

# MASDAR HOSSAIN CASE



# Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain & others

52 DLR (AD) 82

## Name of the Judges

Mustafa Kamal, C.J. (Author Judge), Latifur Rahman, Bimalendu Bikash Roy Choudhury and Mahmudul Amin Choudhury, JJ.

## Counsels

1. Mahmudul Islam, Attorney General [For the Appellant]
2. Dr. Kamal Hossain, Syed Ishtiaq Ahmed and Amir-UI Islam, Senior Advocates [For the Respondents]

## Short Facts

On 01.9.1980, the Cabinet Secretariat, Establishment Division (Implementation Cell) by the Order being the Bangladesh Civil Service (Re-organization) Order, 1980 provided that there shall be 14 Bangladesh Civil Service Cadres. Bangladesh Civil Service (Judicial) being No. 2(X) of them. The parent legislation that supports this Order is the Services (Re-organization and Conditions) Act, 1975 conferring power on the Government to create new services, or amalgamate or unify existing services. In exercise of powers under section 5 thereof, the Government passed the services (Grade, Pay and Allowances) Order, 1977 fixing the grades, scales of pay etc. of the subordinate judiciary, re-fixing them from time to time by issuing fresh Orders under Section 5. By order dated 8.1.1994, the Appellant in the Implementation Cell accepted in paragraph 3 thereof that the Bangladesh Civil Service (Judicial) officials perform a kind of work the nature and character of which is different and separate from others and on that ground and consideration re-fixed their present National Pay Scale, 1991, enhancing substantially their pay scale that was in force before 08.01.1994. However, under the pressure of other Bangladesh Civil Service Cadres the Appellant was forced to postpone implementation of the order dated 08.01.1994 by an order dated 28.02.1994. By a further order dated 02.11.1995 the appellant re-fixed the scale of pay of Bangladesh Civil Service (Judicial) officers with effect from 08.01.1994.

The writ petitioners who are either District Judges or Additional District Judges or Subordinate Judges or other Judges serving in the subordinate judiciary challenged

Bangladesh Civil Service (Re-organization) Order, 1980, the orders dated 28.02.1994 and 02.11.1995 as being discriminatory and violative of their fundamental rights.

The High Court Division was pleased to issue a *Rule Nisi* on 19.11.1995 in the following terms- "why the Bangladesh Civil Service (Re-Organization) Order, 1980, purporting to incorporate "Judicial Service" within the Bangladesh Civil Services as one of the Cadre Services vide paragraph 2(x) thereof should not be declared as ultra vires the Constitution and unconstitutional, in particular violative of Articles 27 and 29 of the Constitution and why the impugned orders passed by the appellant dated 28.02.1994 and 02.11.1995 suspending and then cancelling respectively an earlier order of the appellant dated 08.01.1994 regarding the pay and allowances of the respondents should not be declared ultra vires, malafide, discriminatory and violative of fundamental rights as guaranteed by the Constitution and to show cause as to why the attempt to treat the Judges of the Subordinate Courts as part of the Civil Services Cadre meant for the executive branch of the Government and to subject them to any laws meant for the employees of the executive Government should not be declared as illegal and ultra vires the Constitution and why separate set of rules for the Judges of the subordinate Court should not be framed as contemplated under Article 115 of the Constitution."

Later, another Rule Nisi was issued calling upon the same Respondents to show cause as to why the benefits allowed as per paragraph 3 of the impugned order dated 02.11.1995 to the officers of the other cadres should not be given also to the Senior Assistant Judges and the Assistant Judges of the Judicial Service of the Republic.

The High Court Division heard only the several learned Advocates for the writ petitioners since none from the Respondent contested the Rules Nisi and thereafter by judgment and order dated 07.05.1997 made the Rules Nisi absolute and gave certain other directions.

## ISSUES BEFORE THE COURT

### 1. Whether the members of the judicial service are in the service of the Republic?

The learned Counsel for the Respondents Mr. Amir-Ul-Islam submitted that the definition of the service of the Republic means any service in respect of the "Government of Bangladesh". By "Government of Bangladesh" means the executive

Government that discharges the executive administrative functions of the State. The judicial officers not being executive functionaries cannot be said to be in a service "in respect of the Government of Bangladesh".

