

1 SCOB [2015] AD 22

(APPELLATE DIVISION)

PRESENT:**Mr. Justice Md. Abdul Wahhab Miah****Ms. Justice Nazmun Ara Sultana****Mr. Justice Muhammad Imman Ali****Mr. Justice Hasan Foez Siddique**CIVIL PETITION FOR LEAVE TO APPEAL
NO.1594 OF 2015(From the judgment and order dated the 29th day of April, 2015 passed by the High Court Division in Writ Petition No.3930 of 2015)**Government of :
Bangladesh** ...Petitioner

-Versus-

**Shireen Pervin :
Huq and others** ...RespondentsFor the Petitioner : Mr. Mahbubey Alam,
Senior Advocate
instructed by Mr.
Haridas Paul,
Advocate-on-RecordFor the Respondents : Mr. Aktar Imam,
Senior Advocate
instructed by Mrs.
Madhu Malati
Chowdhury Barua,
Advocate-on-RecordDate of Hearing : The 13th day of
August, 2015**Article 47(3) and 102(3) of the Constitution of Bangladesh:**

In view of the clear bar under article 47(3) of the Constitution read with article 102(3) thereof, the High Court Division had no jurisdiction to entertain the writ petition in question and the same not being entertainable, it ought to have summarily rejected the writ petition on the ground of its maintainability. It is true that the High Court Division has not said anything as to the vires of the sections of the Act, 1973 challenged in the writ petition, but it disposed of the same in the manner as quoted hereinbefore after making some observations as stated earlier; there may be a misgiving in the mind of litigant people that a writ petition challenging a provision of the Act, 1973 or any action of the International Crimes Tribunal, is amendable to the writ jurisdiction of the High Court Division under article 102 of the Constitution. Moreso, the learned Judges cannot arrogate to themselves as advisors and it was not an act of discreet on their part to advise the writ-petitioners to redress their grievance by invoking article 104 of the Constitution.

... (Para 7)

JUDGMENT**Md. Abdul Wahhab Miah, J:**

1. This petition for leave to appeal has been filed by writ-respondent No.1 against the order dated the 29th day of April, 2015 passed by a Division Bench of the High Court Division in Writ Petition No.3930 of 2015 disposing the same.

2. From the facts disclosed in the petition, it appears that respondent Nos.1-12 herein as the petitioners (hereinafter referred to as the writ-petitioners) filed the writ petition challenging section 11(4) read with section 21 of the International Crimes (Tribunals) Act, 1973 (in short, the Act, 1973) to the extent that "these sections do not provide a right of appeal to accused contemporaries" as unconstitutional and void being violative of the fundamental rights of the writ-petitioners as guaranteed in articles 26, 27, 31 and 39 of the Constitution.

3. From the impugned order, it appears that the learned Attorney General made candid submission before the High Court Division that in view of the provisions of article 47(3) of the Constitution, the writ-petitioners could not challenge the vires of sections 11(4) and 21 of the Act, 1973 invoking article 102 of the Constitution

in view of sub-article (3) thereof. It appears that the High Court Division noticed the provisions of articles 47(3) and 102(3) of the Constitution and itself observed "*Since having regard to Article 47(3) of the Constitution the petitioners are not entitled to challenge section 11(4) read with section 21 of the Act, 1973 to the extent that it does not provide right of appeal and that this Court while exercising jurisdiction under Article 102 of the Constitution cannot pass any order in view of Article 102(3) of the Constitution*" and then made further observation that in order to redress their grievance, the writ-petitioners were at liberty to invoke 104 of the Constitution before the Appellate Division "seeking complete justice." In the context, the High Court Division referred the case of Abdul Quader Mollah-Vs- the Chief Prosecutor, International Crimes Tribunal, Dhaka, 66DLR(AD)289 and after quoting the relevant portion from the said judgment where this Division spoke about its inherent jurisdictional power and its power of doing complete justice under article 104 of the Constitution, disposed of the application under article 102 of the Constitution in the following terms:

"Considering the above position of facts and law as well as the observations and findings this application is accordingly disposed of."

4. Mr. Mahbubey Alam, learned Attorney General, appearing for the petitioner submits that since the High Court Division had no jurisdiction to entertain an application under article 102 of the Constitution challenging any provision of the Act, 1973, it should have rejected the application summarily as being not maintainable, instead it disposed of the same with some observations and thereby impliedly made the writ petition maintainable.

5. Mr. Aktar Imam, learned Counsel, appearing for the writ-petitioner-respondents, on the other hand, has submitted that the High Court Division did not say anything as to the vires of the sections of the Act, 1973 challenged before it. It simply after noting his submissions and those of the learned Attorney General and the findings and observations made in the case of Abdul Quader Mollah (supra), disposed of the writ petition. Therefore, the writ-respondent-Government had no reason to be aggrieved; the petition should be dismissed for want of cause of action.

6. We have considered the submissions of the learned Attorney General and the learned Counsel for the writ-petitioner-respondents.

7. In view of the clear bar under article 47(3) of the Constitution read with article 102(3) thereof, the High Court Division had no jurisdiction to entertain the writ petition in question and the same not being entertainable, it ought to have summarily rejected the writ petition on the ground of its maintainability. It is true that the High Court Division has not said anything as to the vires of the sections of the Act, 1973 challenged in the writ petition, but it disposed of the same in the manner as quoted hereinbefore after making some observations as stated earlier; there may be a misgiving in the mind of litigant people that a writ petition challenging a provision of the Act, 1973 or any action of the International Crimes Tribunal, is amendable to the writ jurisdiction of the High Court Division under article 102 of the Constitution. Moreso, the learned Judges cannot arrogate to themselves as advisors and it was not an act of discreet on their part to advise the writ-petitioners to redress their grievance by invoking article 104 of the Constitution.

8. In view of the above, the last two words in the order of the High Court Division to the effect "disposed of" cannot be maintained and those two words need to be modified.

9. Accordingly, the order of the High Court Division stands modified to the effect that in place of "disposed of", it shall be read as "summarily rejected"

10. This petition is disposed of accordingly.