In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Present:
**Mr. Justice A.H.M. Shamsuddin Choudhury**
and
**Mr. Justice Sheikh Md. Zakir Hossain**.

**Writ Petition No.7473 of 2010**

In the Matter of:
An application under Article 102(2)(b)(ii) of the Constitution of the People's Republic of Bangladesh.
And
In the Matter of:
Advocate Tapash Kumar Pal

.....Petitioner.

Versus
Bangladesh Represented by the Secretary the Prime Minister's Office Secretariat Tejgaon, Dhaka, Bangladesh, Dhaka and others.

.....Respondents.

**Mr.Manzill Murshid, Advocate**
.... For the petitioner.
**Mr.Abdur Rab Choudhury, Advocate**
…….For the added respondent No.6.

Heard on 6.2.2011 and Judgment on 14.2.2011.

**A.H.M.Shamsuddin Choudhury,J.-**

The Rule under adjudication, issued on 26th August 2010 was in following terms:

"Let a Rule be issued calling upon the respondents to show cause as to under what authority the respondent No.6. is holding the present post of the Chairman, Administrative Appellate Tribunal and/or such order or orders other or further passed as to this court may seem fit and proper."

The petitioner's averment, in summary are, as follows;

The petitioner, a conscious citizen of the country, is a regular practitioner in the Judge's Court, Dhaka and is a social worker. He is informed that the respondent No.6 has been appointed as the Chairman of Administrative Appellate Tribunal, Dhaka and has been holding the post violating the basic principle of the Judgment of the Appellate Division passed in Masder Hossain Case and the terms of the appointment as contained in the notification, dated 10.05.2009.

The respondent No.6 has been so appointed by the Ministry of Establishment for two years. A notification was published by the respondent under a memo dated 13.05.2009. It is a condition of the appointment, that the appointee shuns all connection with all organizations.

The petitioner being a conscious citizen of the country tried to get information as to the appointment of Mr. Justice Gour Gopal Shaha (respondent No.6) to the said post. The petitioner however, succeeded to collect some documents and found that at present Mr. Justice Gour Gopal Shaha is holding the post of the Vice Chairman of Board of Trustee of Hindu Religion Kallan Truss. The appointment was made by the Ministry of Religious Affairs by a notification dated 06.06.2010. The respondent No.6 is also the Executive President of Shri Shri Maddah Gouria Math Management Committee, President of Shri Shri Shib Mandir Management Committee, Chief Adviser to Shri Shri Brahmah Chari Ashram, President of Ramkrishna Math and Mission, Dhaka and President of Gandhi Asram Trust, Noakhali. The appointment was made to the post of the Chairman, Administrative Appellate Tribunal, subject to cessation of all involvement with any other organization. It is evident that Mr. Justice Gour Gopal Shaha, without ceasing to be involved with other organizations, is continuing to hold the post of the Chairman, Administrative Appellate Tribunal, which is illegal and without lawful authority and is violative of the principles enunciated in Masdar Hossain Case.

After the separation of the Judiciary, no Judge is allowed to perform any administrative function. The post of the Chairman of Administrative Appellate Tribunal is equivalent to that of the Hon'ble Judges of the High Court Division. The function of the Chairman of the Administrative Appellate Tribunal is judicial in nature as he hears appeals arising out of Judgment passed by the Administrative Tribunal. Despite that, Mr. Justice Gour Gopal Shaha has been appointed by the Ministry of Religious Affairs to the post of Vice Chairman of Hindu Religion Kallan Trust and he is also performing the administrative function as per the appointment by a notification dated 06.06.2010. Moreover he is also participating in other administrative work of many religious organization, where he has been dealing with the Hindu community. If any of them faces any problem about service matter they have to go to the tribunal for remedies and in the appeal stage the case may be heard by the respondent no.6. So, some litigant people may be confused about the dispensation of impartial justice. In view of the above circumstances, the judicial function of the Chairman of Administrative Appellate Tribunal may be impaired.

The respondent no.6 has filed an affidavit-in-opposition, figuring the following statement;

The writ petition is not maintainable as the petitioner is not an aggrieved person. He has filed this writ petition out of grudge and enmity against the respondent No.6. Para 7-11 of the writ petition are not supported by any affidavit.

Terms of the respondent's appointment as the Chairman of the Administrative Appellate Tribunal are contained in the Contract of Appointment, dated 20.05.09. This respondent has been working within the conditions and restrictions contained therein.

