

2011 BLD (HCD) 31

Md. Imman Ali and Sheikh Hassan Arif, JJ

BANGLADESH NATIONAL WOMEN LAWYERS ASSOCIATION (BNWLA), REPRESENTED BY SALMA ALI, EXECUTIVE DIRECTOR OF BNWLA, MONICO MONA TOWER (1ST & 2ND FLOOR), 48/3, WEST AGARGAON, SHERE BANGLA NAGAR, DHAKA-1207.

v.

GOVERNMENT OF BANGLADESH, REPRESENTED BY THE CABINET SECRETARY OF CABINET DIVISION, BANGLADESH SECRETARIAT, DHAKA AND OTHERS*

When there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard.

Article 10 of our Constitution has mandated participation of women in all spheres of national life; Article 17 made it obligatory on the State to ensure free and compulsory education for all children; Article 28 prohibits discrimination on the ground of sex; Article 29 guarantees equal opportunity of women in employment in the public sector; Article 31 guarantees equal protection of law and to be treated only in accordance with law; Article 32 prohibits deprivation of personal liberty save in accordance with law and, most importantly, Article 36 guarantees right of free movement to every citizen. Apart from Article 10, all other guarantees mentioned above are enshrined in the Constitution as fundamental rights of every citizen and thus put an obligation on the State to ensure them to the citizens. If the State fails to ensure those fun-

damental rights, Article 44 grants a person aggrieved another fundamental right to move the High Court Division under Article 102 (1) for the enforcement of such rights.

(Para—16)
The guarantee of free and compulsory education for children, right to liberty and the right to freedom of movement guaranteed under Articles 17, 32 and 36 respectively are meaningless if the girls and women of this country are kept away from school and colleges on account of sexual harassment in the streets, if they face obstruction and hindrance in the streets or any other place, if they are subjected to sexual teasing or stalking, humiliation by Romeoos at public or private places and so on. It is the obligation of the State to ensure those rights guaranteed by the Constitution under Part- III, and in case of failure of the State, as in the present case, the High Court Division is obliged to entertain their grievance and intervene to redress even at the instance of public-spirited organization like the petitioner.

(Para—17)
The Universal Declaration of Human Rights 1948 (UDHR) recognizes the equal rights of men and women (Preamble articles 1 and 2). Discrimination in the enjoyment of civil, political, economic, social and cultural rights on the basis of sex has been prohibited under the International Covenant on Civil and Political Rights 1966 (ICCPR) [article 2(1)], and the International Covenant on Economic, Social and Cultural Rights (ICESCR) [article 2(2)]. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 is the most comprehensive treaty on women's human right, establishing legally binding obligations to end discrimination against women. It states that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields. Bangladesh is a signatory and has acceded to the

above instruments⁹ making it obliged to implement those provisions. (Para—18)

Ms. Fahima Nasrin with Ms. Salma Ali, Advocates, For the petitioner.

Mr. Md. Motaher Hossain, D.A.G. with Mr. Samarindra Nath Biswash, A.A.G., For the respondent no.2.

Judgment delivered on January 25 and 26, 2011.

Judgment

Sheikh Hassan Arif, J.:

Background:

1. During a period from 2009 till date, this country has faced (and is still facing) a new social menace which has become widely known as "eve teasing" resulting in several suicides by the victim girls, killing of their relatives or other people who try to protect the victims from any attempt by the perpetrators of such menace. The sordid incidents of so called "eve teasing" have been taking place with numerous frequency all over the country including the streets, homes, neighbourhood areas, transports, different stations, cinema halls, amusement parks, schools, colleges, universities, working places and other public places usually frequented by women and girls.
2. In the wake of such horrific situation putting the country on the edge of precipice, a public spirited and reputed non-governmental organization, namely Bangladesh National Women Lawyers Association (BNWLA), represented by its executive director Advocate Salma Ali, has approached this court seeking some directives/guidelines as, according to them, the government has failed to contain the situation. Thereupon, this court by order dated 02.11.2010 issued Rule Nisi calling upon the respondents (mainly the concerned ministries and police) to show cause as to why they should not be di-

rected to formulate guidelines, or issue policy statements or specific legislations, to address the issue of sexual abuse, sexual harassment, eve-teasing, stalking in order to protect and safeguard the rights of the women and girls in our society in their homes and on their way to and from educational institutions/schools/colleges and other public places wherever necessary. In view of the horrific turn of such events as highlighted in the writ petition, this court, upon hearing the submissions of the learned senior members of the bar present in the court, on the same day issued the following four interim directions:

