IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique, C. J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 218 OF 2018

(From the judgement and order dated the 19th day of October, 2017 passed by the High Court Division in Writ Petition No.10371 of 2007).

Bangladesh Bar Council	:	. . . Appellant
	-Versus-	
Advocate Md. Toyob Ali and others	:	. . . Respondents

For the Appellant	:	A.Y. Moshiuzzaman, Senior Advocate, instructed by Syed Mahbubar Rahman, Advocate-on-Record
For the Respondents	:	Mr. Nozrul Islam Chowdhury, Senior Advocate, instructed by Ms. Madhu Maloti Chowdhury Barua, Advocate-on-Record
Date of hearing and judgment	**:**	**The 19th day of July, 2023**

JUDGMENT

M. Enayetur Rahim, J: The civil appeal, by leave, is directed against the judgment and order dated 19.10.2017 passed by the High Court Division in Writ Petition No.10371 of 2007 making the Rule absolute.

The facts, relevant for disposal of this civil appeal, in brief, are that Respondent No.1, as writ petitioner, filed Writ Petition No.10371 of 2007 before the High Court Division challenging the decision dated 25.06.2007 of the Bangladesh Bar Council (shortly stated as Bar Council) vide its Memo No. BBC/20007/2634 dated 22.09.2007, cancelling the enrolment Sanad/certificate of the writ-petitioner.

In the writ petition it was contended that the writ petitioner passed Secondary School Certificate (SSC)

examination in 1982, Higher Secondary Education Certificate examination in 1985, Bachelor of Arts examination in 1987 and LL.B examination in 1994. Thereafter, he passed enrolment examination of Bar Council and has been enrolled as an advocate in the Bar Council on 09.05.2000 bearing Sanad/ Certificate No. 255 of2000 (Sunamgonj). In the certificate, the name of the writ petitioner was recorded as Md. Toyob Ali alias Sheikh Md. Jahir Ali as he was/is known as Sheikh Md. Jahir Ali in his locality, but all the academic certificates, from SSC to LL.B are in the name of Md. Toyob Ali.

Subsequently, the matter relating to his name was inquired by Sunamgonj District Bar Association and it submitted a report mentioning that Md. Toyob Ali is known as Md. Jahir Ali in his locality. Thereafter, a private person made a complaint against the writ petitioner alleging that Md. Toyob Ali and Sheikh Md. Jahir Ali are two different persons. The writ petitioner used his brother's name and SSC certificate at the time of his enrolment in Bar Council. Upon inquiry into the matter local Bar Association allegedly found that Md. Jahir Ali and Md. Toyob Ali are two sons of the same father and SSC certificate of the writ petitioner is not genuine. Sunamganj Bar Association referred the matter to the Bar Council and erase his lifetime membership from Sunamgonj Bar Association. Therefore, Bar Council decided to cancel his Sanad/Certificate issued by it. The said decision was also communicated to the writ petitioner by the Bar Council.

The Rule *Nisi* was heard and disposed of by a Division Bench of the High Court Division by its judgment and order dated 02.07.2017. Thereafter, the writ petitioner filed an application for re-hearing of the said writ petition on

09.07.2017 alleging that some documents could not be properly placed before the Court by him. The said application for re-hearing was allowed by the High Court Division. The High Court Division by the impugned judgment and order dated 19.10.2017 made the Rule *Nisi* absolute in Writ Petition No.10371 of 2007 upon recalling its previous judgment and order dated 02.07.2017.

In the above scenario, Bar Council has filed Civil Petition for Leave to Appeal No.946 of 2018 before this Division challenging the legality of the impugned judgment. Eventually leave was granted on 11.11.2018. Hence, the appeal.