It would be seen from the instrument figuring the said Contract of Service, dated 20.05.09 that there is nothing to stop the said respondent from working for any religious or charitable organization if such be without remuneration or honorium. An Administrative Tribunal is not a Court as per the observation made by the Appellate Division (44 DLR (AD) 111). Administrative Appellate Tribunal comprises three members, including the Chairman. One member is a joint secretary of the Government who is in the Executive Branch. It is clearly an administrative body.

The final contract of service dated 20.05.09 does not contain any provision requiring the deponent to relinquish all previous connections with charitable, humanitarian and religious associations. This respondent has already withdrawn himself from the post of President, Sree Sree Shib Mandir Managing Committee on 10.06.2010. He has also resigned from the Post of the Executive President of Madhya Gaudio Math Managing Committee long before this writ petition was mooted. The petitioner suppressed these facts as he was ignited by oblique motives in filing this writ petition. Ram Krishna Mission, Dhaka, and the Ghandi Ashram Noakhali are religious and humanitarian organizations. This respondent, as chairman of those organizations, has no executive functions and he does not take any remuneration or honourarium from these bodies. The honorary work he is doing for these organizations does not, in any way undermine or compromise his work as the Chairman of the Administrative Appellate Tribunal.

The swearing respondent was appointed as a Vice-Chairman of the Hindu Religious Kallyan Trust. He has no executive functions, does he get any financial benefit from that body. The apprehension that because of his appointment as a Vice Chairman of the Hindu Kallyan Trust any hindu litigant before the Administrative Tribunal may get extra favour from him, is untenable in law. There are many distinguished judges of the Supreme Court who belong to Hindu, Muslim and other religious denominations but no allegations were ever made against any of them. The Administrative Appellate Tribunal has two other members belonging to Muslim Community but there was never any allegation of bias or ill will on this account.

The Hindu Religious Welfare Trust was set up by the Government for specific purpose and the Minister-in-Charge of the Religious Affairs Ministry is the Chairman and executive head of the Trust.

The respondent No.6 has been working in full compliance of the terms and conditions contained in the Contract of Service dated 20.05.09. The Government, as his employer, does not have any complaint against him nor was he appointed as Vice-Chairman of the Hindu Kallyan Trust at his request.

As the Rule matured, Mr. Manzil Murshid proffered for the petitioner that the respondent No. 6's argument that the Administrative Tribunal is not a Court and, as such the Masdar Hussain principle is not applicable, is not tenable in law, because, whether one designates it a Court or not, the truth is that it performs important judicial, not admin function. According to him, any person vested with the duty to pass an order which is judicial in nature, is bound by the ratio in Masdar Hussain decision and is bound to maintain a distance from the executive functionaries of the republic.

Mr. Abdur Rab Chowdhury, the learned Senior Advocate, on the other hand argued that, notwithstanding the fact that the chairman of the Administrative Tribunal performs some kind of judicial duty, his Job can not be equated with that of a strictly judicial functionary and hence he can not be pronounced as disqualified because of his nominal connection with a body that has been set up by the Religious Affairs Ministry. He went on to contend that his client's role in the Hindu Religious Welfare Trust is not of executive nature either, and hence it can not be said that his standing in the said Trust would be tantamount to comprising with his posting as the chairman of the Admin Tribunal.

For us the question is whether the respondent no 6's liaise with the organisations cited in the petition, rendered him disqualified from acting as the chair of the Administrative Appellate Tribunal.

The petitioner's contention is that a person holding a judicial Office must maintain an arm length distance with the other organs of the state.

This equation stems from the doctrine of separation of power, a noble product of the European Renaissance. Although Plato made pronouncement on it before the emergence of the Christian era, and Maitland traced it during the reign of Edward 1, Baron Montesquieu, a pivotal figure in the flock that brought about intellectual revolution in the medieval Europe, proclaimed with a sufficiently loud audibility that tyranny persists in a situation where all of the three kinds of state power assimilate in one body.

This dogma received wide acclamation during the successive era, so much so that the founding fathers of the US Constitution adopted this theorem almost in toto. In essence, this theory contemplates a state where the Executive organ shall be vested with admin works, the Legislature in making laws and the Judiciary in adjudication of causes and that no organ shall cause any transgression upon the realm set apart for the other two.

The doctrine of the Independence of the Judiciary is an offshoot of the theory of separation of power.

Like the Constitution of the United States, most of the countries that succeeded to rid themselves of the colonial yoke at the cessation of the second great war, also adhered to this theory in framing their constitutions. Framers of our Constitution also followed this pursuit, after we attained liberation from Pakistan.