"i) the Inspector General of Police (IGP) is hereby directed to take immediate steps to apprehend all stalkers/eve-teasers who physically, psychologically, emotionally or sexually abuse or harass women and children, in particular those against whom any allegation is made of harassing/stalking girls and women in any place including at their homes, in the streets, work places and other public places.

ii) the respondent No. 1 is directed to issue immediate instructions to all the Deputy Commissioners throughout the country and all Upazilla Nirbahi Officers to be on high alert and to deal with this particular menace of stalking/eve-teasing and sexual harassment separately and independently of any other crime and to take appropriate and immediate action against the alleged offenders.

iii) the Secretary, Ministry of Home Affairs and the Inspector General of Police are hereby directed to take immediate steps to direct the Superintendent of Police of every District as well as the officer-in-Charge of the Police Stations to take appropriate and immediate steps for providing protection to the family members as well as the civil society who come forward to assist in the event of any

⁹ Bangladesh ratified ICESCR and ICCPR in 1998 and 2000 respectively; Bangladesh acceded to the CEDAW in 1984;

eve teasing, to ensure that no harm may come to them through any reaction by the stalkers/eve teasers.

iv) the respondents No. 3 and 4 are hereby directed to take steps to ensure that the media, including the electronic media, namely radio and television, broadcast the seriousness of the menace of eve-teasing and stalking and also to notify the severe consequence that may be brought upon the perpetrators. The respondents No. 3 and 4 may also engage the NGOs and civil society in order to make the general public aware of the menace which now besieges us. The community must also be told how best to protect themselves."

3. In the above mentioned order, this court also expressed concern over limitations and inefficiencies of the existing laws to deal with the situation which had blown out of proportion and further directed respondent No. 2 (Ministry of Law, Justice & Parliamentary Affairs) to take immediate steps in consultation with the respondent Nos. 3 to 7 for formulating specific laws to counter the said menace keeping in mind that deterrence should be the aim of the new law, and the court directed respondent No. 2 to report to the court about the steps taken in this regard.

4. Pursuant to the above orders and directions, respondent no.2, through its acting Secretary, Legislative Wing, sent a report on 07.12.2010 mentioning therein some steps taken by it and other concerned ministries for the purpose of preventing the said social menace. The steps include a proposed amendment to the Nari-O-Shisho Nirjaton Daman Ain 2000 by incorporating a new section "10 Ka. Penalty for Sexual Harassment" after the existing section 10 — proposing thereby a definition of a separate offence named 'Sexual Harassment' as well as punishment of one to seven years' imprisonment and fine for committing the same. The report, in particular, refers to another step taken

by the government through inclusion of section 509 of the Penal Code 1860 in the Schedule to the Mobile Court Act, 2009 — thereby empowering the Executive Magistrates to punish the offenders / eve teasers on the spot.

5. By the writ petition and two supplementary affidavits, the petitioner has brought to our notice numerous macabre incidents of eve teasing/stalking along with the resultant suicides and killings of the victims and their relatives. To avoid detailed narrations, a few of them are noted below in short:

- Suicide by Rupali (Daily Samakal on 03.11.2010):

Rupali, a Hindu girl, was a student of class nine. She was kidnapped by a youth on the way to her private tutor and the youth put vermilion on her forehead — signifying Hindu marriage. Failing to tolerate the insult and social humiliation, Rupali protested by taking her life.

