for it.'

9. Writ petitioners did not challenge any disciplinary action taken against them by the Inspector–General of Police. The authority did not give the directions in accordance with the Police Act or the Bengal Police Regulations or the Ordinance of 1969. The writ petitioners also did not challenge the propriety of the imposition of black marks upon them. They have challenged the embargo imposed upon them by the Police Headquarter,

which directly affected their right to be considered for promotion to the next higher post. Clause (5) of Article 102 does not stand in their way of making an application under Article 102(1) of the Constitution subject to the provision of Article 45 of the Constitution. They are not entitled to a remedy under Article 102(1) if they are aggrieved by any decision of a court or tribunal established under The Police Act, 1861 or the Junior Police Service Rules, 1969 or the Police Regulations of Bengal. The ouster clause contains in clause (5) of Article 102 is one's being a member of disciplined force from challenging any decision of a tribunal or court or authority which deals with anything or matter relating to his discharging duty or the maintenance of discipline in that force.

10. Article 45 says that any member of a disciplined force cannot seek fundamental rights available in part III of the Constitution in respect of discharging his duty or the maintenance of discipline in that force. The Bengali provision is more clear which states that "আইন শৃঙ্খলা-বাহিনীর সদস্য-সম্পর্কিত কোন শৃঙ্খলামূলক আইনের যে কোন বিধান উক্ত সদস্যদের যথাযথ কর্তব্যপালন বা উক্ত বাহিনীতে শৃঙ্খলারক্ষা নিশ্চিত করিবার উদ্দেশ্যে প্রণীত বিধান বলিয়া অনুরূপ বিধানের ক্ষেত্রে এই ভাগের কোন কিছুই প্রযোজ্য হইবে না।" A plain reading of this provision is discernable, that is to say, if any disciplinary action is taken for maintaining the discipline of a member of disciplined force, he cannot seek fundamental rights available in Part III of the Constitution. Article 102(1) empowers the High Court Division to give such direction as are necessary for the enforcement of fundamental rights on the application of any aggrieved person. The writ petitioners are seeking fundamental rights on the ground that their cases for promotion to be considered by the authority have been curtailed by the impugned memo dated 5th August, 2009. This memo was issued by the Police Headquarters containing a prohibitory order that no Sub-Inspector of Police will be considered for promotion who has received 3 black marks or major punishment in his service career.

11. So apparently this office order does not relate to any disciplinary action relating to the maintenance of discipline or any disciplinary action taken against the writ petitioners rather it relates to an embargo put upon them to place their cases for consideration for promotion. The writ petitioners claim that this condition is not based on any law or Police Regulation and therefore, the Police Headquarters or in that matter, the Inspector General of Police had/has no authority to attach such condition to the detriment of their rights to be considered for promotion to the next higher post. The High Court Division held that "Article 45 of the Constitution would thwart the petitioners' attempt to explore their rights under Articles 102 and 44, for restrictive covenant of Article 45 applies to disciplinary laws and is limited to the purpose of ensuring proper discharge of their duties or the maintenance of discipline in that force" has no force at all.

12. Rule 4 of the 'Junior Police Service Rules, 1969' prescribes the method of recruitment in the rank of Inspector. Under this rule, vacancies in the rank of Inspector shall be filled in by promotion from the rank of Sub-Inspectors of Police or Surgeants. Lists of Sub-Inspectors or Surgeants fit to be appointed as Inspectors shall be prepared by the Police Directorate. The procedure for selection of Sub-Inspectors or Surgeants fit for promotion to be appointed as Inspectors in the approved list has been laid down in Appendices I and II. Paragraph 3 of Appendix – I provides inter alia that; 'In submitting nominations, Superintendents must clearly understand that ordinarily no officers should be nominated for promotion who has not a thoroughly clean record as regards honesty, and who is not of marked activity and efficiency and who has not completely passed the departmental examinations as laid down in annexure II.' Regulation 857 of the Police Regulations of Bengal shows that an award of black marks is treated as major punishment and it is understandable that being a member of disciplined force, a police officer who is not a thoroughly record as regards honesty is not eligible to promotion. Though a black marks is taken as major penalty, Regulation 874 prescribes the method of imposing a black marks. This provision shows that such punishments is awarded in lieu of other punishments when an officer absents himself without leave and if it is not thought desirable to grant him regular leave, the delinquent may be punished for misdemeanour, which is awarded in lieu of other punishments and they are intended to take place of fines which shall not be inflicted. Not more than one black marks may be awarded for any one specific offence, nor a black marks be awarded in addition to any other punishment.