The learned Counsel for the Appellant submitted that the word "Government" in the definition of "the service of the Republic" has been used in a generic sense including the parliament, executive and judiciary. He referred Articles 1, 87 (1), 90 and 146 of the constitution in support of his contention. [Para-20]

The Court held that the Constitution uses the word "government" both in the sense of executive government and in a generic sense. Article 47(1)(e) and Chapters I, II, IIA and III of Part IV use the word in the sense of executive Government but Chapter II of Part V, "Legislative and Financial Procedure" uses the word "Government" in a generic sense, meaning the republic as a whole.

Persons appointed to the Secretariat of Parliament and the staff of the Supreme Court are entitled to the protection of Article 134, because they are public officers holding or acting in an office of emolument in the service of the Republic. They are not in the executive administrative service of the executive Government of Bangladesh, but broadly, and in a generic sense, in a service in respect of the Government of Bangladesh. The definition of "the service of the Republic" uses the word "Government" in a generic sense. Hence on that ground the members of the judicial service cannot be excluded from the ambit of "the service of the Republic". [Para-21]

## 2. What are the distinctive features that rendered the judicial service distinct from other services?

The Court relied on the case of **All India Judges Association and others vs. Union of India and others**<sup>1</sup>. In this case, the Supreme Court of India held as follows:

"The judicial service is not service in the sense of "employment". The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature...., The executive, the legislature and the judiciary constitute the three pillars of the State, .... the three essential

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<sup>1</sup> (1993) 4 SCC 288

functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the state power are the Ministers, the Legislators and the Judges and not the members of their staff who implement or assist in implementing their decisions. .... The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. The Judges, at whatever level they may be, represent the States and its authority unlike the administrative executive or the members of the other services. The Members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally. Therefore, while determining the service condition of the members of judiciary, a distinction can be made between them and the members of the other services." [Para-38]

### **3. What is the Primary Power, Contingent Power and Rule approving authority of the President?**

#### **Contingent Power**

The President may, by order or by making rules, make provision for certain matters until the Parliament enacts to that effect. As and where laws are made by Parliament, either the Presidential orders or rules go out of existence or they exist to the extent not in conflict with laws made by the Parliament. This is called the contingent rule-making power of the President. For example- Articles 62(2), 75(1)(a), 79(3), 85, 121(2), 128(3), proviso to Article 133, Articles 138(1) and 147(2)(b) of the constitution. [Para-27]

#### **Primary Power**

Constitution conferred on the President the direct, primary and plenary power of framing rules which even the Parliament cannot frame having an immediate legislative effect, for instance, Article 55(6) and Article 115 of the Constitution. [Para-29]

### **Rule approving authority**

Under the Constitutional dispensation, the President is designate as a rule approving authority which means that no rules can be framed without his prior or subsequent approval. Examples are Articles 107(1) and 113(1) of the Constitution. [Para-28]

#### **4. Whether the President is under obligation to consult with the Supreme Court for making Rules under Article 115 of the constitution?**

The Court held that in the original un-amended Constitution of 1972, Article 115 required the President to make appointments of District Judges on the recommendation of the Supreme Court and in the case of any other persons in accordance with rules made by him after consulting the appropriate public service commission and the Supreme Court. After amendment the recommendatory role of the Supreme Court in the case of appointment of District Judges and the consultative role of the appropriate public service commission and the Supreme Court in the case of appointment of any other persons in the judicial service have been done away with. The effect of amendment in Article 115 while interpreting it cannot be ignored. If the recommendation or consultation with the Supreme Court is mandated still necessary under Article 115, then the necessity of omission of recommendation and consultation in the amendment of Article 115 cannot be explained by any means. [Para-29]

#### **5. Whether the power to appoint under Article 115 of the constitution includes power to suspend or dismiss?**

The learned Counsel for the Respondents Mr. Amir-Ul Islam submitted that the President has the authority to make rules regarding suspension and dismissal in exercise of his power under Article 115 of the Constitution. [Para-30]

The Court held that the power to suspend or dismiss, like the power to appoint, is an executive power but if the executive power to appoint includes the power to suspend or dismiss, and if Article 115 gives the President the rule making power in respect of appointment, then the word "appointments" in Article 115 should be given its full meaning both in the executive and rulemaking spheres and rule-making power of "appointment" should extend to rule making power to suspend or dismiss.