- Iti lost mental balance (Daily Sangbad on 04.11.2010):

The eve teasers/stalkers made Junior School Certificate (JSC) candidate Iti to lose her mental balance. A youth named Shahriar had been teasing/stalking her for two years, but the father through fear even could not lodge a G. D. (General Diary) with the police station.

- Eve Teasers mutilated Marry's face by axe (Bhorer Kagaj on 04.11.2010):

Marry, a HSC student of Mothbaria Government College, Borishal, was attacked by local youths Rajib, Showrav and others as she protested their teasing/stalking on her way back from college. The perpetrators mutilated her face with a Chinese axe and also injured her father while he came to her rescue. Police even turned down her father's request for help as the attackers are mates of the local UP chairman.

- Class-V student Shabnur commits suicide (Shangbad on 21.11.2010):

Poor mother named her Shabnoor, after the name of a popular heroine of Bangladeshi films, as she looked pretty. Bulu's father and his people mercilessly beat Shabnoor's parents as they protested Bulu's teasing /stalking her. Failing to tolerate humiliation and mental trauma, she shamed this world by hanging herself at night.

- College girl Choiti commits suicide in fear of her pornographic exposure (Jana Kantho on 14.12.2010):

Choiti fell in love with Shagor who took her pornographic video and threatened to upload them in the internet. In fear of losing her family reputation, she committed suicide.

- Champa Rani, mother of victims, killed by teaser/stalker (Prothom Alo on 04.11.2010):

Stalker Debashish admitted that he deliberately ran over Champa Rani with motor-bike because she protested his teasing/stalking on her daughters. Champa Rani died consequently.

- Teasers/stalkers kill teacher as he protested teasing (Bhorer Kagaj on 25.10.2010):

Eve teasers/Stalkers in Natore killed teacher Mizanur Rashid as he protested teasing/stalking on his female students.

According to the Daily Bhorer Kagaj report dated 25.10.2010, the suicide from eve-teasing/stalking drew attention in 2001 when Simi, a fine-arts student, chose to take her own life in protest of teasing in Khilgaon, Dhaka. It further reported that according to the rights' organizations 16(sixteen) girls had committed suicide as a result of such teasing/stalking in the first five months of 2010.

The above-mentioned and numerous other incidents of like nature have already raised huge concern and protests around the country. People demanded immediate actions by the government; civil society and human rights organizations organized seminars to find a solution to this social epidemic and formed human-chains to demonstrate their grievance and frustration; and the government apparently took some steps in this regard — but the menace remained unabated. As against the above back drop, this court took up the matter for hearing at the instance of the petitioner.

Parties appeared before the Court:

6. Although the notices of the rule nisi have been duly served on all the respondents, only respondent no.2- the Ministry of Law, Justice and Parliamentary Affairs, represented by the Secretary, appeared before this court with an affidavit-in-compliance reiterating the steps taken by it as mentioned in the above noted report sent by it to this court. Non-appearance of the respondent Nos. 3 and 6, namely Ministry of Children & Women Affairs and Ministry of Home Affairs respectively, who are intimately, rather inalienably, connected to the issues being dealt with, signifies their lack of interest in the matter and is thus unbecoming and is highly deprecated.

Submissions:

7. Ms. Fahima Nasreen, the learned advocate appearing for the petitioner, at the very outset, draws our attention to the different news paper clippings as annexed to the writ petition as annexure-C series. She submits that the problem has reached such extent that the whole conceptual perspective regarding the issue has to be changed, and since the government has not so far taken sufficient steps to tackle the problem, the court should intervene to fill up the vacuum created by the absence of sufficient laws and the lack of appropriate actions by the government. She submits that the proposed definition of

'sexual harassment' does not address the consequences of the said offence and the mental trauma of the victim and her family — which are the main causes of suicides by the victims. She argues that the term "eve teasing" as widely used now to describe the mischief is in fact doing injustice to the victims, as the term itself is contributing to undermine or lessen the gravity of the real harm caused to them.

