

JUDGMENTS ON FUNDAMENTAL RIGHTS

This chapter outlines key judgments and orders on fundamental rights reported during 2008. Given the continuance of the SoE and the restrictions on moving or hearing petitions for enforcement of fundamental rights, there were few judgments which referred to such rights at all. This chapter therefore first examines judgments on the interpretation of the Emergency Powers Rules in relation to the issue of liberty and fair trial, and then considers the few cases reported during the year on the right to life, freedom of assembly and workers' rights. Finally, it discusses two judgments relating to institutional developments in the Judiciary (holding of two offices) and the Election Commission (holding of elections).

Emergency Powers and Fundamental Rights

Early in the year, the High Court held that pursuant to the Emergency Proclamation Rules, 2007, the hearing of all cases relating to the enforcement of fundamental rights would remain suspended during the subsistence of the SoE.¹ In this case, the petitioners had challenged sections 56(2) (cha) and 56(3) of the Jagannath University Act, 2005 on the ground that these two provisions are discriminatory and infringe the fundamental rights of the petitioners. The Court opined that since the Rule involved enforcement of fundamental rights, they could not hear it under the prevailing circumstances. Similar orders were given in a number of cases throughout the year, but this principle was not always consistently applied.

In a later judgment, the High Court struck down a sanction issued pursuant to the the Emergency Powers Rules on the ground of inconsistency with Article 26(2) of the Constitution, and made clear observations that the Government has no authority even under an SoE to make any law inconsistent with the fundamental rights guaranteed under Articles 26 to Article 35 of the Constitution.² The High Court declared that a government sanction to try an extortion case against the former Prime Minister Sheikh Hasina under the Emergency Power Rules (EPR) was without lawful authority, and stayed the trial proceedings. The High Court held that the impugned sanction was *mala fide* with a power to harass and cause loss to the accused, a former Prime Minister, with the ulterior motive to treat her harshly and deprive her from getting fair justice and bail. It was further held that, the High Court's powers were not curtailed by the Emergency and that it could grant bail and address related matters in accordance with the existing laws in force. Furthermore, any case arising out of an offence committed prior to the date of the Emergency i.e. 11.01.2007 cannot be tried under the Emergency Power Rules, 2007.

Bail under Emergency Powers Rules

In an important judgment dealing with the right to liberty in the context of application of the Emergency Power Rules 2007, and the Court's powers to grant anticipatory/pre-arrest bail, the Appellate Division held that Rule 19(Gha) EPR ousts the jurisdiction of the courts, including the Supreme Court, to grant bail to accused persons, with limited exceptions.³ It held that anticipatory bail could only be granted exceptionally in certain circumstances, upon a proper and intelligent exercise of discretion by the Court, and in circum-

¹ *Abdul Hashem & others v Government of the People's Republic of Bangladesh and others*, 16 BLT (HCD) (2008) 148, judgment dated 12 September 2007.

² *Sheikh Hasina v Government of the People's Republic of Bangladesh and others*, 16 BLT (HCD) (2008) 153, judgment dated 5 and 6 February 2008.

³ *State v Moyez Uddin Sikder and others*, 13 MLR (AD) (2008) 208, judgment dated 23 April 2008.

stances where it was evident that the criminal proceedings had been initiated with an ulterior motive, political or otherwise, for harassing the accused and not for securing the ends of justice.⁴

In another case, the High Court, in its writ jurisdiction, quashed the trial proceedings of a case under sections 165 and 166 of the Income Tax Ordinance, 1984. The allegations were that the accused-petitioner did not disclose his wealth statements/earned income/expenditures, concealed particulars of his income, and evaded tax payable thereon. As such he committed an offence under Section 166 of the Income Tax Ordinance 1984⁵ read with Rule 15 of the Emergency Power Rules, 2007.

The Court held that the prosecution of the offence of concealment of income and/or furnishing false statements in the verifications under section 165 and 166 of the Income Tax Ordinance in respect of eight assessment years was incompetent, unauthorised and vitiated since no prior proceedings for assessment of income was commenced before the prosecution. Thus, the accused-petitioner was not given a notice or an opportunity to compound such offence before the sanction was given for the prosecution of the offence. Cognisance of the alleged offences under section 165 and 166 of the Income Tax Ordinance, 1984 read with Rule 15 of the Emergency Power Rules, 2007 by the Senior Special Judge on the basis of an illegal, *mala fide* and *coram non iudice* sanction was illegal, without jurisdiction, and vitiated.⁶

Regarding the issue of double jeopardy, it was stated that when “the act or omission constitutes an offence under two or more enactments” as stated in section 26 of the General Clauses Act, 1897, the emphasis is given not on the facts alleged in the two complaints but on the ingredients which constitute the two offences for which one is charged with. Secondly, the trial under two enactments is not barred but what is barred is the punishment of the offender twice for the same offence. The Court was referring to the two concurrent trials: one under sections 165 and 166 of the Income Tax Ordinance, 1984 and another under the Anti-Corruption Commission Act, 2004, the Emergency Powers Rules, 2007 and the Prevention of Corruption Act, 1974.

