IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

CONTEMPT PETITION NO.374 of 2024.
(Arising out of Writ Petition No. 2424 of 1995)

IN THE MATTER OF:

An application under Article 108 of the Constitution of the People's Republic of Bangladesh.

And
IN THE MATTER OF:

Muhammad Mazharul Islam.
..... Petitioner

-vs-

Dr. Mohammad Abdus Salam and others.
.....Respondent-contemners.

And
Mr. Tanim Husain Shawon, Advocate with
Mr. Reduanul Karim, Advocate
..... For the contempt-Petitioner.
Mr. Mohammad Rezaul Karim, Advocate
.... For the contemner-respondent No.1
Mr. Zainul Abedin, Senior Advocate with
Mr. Md. Ziaul Haque, Advocate
…..For the contemner-respondent Nos. 2 and 3.

Heard on 03.12.2024 and
judgment on 18.12.2024

Present:
Mrs. Justice Farah Mahbub.
And
Mr. Justice Debasish Roy Chowdhury

Farah Mahbub, J:

On the allegation of authoring, publishing and disseminating contemptuous statements in the article in question authored by the contemner-respondent no.1 under the caption "ফিরে দেখা বিচার বিভাগ পৃথকিকরণ" in the "Daily Jugantor" dated 01.11.2024, a contempt Rule was

issued by this Court upon the respective contemner-respondents with direction to give reply with affidavit in connection with the article, published in the said newspaper on 01.11.2024. In compliance thereof the contemner-respondent no.1, the author of the said article, filed affidavit of compliance on 10.11.2024. However, upon tendering unconditional apology it has been stated therein that he would not contest the contempt Rule being full of remorse and contrition. By filing a supplementary affidavit contemner-respondent no.1 further stated that meanwhile the publication of the Article "ফিরে দেখা বিচার বিভাগ পৃথকিকরণ" in the "Daily Jugantor", authored by him, had been withdrawn on 23.11.2024 (Annexure-1). More so, the Editor and the Publisher also expressed their regret by publishing a rejoinder in the said newspaper on the same date.

Subsequently, the contemner-respondent no.1 by publishing a separate rejoinder, published in the respective newspaper on 03.12.2024 (Annexure-2), filed another supplementary affidavit, annexing the said rejoinder, reiterating the statements that the article in question authored by him has been withdrawn and at the same time the Editor, the Publisher including the Author expressed their regret in the said rejoinder.

Today, when the matter has been taken up for hearing the contemner-respondent no.1, at the outset, tenders unconditional apology and throws himself at the mercy of this Court for commission of the inadvertent mistake causing contempt of this Court while authoring the said Article and expresses deep sorrow, repentance and remorse for the same. In this regard, his further assertion is that the article in question was written in connection with the judgment and order passed in Writ Petition No.2424 of 1995 followed by Civil Petition for Leave to Appeal No.79 of

1999 analyzing the subject matter of the issue, i.e. separation of judiciary in the context of its execution against the public perception, not to undermine the judiciary and this Hon'ble Court.

He further goes to assert that the background context which led the contemner to author the article is that while he was functioning as 1st Class Magistrate in Bagura District in 1999, he recorded some confessional statements of the accused under Section 164 of the Code of Criminal Procedure in Sessions Case No.113 of 2000, pending in the Court of learned Additional Sessions Judge, 2nd Court, Bagura. After about 24 years of recording the said confessional statement the contemner, who has meanwhile retired, was called for, to give his depositions in respect of recording those statements. However, for travelling from Dhaka to Bogura, for attending the court for recording his deposition he will not get any TA/DA; thus, causing serious hardship for a retired person like him. However, he realized that the Article in question might have caused uncalled for mischief and he regrets for it.

He also averred that there was no wilful negligence on his part in respect of authoring the article. Accordingly, he seeks unconditional apology for causing disrespect to this Hon'ble Court and commits that he will never pen such an article which will undermine the prestige and dignity of the judiciary. Hence, for the cause of justice he may be exonerated from the contempt proceeding.

In support, the contemner respondent no.3 also filed an affidavit of compliance stating, *inter-alia,* that the contemner respondent no.1 has already given a rejoinder with regard to the article wherein he clearly stated that he regretted the mistakes being committed by him while

writing the article in connection with the interpretation of the judgment of the apex court passed in the case of *Masdar Hossain Vs. Secretary, Ministry of Law Justice & Parliamentary Affairs and others,* and sought for unconditional apology.

In this regard, the respondent-contemnor nos.2 and 3 in their rejoinder, published in the respective newspaper, have also sought for unconditional apology for publishing such sensitive article and both the rejoinders, seeking unconditional apologies, have been published in the "Daily Jugantor" on 23.11.2024 and 24.11.2024 respectively. Further, it has been asserted therein that the contemners do firmly believe in the supremacy of the judiciary. They also believe for effective separation of the judiciary from the executive, necessity to have separate Secretariat and to have separate financial arrangement so that the judiciary can run its function independently without any dependency on the other organs of the State. Also, "Daily Jugantor" has always been in support towards enforcement of the judgment of *Masdar Hossain Case.*

Under the circumstances, the contemners again offer unconditional apology for their unintentional and bonafide mistake in publishing the article in question touching the issues of the Supreme Court of Bangladesh as well as the judiciary and as such, prayed for exonerating them from the charge of contempt of court upon accepting their unconditional apology, for the cause of justice.