Article 115, by using the word "appointments" and Article 152(2), by making the General Clauses Act 1897 applicable to the Constitution, widened the scope of rule-making power of the President under Article 115 so as to include rule-making power of suspension and dismissal as well. [Para-31]

## **6. Is it constitutional to arrange BCS (Judicial) Cadre Service by the Legislature under Article 133 read with Article 136 of the constitution?**

The Court held that in the light of Article 115 of the constitution, there is no constitutional basis for the exercise of governmental power in creating B.C.S. (Judicial) Service Cadre under the S.R.O. dated 01.09.1980 and 31.08.1986. Article 133 and Article 136 of the Constitution are general provisions, but Article 115 is a special condition. This power of the President cannot be obliterated when the Parliament makes or exhausts its exercises under Article 136. The President is not empowered to act under the proviso to Article 133 what he is required to do under Article 115. These are distinct and separate powers. The Parliament in exercise of its power under Article 136 cannot usurp the primary rulemaking power of the President under Article 115. Article 136 will always have to be read keeping in view the fact that the re-organization of the services of the Republic cannot be allowed by amalgamating or unifying the judicial service with any other civil administrative executive services of the Republic or by placing the judicial service on a par with the civil administrative executive services on making it one of the many Cadre services of the Bangladesh Civil Service. The judicial service has a permanent entity as a separate service altogether and it must always remain so in order that Chapter II of Part VI is not rendered nugatory. [Para-33]

The Court further held that Parliament forgot that neither the Parliament in exercise of its power under Article 136 of the Constitution nor the President in exercise of his power under the proviso to Article 133 of the Constitution can usurp the primary rule-making power of the President in respect of appointments of persons to offices in the judicial service or as magistrates exercising judicial functions. Therefore, the creation of a B.C.S. (Judicial) Cadre along with civil administrative cadres, by the Bangladesh Civil Service (Re-organization) Order, 1980 with amendment of 1986 has been rightly declared to be ultra vires the constitution by the High Court Division. [Para-39]

### When amalgamation is possible

Amalgamation is possible and permissible between allied services. Judicial service may be amalgamated with judicial magistrates pursuing a judicial career all the way. But as oil and water cannot mix, the judicial and civil administrative executive services are non-amalgamable. [Para-35]

### Consequence of mixing up

This amalgamation of mixing up or tying together of the judicial service with other civil administrative services has been a monumental constitutional blunder committed during the early years of liberation, the harmful legacy of which is the dogged and headstrong denial of the proper and rightful institutional status of the members of the judicial service and of magistrates exercising judicial functions at the implementation stage. [Para-37]

## **7. Whether Rules regarding the terms and services of members in the judicial service have to be framed under Article 116 or else Article?**

The learned counsels for Respondents Mr. Amir-Ul Islam and Syed Ishtiaq Ahmed argued that the word "control" in Article 116, read with Article 115, includes the rulemaking power of the President in consultation with the Supreme Court in respect not only of posting, promotion, grant of leave and discipline but also of the entire gamut of terms and conditions of service of persons employed in the judicial service and magistrates exercising judicial functions. [Para-42]

The learned counsel for the Appellant argued that the power vested in the President under Article 116 is the power of control (including some enumerated subjects) and discipline of persons employed in the judicial service and magistrates exercising judicial functions. This power is purely an executive power and not a legislative power. [Para-43 (a)]

The Court held that Article 115 contains both executive and legislative powers but Article 116 contains only an executive power and the manner of its exercise. The Court was unable to read any rule making authority in Article 116. Therefore, formation and composition of the judicial service, and recruitment and appointment rules of the judicial service are to be made under Article 115 by the President, Service rules regarding posting, promotion, grant of leave, salary, remuneration and other privileges shall be made separately in each case from the civil administrative

executive service cadre rules under Article 133 or, when applicable, under Article 136, and those separate rules shall be consistent with Articles 116 and 116A. [Paras- 43 (a), 47]

### **7.1 Whether Rules regarding salary, remuneration etc. of judges can be made under Article 116 incorporating the doctrine of implied power?**

The learned counsel for the Respondents argued that although there is lack of any express rulemaking provision in Article 116 with regard to salary, remuneration etc. of the members of the judicial service but the void can be filled up by taking recourse to the doctrine of implied power used by this Court in the case of Mujibur Rahman (Md.) Vs. Government of Bangladesh<sup>2</sup>.