8. Referring to the inclusion of section 509 of the Penal Code in the schedule to the Mobile Court Act 2009, she contends that this is not what the civil society and rights organizations wanted. The procedure of Mobile Court in punishing an accused is such that the accused does not have any right to engage a lawyer or to cross examine the witnesses resulting in unsafe and unfair victimization, she argues. Drawing our attention to different fact-finding reports prepared by the petitioner organization, as annexed to the supplementary affidavit as annexure-H, she submits that the situation is so unique that even the victims and their relatives do not feel safe to assist police or to give information to the rights organizations to get any relief. Referring to the unabated situation prevailing in the country, she submits that the right to free movement as guaranteed to a woman under Article 36 of the Constitution has been rendered nugatory and the Government is not taking adequate measures in this regard.

9. Mr. Motaher Hossain Saju, the learned Deputy Attorney General, appearing for respondent No. 2, on the other hand, submits that some effective steps have already been taken by different Ministries and law enforcing agencies pursuant to the decision of a meeting held on 04.11.2010 chaired by the Chief Secretary to the Prime Minister and another Inter-Ministerial Meeting held on 10.11.2010 chaired by the Hon'ble State Minister for Ministry of Women and Children Affairs. Referring to a letter dated 14.11.2010, annexure - 2 to the Affidavit in Compli-

ance, he submits that the Ministry of Women and Children Affairs has already proposed an effective amendment to the Nari-O-Shishu Nirjatan Daman Ain 2000 by way of incorporating a new provision "Section 10(Ka)" after section 10. He submits that since the proposed amendment covers all the relevant mischief, the situation would be effectively taken care of once the same is incorporated in the statute book after completion of all formalities. He further submits that after inclusion of section 509 of the Penal Code in the Schedule to the Mobile Court Act, 2009, the Mobile Courts are now effectively functioning to punish the perpetrators on the spot and has already punished several offenders.

The term "Eve Teasing":

10. Heard the learned advocates, perused the writ-petition, affidavit-in-compliance and supplementary affidavit submitted by the parties. For better understanding of the issue, we may first deal with the term eve-teasing. The meaning of the words "eve" and "tease" are separately given in some dictionaries, but not the word "eve-teasing". As per Wikipedia¹⁰, the word 'Eve' signifies the biblical eve, the first woman on the earth. 'Tease' on the other hand means 'to laugh at somebody and make jokes about them, either in a friendly way or in order to annoy or embarrass them'¹¹. However, according to Wikipedia, 'eve teasing' is a euphemism used in India, Pakistan, Bangladesh and Nepal for public sexual harassment, street harassment or molestation of women by men. Whatever may be the real meaning, the word 'eve teasing' in our country has in the mean time attained notoriety to such extent that demands are abound even to change the term itself so that the real gravity of the mischief of 'eve teasing' is

¹⁰ A free encyclopaedia accessible through the internet; Downloaded on 13.01.2011;

¹¹ See the Oxford Advanced Learner's Dictionary, 7th edition;

reflected in the name¹. "Calling it 'Eve-teasing' trivialises the act; it isn't teasing, it's harassment", observed Aisha Zakaria, Director of Hollaback!², Mumbai

11. However, in our common knowledge, the word 'teasing' refers to funny comments for amusement passed by one or more individuals to others. It is usually harmless if it is done between friends in a friendly environment and if the same is welcomed by the female recipient. But if it is not received easily because it connotes sexuality, it may cause mental harm to her which may sometimes lead to direct or indirect physical harm. The degree of harm caused to the female recipient depends on her social background, mental setup, the context in which the teasing has taken place etc. While teasing may be enjoyable and pleasant to an American or British female of young age, it may be unpleasant and harmful to a Bangladeshi female of the same age because of cultural difference and/or the relationship of the person doing the teasing. Teasing of younger sister-in-law is a common phenomenon in Bangladesh and is generally accepted in good grace. Sometimes the same teasing in Bangladesh may cause different degree of harm to the girls/women of different mental, social and psychological make-up. What may be normal for a girl in Dhanmondi or Gulshan, may be the reason for mental disturbance of a girl in a remote conservative village. Therefore, most of the time the effect of teasing is dependent on the recipient girl, in that a somewhat normal friendly gesture sometimes turns into sex-

ual harassment — making it very difficult to prove sexual harassment done in the form of so called 'eve teasing' in a patriarchal society like ours.