Later, by publishing another rejoinder on 01.12.2024 (Annexure-2) in the "Daily Jugantor" the contemners respondent nos.2 and 3 reiterated their earlier assertions and upon annexing the said publication filed affidavit of compliance afresh before this Court on 02.12.2024.

Per contra, the categorical contention of the petitioner is that while discussing the limits of criticism of a judge or court, the Hon'ble Appellate Division in *State Vs. Swadesh Roy*, "Daily Janakantha": *68 DLR (AD) (2016) 162* held that the criticism of a judge or court must be fair and an improper imputation amounts to contempt of court. In this regard, the following observation is notable.

> *"Scandalization, to express shortly, includes an attack upon any Judge in his public capacity for, such attack would be calculated to malign the judge and to lower the authority of the Court over which the judge performs his judicial function. At the same time, it also amounts to interference with the course of justice and the proper administration thereof. Criticism of judges of the highest Court in respect of acts done in their administrative capacity, which contain improper imputation, amounts to contempt. If the Chief Justice is criticized for acts done in his administrative capacity this also amounts to contempt. The criticism should be fair and not made with oblique motive or with the object of maligning the justice delivery system and lowering the majesty of the law and dignity of the Court in the estimation of the public.* "

With regard to the Supreme Court's power to give punishment for contempt of court, the Appellate Division in the abovementioned decision, further observed as follows:

> *"The expression used in Article 108 is extensive in nature. The framers of the Constitution intended that the Supreme Court should have power to punish for contempt of itself only by inserting the expression 'to make an order for the investigation of or punishment for any contempt of itself". This provision confers upon the apex court the power to punish for contempt of itself and in addition, it confers some additional power relating to contempt as it appears from the expression 'including'. This expression has been used in a wider scope of power, that is to say, this Court has the power to punish the contempt of itself and also something else, which could fall within the inherent jurisdiction of the court of record."*

Accordingly, it has been contended that this Hon'ble Court is at liberty to apply its discretion on whether or not to accept what is claimed

to be an “unconditional apology” and also to determine whether an apology tendered before it is, in fact, a remorseful and unconditional apology.

In this regard, Mr. Tanim Husain Shawon, the learned Advocate for the petitioner relying upon the decision of the case of *State vs Advocate Md. Qamrul Islam M.P and others :25BLT(AD)2017 p-83*, submits that in the said case though the contemners tendered “unconditional apology”, the Hon’ble Appellate Division imposed a fine. Referring to the context of the present case, he submits that the impugned Article titled “ফিরে দেখা বিচার বিভাগ পৃথকিকরণ”, published in the “Daily Jugantor” on 01.11.2024, exceeded all limits of fairness, inasmuch as it contained deliberate misrepresentation of the judgment of the Hon’ble Appellate Division in the *Masdar Hossain Case*; it contained improper imputation on the judges who passed the judgments in the said case; it was a clearly calculated attempt to instigate tension between the judiciary and the other organs of the State; and the publication was deliberately timed so that the ongoing reform initiatives to fully implement the independence of the judiciary in the light of the judgment of the said case was disrupted.

More so, he goes to contend, the affidavit dated 24.11.2024 filed by the contemner-respondent no.1, annexing an alleged retraction published on 23.11.2024, does not exhibit a proper remorse on the part of the said contemner, inasmuch as he has sought to justify the article, published on 01.11.2024, without admitting that he misrepresented the judgment of the Hon’ble Court in the *Masdar Hossain Case* and also, that he made improper imputation on the judges concerned. The contemner tendered a

perfunctory apology merely for the use of some words and sentences in the article, which not only underplays the extent of the contemptuous aspects of his article but is also tantamount to a tactic to avoid the consequences of the offence of criminal contempt of court, perpetrated by him.

In addition, he submits, at paragraph No. 9 of his affidavit, the contemner-respondent no. 1 has narrated a "background context" for publishing his article which clearly has no nexus or relevance to the contents of the article. As such, the statements in the aforesaid paragraph demonstrate a complete lack of remorse on the part of the contemner.

Accordingly, he prays for making the Rule absolute with imposition of necessary punishment upon the contemners.

In view of the above context, we have perused the affidavits of compliance of the respective contemner respondents along with the supplementary affidavit offering unconditional apology with a prayer for exonerating them from the charge of contempt of court. We have also examined the rejoinders dated 23.11.2024, 01.12.2024 and 03.12.2024 respectively seeking unconditional apology to the public at large for authority, publishing and disseminating the contemptuous statements in the article in question.

The fundamental right of freedom of speech and expression, as contained in Article 39(2) of the Constitution, is subject to the reasonable restriction or the limitation on the scope of reporting of a judicial proceeding or any stage thereof. However, "fair criticism" or "comment" on the merit of any case which has been heard and finally decided, will not render the person concerned guilty of contempt of court.