The learned counsel for the Appellant argued that the doctrine of implied power is available only when there is a presence of legislative power in order to fill up the ancillary or subsidiary matters not taken care of by express legislation. As Article 116 is devoid of any legislative or rule-making power the doctrine of implied power cannot be invoked in the circumstances.

The Court accepting the argument of the learned counsel for the Appellant held Rules regarding salary, remuneration etc. of judges cannot be made under Article 116 incorporating the doctrine of implied power. [Para- 45 (e)]

### **7.2 What is the meaning of consultation with Supreme Court in Article 116 of the constitution?**

The learned Counsel for the Respondent Mr. Syed Ishtiaq Ahmed submitted that in the amended Article 116 the control has been vested formally in the President but actually and in reality in the Prime Minister who is the executive head. The real saving is the provision of consultation with the Supreme Court and if Article 109 and 116 are read together they

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<sup>2</sup> 44 DLR (AD) 111

mean that the real control over both the Courts and tribunals and their presiding officers will be exercised by the Supreme Court. [Para-42]

The Court held that the words "in consultation with the Supreme Court" in Article 116 of the constitution is a pillar which held up the independence of the judiciary as a basic structure of the Constitution. In order that this pillar may not end up as a bamboo pillar, the word "consultation" has to be given some teeth. Meaningful and substantive consultations and full disclosure of all connected facts during consultations are the stepping stone but the end result shall be the primacy of the views and opinion of the Supreme Court which the Executive shall not disregard, for it is the Supreme Court, not the political executive, which is the best judge of judicial matters and judicial officers. The Court, therefore, held that under Article 116 the views and opinion of the Supreme Court on any matter covered by that Article shall get primacy over the views and opinion of the Executive. [Para-46]

### **7.3 Whether making law by parliament under Article 133 (or 136) infringes independence of the judiciary?**

The Court held that so long as the essential approaches to the substantive conditions of Independence exists in the laws or rules framed under Articles 115, 133 or 136, the power of the Parliament to make laws or the plenary or contingent power of the President to make rules regulating the terms and conditions of service of members of the judicial service cannot be regarded as an infringement of their independence. [Para-50]

## **8. What is the meaning of independence of judiciary?**

### **Independence of judiciary in our constitutional dispensation**

The Court held that the independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution but there is no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the

President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly cannot be done indirectly. [Para-53]

## Meaning of Independence

The Court relied on the case of **Walter Valente Vs. Her Majesty the Queen**<sup>3</sup> for explaining the meaning of independence of judiciary. The Supreme Court of Canada listed three essential conditions of judicial independence.

### (i) Security of Tenure

"Security of tenure because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence... The essentials of such security are that a Judge be removed only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure..... whether until an age of retirement, for a fixed term, for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner." [*Walter Valente Vs. Her Majesty the Queen* (P.675)]

The Court held that Such security of tenure is already assured by Article 135 of the Constitution in the case of permanent appointments notwithstanding the fact that the subordinate judiciary holds office during the pleasure of the President under Article 134. So long as the protection under Article 135 remains, the doctrine of pleasure cannot impair or destroy the security of tenure of the subordinate judiciary. [Paras-54, 55]

### (ii) Security of Salary

"The essence of such security is that the right to salary and pension should be established by law or rules and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive." [*Walter Valente Vs. Her Majesty the Queen* (P.676)]

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<sup>3</sup> (1985) 2 R.C.S. 673

The Court held it desirable that the right to salary and pension of the subordinate judiciary be established by law and there should be no way in which the executive could interfere with that right in a manner to affect the independence of the subordinate court judges. [Para-56]

**(iii) Institutional independence of the subordinate judiciary from the Parliament and the Executive**

The Court held that the judiciary must be free to decide on its own matters of administration bearing directly on the exercise of its judicial functions. The judiciary must be free from actual or apparent interference or dependence upon especially the executive arm of Government. It must be free from powerful nongovernmental interference like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure etc. [Para-57]