Mr. A.Y. Moshiuzzaman, learned Senior Advocate, appearing on behalf of the appellant submits that the High Court Division passed the impugned judgment and order dated 19.10.2017 upon re-calling the previous judgment and order dated 02.07.2017 in utter disregard of the fact that Sheikh Md. Jahir Ali and Toyob Ali are two separate individuals and the Respondent, i.e. writ petitioner perpetrated fraud by using the SSC certificate of Sheikh Md. Toyob Ali for obtaining Enrollment Sanad/Certificate being numbered as 255 of 2000 (Sunamganj) from Bar Council. The learned advocate further submits that the High Court Division in passing the impugned judgment failed to consider the settled principle of law that the disputed question of fact as regards to the discrepancy in name found in all academic certificates and the enrolment sanad of the respondent cannot be resolved in writ jurisdiction and, as such, the writ petition was not maintainable at all. The learned Advocate lastly submits that there is no provision of re-hearing in writ jurisdiction once

judgment and order is passed and signed by the High Court Division and as such the impugned judgment and order is liable to be set aside.

Mr. Nozrul Islam Chowdhury, learned Senior Advocate, appearing on behalf of the writ petitioner-respondent makes submissions in support of the impugned judgment and order of the High Court Division. Mr. Chowdhury also submits that in view of the conspicuous absence any proof as to the geniuses of the academic certificates belonging to the writ petitioner, the Bangladesh Bar Council acted illegally in utter disregard to Sub-Rule 4 of Rule 54 of Bangladesh Legal Practitioners and Bar Council Order, 1972 in cancelling the sanad of the writ petitioner. The learned Senior Advocate further submits that the writ petitioner having no other efficacious remedy against his order of cancellation of sanad, and in view of conspicuous absence of any disputed fact involved in the writ petitioner, rightly and correctly invoked the writ jurisdiction for his remedy. Consequently, the High Court Division in judicious exercise of its constitutional power made the Rule absolute.

Mr. Chowdhury further submits that the Bar Council has reached a decision based on an illegally conducted inquiry and report violating the principles of natural justice and therefore the decision of the Bar Council to cancel the Sanad has been without lawful authority. The petitioner's father had himself sworn an affidavit affirming that his elder son had not even gone to school and it would be absolutely senseless on the fact of the respondents to say that without education allegedly using his brother's S.S.C. certificate where it shown that he had passed in 3rd Division, S.S.C. in

2nd Division and graduate from the Sylhet Government College under the Chittagong University in 2nd Division.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and order of the High Court Division and other materials as placed before us.

In the instant case it is undeniable fact that the High Court Division by its judgment and order dated 02.07.2017 disposed of the Rule with the following direction:

> "Considering the facts and circumstances of the case since Rule 54 sub Rule (4) of the Bar Council Order and Rules, 1972 says that the Executive Committee may scrutinize the complaint case against advocate and place their recommendation to the Bar Council for reference to the Tribunal for trial or for summery rejection as the case may be and that has not been actually done, therefore, let the decision was taken by the Bar Council dated 25.06.2007 be placed before the tribunal for appropriate decision within 30 days from the date of receipt of this order."

After disposal of the Rule, the writ petitioner filed an application for re-hearing of the Rule *Nisi* contending, *inter alia*, that at the time of hearing of the writ petition some vital and relevant documents have not been properly placed before the Court. The High Court Division after hearing the said application by its order dated 19.10.2017 recalled the earlier judgement and order and made the Rule absolute and declared that exclusion of the name of the writ petitioner from the list of the Advocates and decision taken for cancellation of enrolment sanad is without lawful authority and is of no legal effect.

On our repeated query, the learned Advocate for the respondent has failed to satisfied us under what provision of

law the High Court Division after pronouncement of the judgment and signing the same re-hear the Rule and made the same absolute recalling its earlier order. The learned Advocate finally conceded that the application for re-hearing as filed by the writ petitioner cannot be treated or termed as a review application.

Neither the Code of Civil Procedure nor the High Court Division Rules provides for re-hearing of a Rule or an appeal after pronouncement and signing of the judgment.

It is pertinent to discuss here that for disposal of the writ petitioner other than habeas corpus the provisions of the Code of Civil Procedure may apply in respect of matters not covered by the High Court Rules of 1960 by virtue of section 117 of the Code of Civil Procedure. [reference: Hussain Bakhsh vs. Settlement Commissioner and another(1969) 21 DLR (SC) 456].