The ratio in the case of Secretary, Ministry of Finance-v-Masdar Hussain 2000 BLD AD 104, popularly known as Masdar Husssain Case, was founded upon the interpretation on that provision of our Constitution which summons that the Judiciary is to remain independent.

In delivering a Historic Judgment in that case the Appellate Division of our Supreme Court entertained no hesitation in proclaiming that the constitutional mandate in favour of an independent judiciary must be followed without flipside contretemps.

The question is whether Masdar Hussain principle applies only to such bodies that are designated as courts or whether it extends to all judicial institutions as a conglomeration.

Every country within the Common Law area, have judicial institutes bearing two main nomenclatures, such as "Courts" and "Tribunals".

Halsbury's Laws of England defines a court, stating that the word court originally meant the King's Palace, but subsequently acquired the meaning of (1) a place where justice was administered, and (2) the person or persons who administered it.

The Evidence Act defined it as including all Judges and Magistrates and all persons except arbitrators, legally authorized to take evidence.

The Indian supreme court observed; "There can be no doubt that to be a Court, the person or persons who constitute it, must be entrusted with judicial functions, that is, of deciding litigated questions according to law. However, by argument between the parties, arbitrators may be called upon to exercise judicial powers and decide a dispute according to law but that would not make the arbitrators a Court. It appears to me that before a person or persons can be said to constitute a Court, it must be held

that they derive their powers from the state and exercise the judicial powers of the state." (Maloyan and Bharat Bank Ltd. -v- Employees of Bharat Bank Ltd., AIR 1950 SC 188).

The Kings Bench Division in – Cooper –v-Wilson (1937 2 KB 309) had this to say; "A true judicial decision presupposes an existing dispute between two or more parties, and then involve four requisites: (1) the presentation (not necessarily orally) of their case by the parties; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by finding upon the facts in dispute and application of the law of the land to the facts so found, including, where required, ruling upon any disputed question of law."

As per the decision in K C Nanda –v- Certificate Officer, Bondh 1970 36 Cut L.T. 1282, to constitute a Court, in the strict sense of the term, it must exercise judicial power of the state, namely the power, which every sovereign authority, must of necessity, have to decide itself on its subjects, whether rights relate to life, liberty or property; and as an essential condition thereof, it must have the power to give a decision or definitive judgment which has finality and authoritiveness.

The Indian Apex Court expressed; "By "courts" is meant Courts of Civil Judicature and by "tribunals", those bodies of men who are appointed to decide controversies arising under certain special laws. …….the power of the state is included the power to decide such controversies. This is undoubtedly one of the attributes of the state, and is aptly called the judicial power, a clear division is thus noticeable. Broadly speaking certain special matters go before tribunals and the residue go before the ordinary Court of Civil Judicature. Their procedure may differ, but the functions are not essentially different. What distinguishes them have never been successfully established. Lord Stamp said that "the real distinction is that courts have an air of detachment." But this more a matter of age and tradition and is not of essence." (Harinagar Sugar Mills Ltd –v-Shyam Sundar Jhunjhunwala AIR 1961 S.C. 1969.

The same Court also stated in another case; "If a statute empowers an authority, no being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statue which claim is opposed by another party and to determine the respective rights of the contesting parties, who are opposed to each other, there is a lis, and prima facie, and in the absence of anything in the statue to the contrary, it is the duty of the authority to act judicially and the decision of the authority is quasi judicial act." (Associated Cement Companies Ltd –v-P.N. Sharma AIR 1965 S.C. 1595),

The Indian Supreme Court also held, "Industrial tribunals, though they are not full fledged courts, yet exercise quasi judicial functions and are within the ambit of the word "tribunal" in Article 136 of the Constitution. The expression "tribunal" as used in Article 136 of the Constitution does not mean the same thing as "court" but includes, within its ambit all adjudicating bodies provided they are constituted by the state and are invested with judicial, and distinguished from purely administrative or executive functions" (Associated Cement Companies Ltd –v- P.N. Sharma AIR 1965 S.C. 1595).

In drawing the fence between a Court and a Tribunal, the highest Court of India had the following observation to make; "The expression tribunal as used in Article 136 of the Constitution does not mean same thing as court but includes, within its ambit all adjudicating bodies, provided they are constituted by the state and invested with judicial as distinguished from purely administrative or executive functions. Thus, there can be no doubt that the test which has to be applied in determining the character of an adjudicating body is whether the said body has been invested by the state with its inherent judicial power. This test implies that the adjudicating body should be constituted by the state and should be invested with the state's judicial powers which it is authorized to exercise" (Engineering Mazdoar Sabha -v-Hind Cycles Ltd. AIR 1963 SC 877).