**(iv) Two other essential conditions of judicial independence in the special context of Bangladesh:**

**Judicial Appointment**

The Court held that Judicial appointments should normally be permanent. Recruitment to the judicial service shall be made by a separate judicial' services separate judicial' services commission with a majority of members from the senior judiciary. Recommendations for appointment on merit should come from the commission. [Para- 58]

**Administrative and Financial Independence**

The Court held that the dependence of the Supreme Court (a Division of which supervises and controls the courts and tribunals subordinate to it) on the executive branch for resources is another factor which impairs its independence including its functions under Article 109 financial independence of the Supreme Court can be secured if the funds allocated to the Supreme Court in the annual budgets are allowed to be disbursed within the limits of the sanctioned budgets by the Chief Justice without any interference by the Executive.

The financial independence of the Supreme Court is inextricably connected with the functioning of the subordinate judiciary as the High

Court Division has a controlling role and a supervisory role and the Supreme Court has a consultative role connected with the subordinate judiciary. There shall be a completely different pay commission to consider the grade and scale of pay of the members of the judicial service which shall not suffer parallelism with any, supposedly corresponding civil administrative post.

The Court further held that there shall a body, such as commission, between the judiciary and the other branches of the government to depoliticize the process of determining changes to or freezes in judicial remuneration. These conditions of judicial independence will be reflected while making rules under Article 115, enacting laws or making rules under Article 133 or enacting laws and making orders under Article 136. [Paras-58-63]

**9. Whether the judicial officers are required to ventilate their grievances through Administrative Tribunal or is there any other forum for their legal redress?**

The learned Counsel for the Appellant argued that the High Court Division was wrong in holding that the judicial officers need not approach the administrative tribunal for relief and that the High Court Division took a wrong view of Articles 109 and 117 of the Constitution. [Para-67]

The Court held that the administrative tribunals are sanctioned by the constitution and in our view the independence of the subordinate judiciary will in no way be compromised if the members of the judicial service are to seek relief before the administrative tribunal in respect of matters relating to or arising out of their terms and conditions of service, including the matters provided for in Part IX and in respect of the award of penalties or punishments meted out to them. [Para-68].

**10. Whether the judiciary is competent to pass direction upon the parliament to enact particular law or to frame Rules by the President?**

The learned Counsel for the Respondent argued that the judiciary cannot direct the Parliament to adopt legislative measures or direct the President to frame rules under the proviso to Article 133 of the Constitution.

The Court held that in the present case constitutional deviation and constitutional arrangements have been interfered with and altered both by the Parliament by enacting the Act and by the Government by issuing various orders in respect of the judicial service. For long 28 years after liberation sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution remains unimplemented. When Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. This exercise was made by this Court in the case of **Kudrat-E-Elahi Panir Vs. Bangladesh**<sup>4</sup>. The Court further referred the case- **Government of Sindh Vs. Sharaf Faridi**<sup>5</sup>. [Para-69]

## 11. Whether any constitutional amendment is required in order to give full effect to the judicial separation?

The Court held that “if the Parliament wishes, it can extend the frontiers of separation of judiciary from the executive organs of the State by a constitutional amendment the door to which should not be foreclosed by holding that no amendment is necessary. We have identified and delineated the extent of separation that already exists and we would rather invite the Parliament to bring a constitutional amendment to make the separation further and complete.” [Para-70]

### Operative Part

The Court partly allowed the appeal and drew the summary of the case in the following manner-

1. It is declared that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the

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<sup>4</sup> 44 DLR (AD) 319

<sup>5</sup> PLD 1994 (SC) 105

Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services.