In the case of **Moni Begum and others vs. Rajdhani Unnayan Kartripakha and others,** reported in **(1994) 46 DLR (AD)154** this Division found the proceedings in writ jurisdiction to be civil proceedings, but having regard to the summary nature of the proceedings held that section 141 of the Code would not in terms apply. This Division has observed that:

> *"In our view, the High Court Division while exercising the writ jurisdiction relating to a civil matter is no doubt in seisin of a civil proceeding,....."*
>
> And
>
> *".....the Court in its discretion can apply the principles as distinguished from the technical provision of the Code of Civil Procedure to meet the exigencies of the situation in appropriate case*

on the ground of justice, equity and good conscience. In what situation the principles of the Code of Civil Procedure will be applied and to what extent may perhaps be left to the wise discretion of the Court itself. In other words, barring what is specifically provided for in the Rules themselves, the Court is the master of its own procedure and it will exercise both its procedural and substantive discretions only on the ground of justice, equity and good conscience."

And

"Section 141 CPC does not in terms apply to proceedings in writ. But the Court in its discretion can apply the principles as distinguished from the technical provisions of the CPC to meet the exigencies of the situation on the ground of justice, equity and good conscience."

In view of the above, Code of Civil Procedure is applicable in a proceeding under Article 102 of the Constitution when the proceeding is a civil in nature in other words proceedings in certiorari, prohibition, mandamus and quo-warranto. In exercise of provision as laid down in section 141,151 and 152 of the Code of Civil Procedure there is no scope to entertain an application for re-hearing after pronouncement of the judgment or order, as the case may be.

A judgment or order can be interfered in exercising the power under section 151 of the Code of Civil Procedure only on the following terms:

i) if fraud is detected in obtaining the judgment or order;

ii) to correct the mistake of the Court;

iii) to expunge remarks made against a person who is not a party to the proceeding.

In the case of **Bangladesh Shilpa Bank Vs. Bangladesh Hotels Ltd.,** reported in **38 DLR (AD),70** this Division has held that *the inherent power cannot be exercised in disregard of the established principles and norms of law. Even Court cannot recall an order passed which was not without jurisdiction. (Munshi Ramkishun Lal and others v. Saiyid Muhammad Manzurul Haque and others, AIR 1938, Patna 593).*

Under the provision of section 152 of the Code of Civil Procedure clerical or arithmetical mistake in the judgment, decree or order or errors arising therefrom may at any time be corrected by the Court either of its own motion or on the application of a party. **[reference: Golam Nobi vs. Mohammadul Haque Chowdhury being dead his heirs: Mohammad Ali and others 1982 BCR (AD) 166**]

In view of the above, we have no hesitation to hold that the High Court Division has committed serious error and also travelled beyond its jurisdiction in re-hearing the Rule *Nisi* making the same absolute after recalling the earlier order of 'disposed of the Rule'. We are sorry to say that this kind of gratuitous relief by the High Court Division is perversed one and highly regrettable.

Mr. Nozrul Islam Chowdhury, learned Senior Advocate, appears for the writ petitioner-respondent has tried to convince us that this Division in exercising power under Article 104 of the Constitution may affirm the judgment of the High Court Division as the writ petitioner is out of profession for more than last 15 (fifteen) years. We are sorry to accept the above submission of the learned Advocate for the writ petitioner.

In the attending facts and circumstances of the present case, there is no scope to exercise the power under Article

104 of the Constitution to endorse an illegal, unwarranted and unauthorized conduct of the High Court Division as has been done.

Having considered and discussed as above, we are of the opinion that the judgment and order passed by the High Court Division suffers from patent illegality and it was passed without jurisdiction.

Accordingly, the appeal is disposed of.

The impugned judgment and order of the High Court Division is set aside.

However, the Bar Council is directed to take immediate steps to resolve the matter in the light of the provision of Rule 54 (4) of the Bangladesh Legal Practitioners and Bar Council Rules preferably within 6(six) months from the date of receipt of this judgment and order, where the parties may be given chance to adduce the evidence in support of their respective case.

C. J.

J.

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