In the language of the Court Appeal, judicial proceeding means and includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction (Dansereom -v-Berget 1953 2 ALL ER 1058).

Judicial acts must be distinguished from ministerial, legistative and administrative or executive acts. The term administrative or executive is capable of bearing a wide range of meanings. Broadly speaking however, this terms refers to broad areas of governmental activities in which repositories of powers may exercise every class of statutory function. The meaning of the term "judicial" varies according to the purpose for which the term has to be defined.

In the United Kingdom tribunals are reckoned to be "specialized court in addition to the courts of general jurisdiction" (Prof A W Bradly and KD Ewing, Constitutional and Administrative Law, 15th Edition, Page 640).

The aforenamed authors further express; "When Parliament creates new public services or regulatory schemes, questions and disputes will inevitably arise from operation of the legislation. There are three main means of enabling such questions and disputes to be settled: (a) by conferring new jurisdiction on the ordinary courts (b) by creating new machinery in the form of a tribunal, sometimes with the right of appeal to a higher tribunal or to the courts; or (c) by leaving decisions to be made by the administrative bodies responsible for the scheme."

Frank Committee, which was set up to examine functioning of the tribunals and published its findings in 1957, expressed that tribunals and inquiries differed in their constitutional status and functions and that no tribunal ought to be seen as the part of the structure of a government department, for tribunals exercised functions which were essentially judicial in character, although of a specialized nature. Some extract of the committees findings are reproduced below, verbatim, for clarity; "We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned" (Command Paper 218; 1957, Page 9, Ch. 27).

The British Parliament recognized through the Tribunals, Courts and Enforcement Act 2007, that tribunals are vital part of the machinery of justice, operating alongside the ordinary courts of law.

Lord Scarman in his work, "English Law-the New Dimenson", Part III, viewed that although there is today no doubt about the judicial role of tribunals, the existence of

tribunals was sometimes in the past thought to weaken the judiciary and the authority of the ordinary court.

The truth is that ordinary courts are not suited to settle all disputes that arise out of the work of the government. As Professor Bradley and Ewing observed (Administrative Law, 15th Edition, page 641), "the reason for this is the need for specialized knowledge if disputes are to be settled expeditiously and consistently".

The above named authors, in the same book expressed, "Thus the relationship between minister and tribunal is similar to that which exists between the government and the judges in the courts. Tribunals exist not because they exercise a discretion which it would be improper to confer on judges, but because they undertake the adjudication required more efficiently than the courts."

Some English authors, quoted in Bradley and Edwin's Administrative Law, supra, observed; "The essential of good adjudication apply to both tribunals and courts. The right under article 6(1) of ECHR to a fair hearing before an independent and impartial court or tribunal does not depend on the label applied to the decisions makers. It is fundamental that neither judges nor tribunal members should be subject to dismissal when government department is dissatisfied with their decisions. Procedure in a tribunal is said to be informal. But informality is difficult to reconcile with need for legal precision and tribunal procedures are not always less formal than procedures in comparable court.

The authors named above expressed, (page 642); "Today, it is impossible to describe the functions of tribunals except in terms that also apply to courts."

The above scanning is bound to make it abundantly clear that difference in the nomenclature notwithstanding, there is barely any deviation between a court and a tribunal so far as the nature of their functions are concerned, because both are engaged in performing judicial functions, settling dispute between contending parties by following certain procedures laid down by Parliament and by analyzing evidence. The notable difference, apart from that in the title, lies in the fact that courts are creation of the Constitution or of statutes of general nature, having jurisdiction generally, while a tribunal is a specialized forum, created by a special statute, having jurisdiction over a specified class of litigants.

Indeed, it will be no exaggeration to say that the function of the Administrative Tribunals, and, a fortiori, that of the Administrative Appellate Tribunal is no less judicial than that of the International War Crime Tribunal or the Labour Appellate Tribunal.

A public tribunal however must be distinguished from a domestic or a departmental tribunal.