2. It is declared that the word "appointments" in Article 115 means that it is the President who under Article 115 can create and establish a judicial service and also a magistracy exercising judicial functions, make recruitment rules and all pre-appointment rules in that behalf, make rules regulating their suspension and dismissal but Article 115 does not contain any rule-making authority with regard to other terms and conditions of service and that Article 133 and Article 136 of the Constitution and the Services (Reorganization and Conditions) Act, 1975 have no application to the above matters in respect of the judicial functions.
3. It is declared that the creation of B.C.S. (Judicial) cadre along with other B.C.S. executive and administrative cadres by Bangladesh Civil Service (Reorganization) Order, 1980 with amendment of 1986 is ultra vires the Constitution. It is also declared that Bangladesh Civil Service Recruitment Rules, 1981 are inapplicable to the judicial service.
4. The appellant and the other respondents to the writ petition are directed that necessary steps be taken forthwith for the President to make Rules under Article 115 to implement its provisions which is a constitutional mandate and not a mere enabling power. It is directed that the nomenclature of the judicial service shall follow the language of the Constitution and shall be designated as the Judicial Service of Bangladesh or Bangladesh Judicial Service. They are further directed that either by legislation or by framing Rules under Article 115 or by executive Order having the force of Rules a Judicial Services Commission be established forthwith with majority of members from the Senior Judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service on merit with the objective of achieving equality between men and women in the recruitment.
5. It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting, promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of rights, not favour) and other terms and conditions of service, consistent with Article 116 and 116A, as interpreted by us, be enacted or framed or made separately for the judicial service and

magistrates exercising judicial functions keeping in view the constitutional status of the said service.

6. The impugned orders in the writ petition dated 28.2.94 and 2.11.95 are declared to be ultra vires the Constitution for the reasons stated in the judgment. The appellant and the other respondents to the writ petition are directed to establish a separate Judicial Pay Commission forthwith as a part of the Rules to be framed under Article 115 to review the pay, allowances and other privileges of the judicial service which shall convene at stated intervals to keep the process of review a continued one. The pay etc. of the judicial service shall follow the recommendations of the Commission.
7. It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the Supreme Court shall have primacy over those of the Executive.
8. The essential conditions of judicial independence in Article 116A, elaborated in the judgment, namely, (1) security of tenure, (2) security of salary and other benefits and pension and (3) institutional independence from the Parliament and the Executive shall be secured in the law or rules made under Article 133 or in the executive orders having the force of Rules.
9. It is declared that the executive Government shall not require the Supreme Court of Bangladesh to seek their approval to incur any expenditure on any item from the funds allocated to the Supreme Court in the annual budgets, provided the expenditure incurred falls within the limit of the sanctioned budgets, as more fully explained in the body of the judgment. Necessary administrative instructions and financial delegations to ensure compliance with this direction shall be issued by the Government to all concerned including the appellant and other respondents to the writ petition by 31.5.2000.
10. It is declared that the members of the judicial service are within the jurisdiction of the administrative tribunal. The declaration of the High Court Division to the opposite effect is set aside.
11. The declaration by the High Court Division that for separation of the subordinate judiciary from the executive no further constitutional amendment is necessary is set

aside. If the Parliament so wishes it can amend the Constitution to make the separation more meaningful, pronounced, effective and complete.

12. It is declared that until the Judicial Pay Commission gives its first recommendation the salary of Judges in the judicial service will continue to be governed by status quo ante as on 8.1.94 vide paragraph 3 of the Order of the same date and also by the further directions of the High Court Division. in respect of Assistant Judges and Senior Assistant Judges. If pay increases are effected in respect of other services of the Republic before the Judicial Pay Commission gives its first recommendation the members of the judicial service will get increases in pay etc. commensurate with their special status in the Constitution and in conformity with the pay etc. that they are presently receiving.

## Conclusion

This is a landmark judgment in our jurisdiction. Complying with this judgment, Judiciary has been separated from the Executive in 2007. Bangladesh Judicial Service Commission was established and বাংলাদেশ জুডিশিয়াল সার্ভিস (শৃঙ্খলা) বিধিমালা, ২০১৭ was formulated. The then Chief Justice Mr. Surendra Kumar Sinha repeatedly urged the learned Attorney General to formulate the Rules and present before the Appellate Division for approval. However, during his tenure, the Rule was not approved. The acting Chief Justice Mr. Abdul Wahhab Miah approved the Rules with the control of the Law Ministry in initiating disciplinary proceeding against the judicial officers. There is a wide range of criticism that by this approval the 22-year-long journey of establishment of independence of judiciary has been compromised.



**Mohammad Shishir Manir**

Advocate

Supreme Court of Bangladesh