In another case, the issue was whether Rule 11(3) of the Emergency Power Rules, 2007 debars the appellate court from granting bail to the appellants during pendency of the appeal. The granting of bail by the appellate court is governed by section 426 of the Code of Criminal Procedure. However, Rule 11(3) specifically bars the jurisdiction of the appellate courts, even the High Court Division, to grant bail. Thus, since section 426 of the Code of Criminal Procedure is inconsistent with Rule 11(3) of the Emergency Power Rules, 2007, no bail can be granted by the High Court. The Appellate Division observed that an application for bail may only be considered in appropriate cases with short sentences not exceeding 3 years, when the appeal could not be disposed off within 90 working days due to no fault of the appellant and/or in cases of serious illnesses endangering lives which are to be certified by a duly constituted Medical Board.⁷

Fair Trial

The Appellate Division held, in respect of trial of offences under section 385/109 of the Penal Code, 1860 under the Emergency Powers Rules, 2007, that while the right to fair trial guaranteed under Article 35(1) prohibits conviction or sentence under an *ex-post facto* law, it does not prohibit the trial itself.⁸ It further

4 The High Court granted bail to a former Advisor of the Caretaker Government in a case against him concerning allegations of discrepancy in wealth statements submitted to the Anti-Corruption Commission. The application for bail was allowed considering the submission that the petitioner was a person of responsible status who may face harassment prior to his surrender in the trial Court: see *Fazlul Haque v ACC*, 60 DLR (2008) 648, judgment dated 4 September 2008. In another case, despite the bar on seeking bail under Rule 19(Gha) of the Emergency Power Rules, 2007, the High Court Division granted bail to a government servant who was allegedly unlawfully arrested and detained in connection with the anti-corruption drive: *Abdur Rashid v State*, 60 DLR (2008) 629, judgment dated 29 May 2008.

5 *Section 166 of the Income Tax Ordinance, 1984* states that a person is guilty of an offence punishable with imprisonment which may extend to five years but shall not be less than three months, or with fine, or with both, if he conceals the particulars, or deliberately furnishes inaccurate particulars, of his income.

6 *Iqbal Hasan Mahmood v Government of Bangladesh and others*, 60 DLR (2008) 88, judgment dated 5 December 2007.

7 *Anti-Corruption Commission v Barrister Mir Mohammad Helal Uddin and Ors*, 28 BLD (AD) (2008) 72, judgment dated 26 February 2008.

8 *Government of Bangladesh v Sheikh Hasina and another*, 60 DLR (AD) (2008) 90, judgment dated 8 May 2008.

held that the provisions of the EP Ordinance and the Emergency Power Rules (EPR) permitting trial of such offences under the EPR did not breach Article 35(1) of the Constitution.

Building on its earlier jurisprudence on confessions, the High Court held that prolonged police custody of the co-accused for two nights and a day, for which no explanation had been accorded, immediately before making a confessional statement creates a serious doubt regarding the voluntariness of the confessional statement itself. It pointed out that prolonged police custody immediately preceding making of the confessional statement by itself makes the confessional statement involuntary and inadmissible.⁹

Search and Seizure

In another judgment on fair trial, the High Court held that the search for and seizure of incriminating articles without strictly complying with the requirement of section 103 of the Code of Criminal Procedure was illegal.¹⁰ Further, under section 342 of the Code of Criminal Procedure, the attention of the accused must be drawn to the incriminating evidence or circumstances sought to be proved against him, otherwise he would be prejudiced.¹¹

Women's Rights to Freedom from Violence

In a case concerning the alleged abduction and forced marriage of a minor girl, the High Court held that the consent of a minor girl to marriage was immaterial and had no validity in the eye of the law. Although, in the *nikah nama* the victim's age was shown as 18 years it was stated that her age as per her birth certificate, S.S.C registration card, and testimonial issued by the school was 14 years 7 months on the date of the alleged marriage. The respondents were found to have jointly abetted the offence by confining the victim in their house and by solemnizing the marriage of a minor girl after abducting her. Abduction of a minor girl for the purpose of marrying her was illegal and any person who kept such a victim in illegal confinement would be found guilty of abetment.¹² The High Court further directed the Nari-O-Shishu Nirjatan Daman Tribunal No.2 to proceed with the case on the basis of the materials on record and in accordance with law.