Existing domestic Laws:

1. Be that as it may, the academic discussion on eve teasing is not that much relevant in the instant matter. What is important is how it is affecting our society and how it can be contained. We have examined the existing relevant provisions in the Penal Code 1860, Nari-O-Shishu Nirjatan Daman Ain, 2000, Mobile Court Act, 2009 and Dhaka Metropolitan Police Ordinance, 1976. Section 292 of the Penal Code provides for three months imprisonment or fine or both for exhibiting or selling pornographic or obscene materials etc; section 354 provides for two years imprisonment for assault or criminal force to a woman with intent to outrage her modesty; Section 75 of the Dhaka Metropolitan Police Ordinance, 1976³ provides for imprisonment for three months or fine or both if some one uses indecent language or behaves indecently in public places or street etc; Section 76 of the same Ordinance provides for one year's imprisonment or fine or both for teasing a woman; Section 9 (Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 provides for rigorous imprisonment for a period from five to ten years for inducing a woman to commit suicide; and Section 10 of the same Ain (Act) provides for rigorous imprisonment for a period between three and ten years for touching the body of a woman for the purpose of gratification of sexual desire and so on. In addition, in the face of quick rise of the incidents of so-called eve-teasing, the gov-

¹ See 'Eve Teasing: The Social Menace' published by BNWLA. Para - 1.10;

² Hollaback ! is an international e-activism against street sexual harassment;

³ Same provisions exist in other Metropolitan Ordinances;

ernment has included section 509 of the Penal Code, 1860 in the Schedule to the Mobile Court Act, 2009⁴ – empowering the Executive Magistrates to impose punishments on the perpetrators on the spot. Section 509 of the Penal Code is quoted below:

“509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

2. In-depth and perspicacious analysis of the provisions mentioned hereinabove reveal that they are simply not enough to deal with the prevailing situation in this country, and to that extent we are in full agreement with the submissions put forward by the learned advocate for the petitioner organization. Intention to outrage or insult the modesty of any woman used in several sections mentioned above, particularly in section 509 of the Penal Code, is very vague-and-almost-impossible to prove. Only one reported case in D.L.R in 1957⁵, where the conviction under section 509 of the Penal Code was upheld by the then Pakistan Supreme Court, proves the inbuilt impediments in those provisions.

3. We have also examined the above mentioned proposed amendment, namely proposed section 10 (ka) of the Nari-O-Shisho Nirjaton Daman Ain, 2000. For ready reference the said proposed amendment is quoted below:

“যৌন হয়রানীর দণ্ডঃ যদি কোন ব্যক্তি ধ্বংসায়/ইচ্ছাকৃত ভাবে কোন নারী বা শিশুর পথরোধ করে অথবা অশালীন কোন মন্তব্য বা শব্দ করে অথবা অশোভন অঙ্গভঙ্গী বা স্বপ্ত বা চিত্র বা সাংকেতিক চিহ্ন বা চিহ্ন প্রদর্শন করে অথবা ইনটেরনেট বা টেলিফোনে বা সেলফোন বা এসএমএস বা অন্য কোন মাধ্যম ব্যবহার করে বা অলোকচিত্র গ্রহণের মাধ্যমে কোন নারী বা শিশুকে উত্ত্যক্ত করে বা অপমান করে বা বিরক্ত করে বা শালীনতার অস্বাভাবিক ঘটায় যা উক্ত নারী বা শিশু দেখিতে পারা বা গুনিতে পায় তাহা যৌন হয়রানী মূলক অপরাধ হিসেবে গণ্য হইবে এবং ভঙ্গন্য উক্ত ব্যক্তি অনধিক ৭ (সাত) বছর কিন্তু অনূন্য ১ (এক) বছর সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থ দণ্ডেও দণ্ডিত হইবেন”