True it is, as His Lordships Habibur Rahman J stated that the Administrative Appellate Tribunal is not a court. But it is true, equally well, that His Lordship also expressed," "An Administrative Tribunal may act Judicially....." (44 DLR AD 111)

It is also to be borne in mind that the above observation was made in a totally different context. As in our view, the doctrine of separation of Power and the Independence of Judiciary is not confined to the bodies termed as courts, but applies to all bodies which perform judicial, as opposed to admin function, the Administrative Appellate Tribunal can not be put in a segregated compartment, away from the threshold of the judicial functionaries. It can not be said that this body does not

adjudicate upon disputed issues. Indeed, it's creation stands contemplated in Article 117 of the Constitution. This Article is in Par IV of the Constitution, the Part that is designated for "The Judiciary". That's not all. This Article does even envisage that tribunals created under this Article are to exercise jurisdiction in respect of matters relating to or arising out of any law to which clause (3) of Article 102 applies.

So, it is a fallacy to say that the Administrative Appellate Tribunal is not a judicial, but an administrative body.

It is very much a fully judicial body, not even a quasi judicial one, because it has jurisdiction to hear appeals against adjudications made by the tribunals of the first instance, in respect of matters relating to the terms and conditions of persons in the service of the Republic. Presence of a Joint Secretary in the tribunal, does not make any difference, because when in the tribunal, the Joint secretary is on deputation, in the same way a District Judge becomes an officer of the Executive Organ when he is deputed to the Ministry of law. When in the tribunal, that Joint Secretary remains free from the administrative control in respect to his duty of adjudication.

Contrary to the claim the respondent no 6 has laid, the Administrative Appellate Tribunal is not an administrative body because of its name. It has been given this name because it is meant to adjudicate upon matters relating to the terms of service of the people who are primarily employed in the administrative cadre.

So, there exists no cogent reason to lend support to the view that the Administrative Appellate Tribunal is not a judicial body.

The next question is whether the doctrines of the separation of power, or the independence of the Judiciary is confined to the courts alone.

Before further ado, it can instantaneously be said that if the doctrine of the separation of power or the independence of the judiciary is kept tamed within the domain of those bodies which are called courts, than the former highest judicial body in the United kingdom, the House of Lords, and the highest judicial forum of the British colonies, namely, the Judicial Committee of the Privy Council, would fall within the exclusionary zone, because neither of them is a court. The House of Lords is the upper House of the British Parliament and used to adjudicate upon appellate matters in the form of Parliamentary deliberation, by tracing the source of its judicial function in the common Law, while the Judicial Committee of the Privy Council is but a Committee of the Privy Council, a Common Law emanation, which exists as a historical body that was created centuries ago to render advice to the Monarch.

Yet, it would be ludicrous to say that the doctrine of separation of power or independence of the judiciary would not apply to them.

Indeed, even before the passage of the Constitution Act 1995, the Lord Chancellor kept a visible distinction from the executive, and, indeed, to make the distance seen, a new Supreme Court has been crated in substitution of the former House of Lords.

It is for the same reason that the British public tribunals were under the administrative (not judicial) control of the Lord Chancellor, and that the members of the tribunals enjoy independence from the executive, including security of tenure. Similarly, in Bangladesh, all the public tribunals, inclusive of those which are manned by members of the admin cadre, like the Land Appeal Board, enjoy total independence in administering justice. So, if the adjudicating personnel in the tribunals are required to enjoy total independence, it is incument that they must be seen to be manifestly and undoubtedly detached from the executive.

Now, we must turn to explore as to whether the respondent no 6 stands disqualified for the reasons the petitioner has advanced. The averments are that the postulant is clinching to various positious in a plentitude of voluntary, charitable, ecclesiastical bodies.

In our view, such involvement, if they be pro-bono, would not strike a compromise with the doctrine of the separation of Power, or the Independence of the Judiciary or with the ratio in the Masdar Hussain decision.

However, the scenario stands on a different platform so far as his position in the Hindu Welfare Trust is concerned. This respondent himself says;

“Government as his employer.....”. So, he, by his own admission, is in the employment of the government as a Vice-President of the Trust. Moreover, irrespective of whether or not that position espouses any executive function, the stark truth is, it is a non-judicial, but an executive service under a Ministry, where a Minister is his colleague.

So, it can not be argued that this position does not disqualify him from holding the Judicial post of the Chairman of the Administrative Appellate Tribunal, where the postulants nature of job is certainly judicial, or in other word, adjudicative, not administrative.

The Rule is hence made absolute.

The respondents are directed to terminate the respondent No. 6 from the chairmanship of the Administrative Appellate Tribunal.

There is no order on cost.

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