Right to Life

The High Court held that a death sentence may be commuted to life imprisonment for securing the ends of justice, in a case in which, from the date when the Druta Bichar Tribunal No.1 first made the death reference, a period of about three years and eight months had elapsed during which the condemned prisoner had undergone mental agony and anxieties.¹³

Freedom of Assembly

In disposing of a public interest litigation challenging the holding of hartals (general strikes), the High Court observed that if hartals lead to violence, death, and damage to the life and property of the citizens such actions would be punishable by the law of the land. However, hartals *per se*, enforced through persuasion, unaccompanied by threats, intimidation, force or violence, are a democratically recognised right of the citizens to freedom of assembly guaranteed under Article 37 of the Constitution.¹⁴

Workers' Rights

The High Court clarified that the termination of the services of workers from BRAC printers having amounted to victimisation for their trade union activities was unlawful.¹⁵

9 *Nurul Islam and another v the State*, 28 BLD (HCD) (2008) 114, judgment dated 30 July 2007.

10 Section 103 of the Code of Criminal Procedure 1898 states that the search should be made in the presence of witnesses.

11 *A Wahab alias Abdul Wahab v State*, 60 DLR (2008) 34, judgment dated 25 April 2007.

12 *Delwar Hossain v the State and others*, 13 MLR (HCD) (2008) 258, judgment dated 17 April 2006.

13 *The State v Yeasin Khan Palash and others*, 16 BLT (HCD) (2008) 1, judgment dated 30 May, 31 May and 3 June 2007.

14 *Abdul Mannan Bhuiyan and another v State*, 60 DLR (AD) (2008) 49, judgment dated 2 December 2007.

15 *BRAC Printers v Chairman, First Labour Court*, 60 DLR (2008) 157, judgment dated 28 August, 2007.

Institutional Developments

Appointments to Election Commission

The High Court held that the appointment of a sitting judge of the apex court to any other constitutional office, including that of the Chief Election Commissioner was unconstitutional, in the context of the highly controversial appointment of Justice MA Aziz as CEC while already serving as a justice of the Appellate Division.¹⁶ The High Court held that no person can hold two constitutional offices simultaneously. It also observed that no sitting judge of the Supreme Court should hold any other constitutional office or any other office of profit in the service of the State for the sake of independence and impartiality.

Reform of Electoral Laws

The High Court held that the Election Commission should take all necessary steps in consultation with the Caretaker Government to amend the relevant laws so far as practicable for holding a free, fair and neutral election and to remove any future dispute in this regard to establish the true spirit of democracy. The existing voter list, which was admitted to be defective by the Attorney General's Office, was challenged on the ground that the Election Commission had failed to prepare an updated revised voter list strictly in compliance with the law as well as directives from the Appellate Division. In the judgment the High Court directed the Election Commission to take initiatives to introduce voter ID cards because such documents are essential elements for a credible election.¹⁷

Conclusion

During 2008, the ongoing State of Emergency placed numerous restrictions on the liberties of individuals and their fundamental rights, the boundaries of which were challenged and tested by the courts. Specifically, Emergency Rules severely restricted the right to liberty and fair trial. The High Court in a number of decisions intervened to provide relief despite these restrictions and granted bail to individuals arrested under the EPR, but within its writ, rather than criminal jurisdiction, which in a number of cases raised further questions regarding 'fast-track justice' for some (see chapter on Institutional Developments, Liberty). The Appellate Division eventually ruled that bail could be granted, even for cases brought under the Emergency Powers Rules, in certain special circumstances. Beyond the EPR, the reported cases on fundamental rights for the year also addressed property rights, women's rights, worker's rights and institutional developments as noted above.

¹⁶ *Ruhul Quddus, Advocate and others v Justice MA Aziz and others*, 60 DLR (2008) 511, judgment dated 12 December 2007.

¹⁷ *Kazi Mammur Rashid v Govt. of Bangladesh and others*, 16 BLT (HCD) (2008) 119, judgment dated 27 March 2007.