It appears that the above proposed amendment has covered some of the issues and mischief — but not enough to tamp down the prevailing amorphous social-epidemic. Just for example, the proposed amendment has not addressed the mischief of stalking and mental trauma of the victims and their family members — although the mental disturbance resulting from the so called eve teasing and stalking is apparently the main reason for the suicides of the victims. Moreover, it does not address sufferings of the well wishers of the victim like relatives, teachers and neighbours who come forward to the rescue of the victim or to protest and/or resist eve-teasing and stalking.

4. There is no doubt that while enacting those laws our legislature took into account the prevalent mischief at the relevant time and the predicted harm and effect of the crime. In enacting a law, no legislature can predict everything with meticulous certainty. We also should not attribute to the legislature of past pre-

science of the present social menace like eve-teasing. There lies the case for change of law to cope with the changing demands of time.

5. Article 10 of our Constitution has mandated participation of women in all spheres of national life; Article 17 made it obligatory on the State to ensure free and compulsory education for all children; Article 28 prohibits discrimination on the ground of sex; Article 29 guarantees equal opportunity of women in employment in the public sector; Article 31 guarantees equal protection of law and to be treated only in accordance with law; Article 32 prohibits deprivation of personal liberty save in accordance with law and, most importantly, Article 36 guarantees right of free movement to every citizen. Apart from Article 10, all other guarantees mentioned above are enshrined in the Constitution as fundamental rights of every citizen and thus put an obligation on the State to ensure them to the citizens. If the State fails to ensure those fundamental rights, Article 44 grants a person aggrieved another fundamental right to move the High Court Division under Article 102 (1) for the enforcement of such rights.

6. The guarantee of free and compulsory education for children, right to liberty and the right to freedom of movement guaranteed under Articles 17, 32 and 36 respectively are meaningless if the girls and women of this country are kept away from school and colleges on account of sexual harassment in the streets, if they face obstruction and hindrance in the streets or any other place, if they are subjected to sexual teasing or stalking, humiliation by Romeos at public or private

places and so on. It is the obligation of the State to ensure those rights guaranteed by the Constitution under Part- III, and in case of failure of the State, as in the present case, the High Court Division is obliged to entertain their grievance and intervene to redress even at the instance of public-spirited organization like the petitioner.

Applicability of International Instruments:

7. The Universal Declaration of Human Rights 1948 (UDHR) recognizes the equal rights of men and women (Preamble articles 1 and 2). Discrimination in the enjoyment of civil, political, economic, social and cultural rights on the basis of sex has been prohibited under the International Covenant on Civil and Political Rights 1966 (ICCPR) [article 2(1)], and the International Covenant on Economic, Social and Cultural Rights (ICESCR) [article 2(2)]. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 is the most comprehensive treaty on women's human right, establishing legally binding obligations to end discrimination against women. It states that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields. Bangladesh is a signatory and has acceded to the above instruments⁶ making it obliged to implement those provisions.
8. In addition, the present Government has also adopted “জাতীয় নারী উন্নয়ন নীতি” (National Women Development Policy) 2008. In the said policy the Government reiter-

⁶ Bangladesh ratified ICESCR and ICCPR in 1998 and 2000 respectively; Bangladesh acceded to the CEDAW in 1984;

⁴ Vide Gazette (extra) Notification dated 10.11.2010, with effect from the date of Gazette;

⁵ Muhammad Sharif V. State, 9 D.L.R (1957) S. C. 27 (A group of young men followed a group of college girls, who were holidaying in a public place, and passed indecent remarks and made obscene gestures;

ated its position to comply with different international covenants and instruments to protect the rights of women. These are not just meaningless commitments.