13. The nomination for promotion to the post of Inspector is to be made by the Superintendents. But the Deputy Inspector General has discretionary power to fill in short vacancies in the rank of Inspector from the Sub-Inspectors who are unlikely to be considered fit on their record for eventual permanent promotion in exceptional circumstances under the rule 4(5) of the Rules of 1969. Not only this power has been curtailed but also a complete embargo has been placed on a future promotion by the impugned memo. This Regulation 857 simply states that 'award of black marks' is included as major punishment but it does not prohibit a police

officer having 2/3 black marks will not be eligible for promotion. True, the writ petitioners were awarded with 3 black marks but they were not dismissed or removed from the service or their rank was not reduced. The authority thought that awarding of 3 black marks was appropriate for violation of the discipline or service rules.

14. Section 12 of the Police Act, 1861 empowers the Inspector General of Police to make Rules in certain matters relating to framing such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police-force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrement and other necessaries to be furnished to them; the collecting and communicating by them of intelligence and information; and all such other orders and rules relative to be police-force as he shall, from time to time deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties. These Rules may be framed with prior approval of the government and he shall pass such orders which are relevant and expedient to the organization, classification and distribution of police force and some other allied matters for preventing abuse or neglect of duties by the members of the force. He has not been given any power to make any Rules affecting the right or interest of any police officer. It appears from the impugned memo that it was issued from the Police Headquarters in the form of directives, of them, directive No.5 contains an embargo upon the promotion prospect in respect of those who have landed with three major punishments. In paragraph 6, it has been mentioned that the officers who have received less than three major punishments shall not be eligible for consideration for promotion before expiry of 3 years from the date of punishment. These are policy matters relating to the terms and conditions of service of a police officer and this power has not been given to the Inspector-General of Police by the Police Act or the Bengal Police Regulation or any other law.

15. The High Court Division has endeavoured much to examine whether or not the black marks faced by the police officers for corruption oriented charges and on consideration of rule 3 of the Junior Police Rules, 1969 was of the view that this rule could not be invoked against the writ petitioners except the writ petitioner Nos.1 and 9 and accordingly distinguished their case from those of others. It is not an issue before the High Court Division. The High Court Division has traveled beyond the terms of the rule. The High Court Division has also directed to lift the curtain for enabling the writ petitioners to be considered for promotion. This cannot be done or declared by the court for, it is the police administration which shall consider as to whether or not under the prevailing laws the writ petitioners are eligible to be considered for promotion to the next higher post. The issue is whether the Inspector-General has power to give guidelines restricting the police officers who have obtained three major punishments to be eligible for consideration for promotion to the next higher post.

16. As observed above, the Inspector-General of Police has not been invested with such power neither under the Police Act nor under the Police Regulations or under the Rules of 1969. This memo has been issued by the police Headquarters presumably by the Inspector General of Police without any lawful authority or in the alternative, this memo has been issued in exercise of powers not vested by law and accordingly, this cannot be taken as the basis for imposing embargo upon the writ petitioner not to be considered for promotion to the rank of Inspector. Though the Police Headquarters issued the impugned memo in the form of directives, it is in substance an amendment to the existing Rules and Regulations relating to the promotion of police officers to the next higher post.

17. A legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from constitutional prohibition. Such a law is colourable legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field.

18. Although apparently the Inspector General of Police in issuing the directives purported to act within the limits of his powers, yet in substance and reality, he transgressed those powers, the transgression being veiled by what appears on a proper examination to be a mere pretence or disguise. Accordingly, we declare the impugned memo to have been issued without lawful authority and of no effect. We further hold that the writ petitioners promotion shall be decided in accordance with rule 4 of the Rules of 1969. This appeal is disposed of with the above declaration and observations.

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