The classic exposition of the right of criticism is that of Lord Atkin when he said:

> *"The path of criticism is a public way; the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.": Ambard V. Attorney General of Trinidad: AIR 1936 PC 141.*

Quoting the above passage the Supreme Court of India observed in *Rama Dayal Markarha V. State of Madhya Pradesh: AIR 1978 SC 921, p-927,*

> *"Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact, such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. A fair and reasonable comment would even be helpful to the Judge concerned because he will be able to see his own shortcomings, limitations or imperfection in his work. The society at large is interested in the administration of public justice because in the words of Benjamin Cardozo, 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by.' Such permissible criticism would itself provide a sensible answer to sometimes ill-informed criticism of Judges as living in ivory towers. But then the criticism has to be fair and reasonable.....*
>
> *If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the courts of law as courts of justice, the criticism would cease to be fair and reasonable criticism as contemplated by section 5 but would scandalise courts and substantially interfere with administration of justice."*

Also, *Sawant J*, speaking for the Supreme Court in *Re: Sanjiv Datta*, underscored the principles of fair comment and criticism on constitutional fundamentals.

> *"The responsibility to maintain the rule of law lies on all individuals and institution. Much more so on the three organs of the State. Our Constitution has separated and demarcated the functions of the Legislature, the Executive and the Judiciary. Each has to perform the functions entrusted to it and respect the functioning of the others.....*
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> *The Constitution entrusts the task of interpreting and administering the law to the judiciary whose view on the subject is made legally final and binding on all till it is changed by a higher court or by a permissible legislative measure. Those living and functioning under the constitution have to accept and submit to this obligation of respecting the constitutional authority of the courts. Under a constitutional Government, such final authority has to vest in some institution. Otherwise, there will be a chaos. The court's verdict has to be respected not necessarily by the authority of its reason but always by reason of its authority. Any conduct designed to or suggestive of challenging this crucial balance of power devised by the Constitution is an attempt to subvert the rule of law and an invitation to anarchy."*

There is no clear cut test formulated by the courts to find out whether a particular criticism can be branded as a "fair comment". Though fair criticism, if made in good faith, works as a defence to contempt but it limited its availability depending on surrounding circumstances, i.e. the person making the comments, his special knowledge in the field of comments and the purpose sought to be achieved: *Arundhati Roy, Re, A 2002 SC 1375, 1394: (2002) 3 SCC 343*.

However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bitter themselves to uphold their dignity and the majesty of law: *Ajay Kumar Pandey, JT 1998(6) SC 571: (1998) 7 SCC 248*.

It is apparent on a fair reading of the article, titled "ফিরে দেখা বিচার বিভাগ পৃথকিকরণ", published in the "Daily Jugantor" on 01.11.2024, that there was misrepresentation of the judgment of the Hon'ble Appellate Division passed in *Masdar Hossain Case*. Said article poses question on the exercise of jurisdiction of the Court who passed the said judgment with a view to have an independent separate judiciary and to uphold justice and rule of law. Above all, the Article has been published at such a juncture when reform initiatives are in progress towards independence of judiciary in the light of *Masdar Hossain Case.* Resultantly, it undermines the object of passing the judgment in question for an independent judiciary, to achieve maintenance of purity in the administration of justice.

In this regard, it is pertinent to note that before any news or articles are published on any judgment passed by the court of law or on the function of judicial administration, concerned quarters/authority, i.e. the Editor, who controls the selection of the matter which is to be published in a particular issue of the newspaper, and the Publisher, who is responsible for publication, must ensure that the statements/comments so made are not distorted, to be careful its attributing motives, its objective approach and analysis. After all, *"the court's verdict has to be respected not necessarily by the authority of its reason but always by reason of its authority*."

From the affidavit of compliance, it does not appear that the respondent nos.2 and 3 made any assessment to that effect prior to selection for publication of the said article in the respective newspaper.

However, fact remains, subsequent to publication of the article in question in the newspaper on 01.11.2024 they published rejoinders on two occasions seeking unconditional apology before the public at large.

We, however, accept the unconditional apology offered by the contemner-respondent nos. 2 and 3 taking into consideration of the 2nd rejoinder published in the respective newspaper on 01.12.2024 (Annexure-2 of the affidavit of compliance dated 02.12.2024) and also, considering the commitment so made by them to remain cautious and careful in future while editing and publishing any article which will have an adverse impact on the administration of justice in the estimation of public at large. Consequently, they are exonerated from the charge of contempt of court.

However, contemner-respondent no.1, the author of the article, has also sought for unconditional apology to this Court by filing affidavit of compliance and also, by publishing rejoinders in the newspaper twice, one, on 23.11.2024 and another, on 03.12.2024 seeking apology before the public at large along with the withdrawal of the said publication from the respective newspaper.

Considering the above, we accept his unconditional apology and thereby exonerating him from the charge of contempt of this Court with caution to remain extremely careful from now on while writing any article which may create any misconception in the administration of justice and also, in the estimation of public at large.

With the above observation this Rule is accordingly disposed of without any order as to costs.

Communicate the judgment and order to the respondents concerned at once.

Debasish Roy Chowdhury, J

I agree.

Tofayel, A. B.O