9. It has now been settled by several decisions of this subcontinent that when there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard. The highly regarded observation of Mr. Justice Bimalendu Bikkash Roy Chowdhury addressing this issue is quoted below:

“The national courts should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law makers to such inconsistencies.”⁷

Applicability of international covenants and conventions was again considered by this court in *State Vs. Metropolitan Police Commissioner*⁸, a case involving rights of children in our country. After examining

several decisions of this subcontinent (including the one mentioned above), this court concluded that if the domestic laws were not clear enough or there was nothing therein, the national courts should draw upon the principles incorporated in the international instruments⁹.

10. A different bench of this court has recently relied on international instruments in *BNWLA vs. Bangladesh*¹⁰ and issued several directives to prevent sexual harassments in education institutions and workplaces of women. We have also had the opportunity to examine the definition of ‘Sexual Harassment’ given by this court in the said decision which is reproduced herein below:

Definition.

(i) Sexual Harassment includes-

- a. Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances.
- b. Attempts or efforts to establish physical relation having sexual implication by the abuse of administrative, authoritative or professional powers.
- c. Sexually coloured verbal representation;
- d. Demand or request for sexual favours;
- e. Showing pornography;
- f. Sexually coloured remark or gesture;
- g. Indecent gesture, teasing through abusive language, stalking, jokes having sexual implication.

⁹ Ibid, paragraphs 20 and 21;

¹⁰ Bangladesh National Women Lawyers Association (BNWLA) Vs. Bangladesh reported in 14 BLC 2009 694;

h. Insult through letters, telephone calls, cell phone calls, SMS, pottering[sic], notice, cartoon, writing on bench, chair, table, notice boards, walls of offices, factory, classroom, washroom having sexual implication.

i. Taking still or video photographs for the purpose of blackmailing and character assassination.

j. preventing participation in sports, cultural, organisational and academic activities on the ground of sex and/or for the purpose of sexual harassment.

k. Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;

l. Attempt to establish sexual relation by intimidation, deception or false assurance.

11. It has to be borne in mind that the judgment and decision of the above noted case was given in a context relating to sexual harassment of girls and women in educational institutions and work places. The court, following the well celebrated judgment of the Indian Supreme Court in *Vishaka case*¹¹, issued some directives in the form of guidelines for preventing sexual harassment of girls/women in the educational institutions and workplaces in Bangladesh.

12. While in full agreement with the said directives and guidelines issued in that case, we are of the view that in the present perspective and in the context of the issues raised in the instant writ petition, we should issue separate supplemental directives and guidelines so that the present horrific situation caused by the so called

eve-teasing and stalking in the streets, neighbourhood, public places, rail and bus station, public and private transports, in and around the home extending to the remote villages of this country may be effectively dealt with. We hold that the definition and directive guidelines given, and / or to be given by this court in this case, are law of this country, and in view of Article 111 of the Constitution, they are binding on all concerned and are to be implemented everywhere until an effective legal measure is evolved and/or enacted by our legislature.

13. Keeping intact the definition of “sexual harassment” given by this court in the above mentioned case¹², we wish to add a new sub-clause (m) to address the issue of ‘stalking’ of women and girls and for this purpose the term “Stalking” has to be defined in clear terms. We have examined relevant laws of other countries in this regard and took help from the definition of ‘stalking’ in the Australian law, namely ‘Stalking Intervention Order Act, 2008’. Although the term stalking has been defined and used in that statute in a gender neutral context, the mischief of stalking in our country in the present scenario has sexual connotations and implications and as such the same is defined herein below in consonance with the same.

14. Since this court’s earlier decision in the above mentioned case has not dealt with sexual harassment in places apart from educational institutions and work places, we hold that the mischief of sexual harassment as defined by this court and its application are not confined only to edu-

⁷ Hussain Mohammad Ershad Vs. Bangladesh & others. 21 BLD (AD)2001 – 69, para –2; Reported in 60 DLR (2008) – 660;

¹¹ Vishaka vs. State of Rajasthan AIR 1997 SC 3011 (see also Delhi Domestic Working Women’s Forum Vs. Union of India. (1995) 1SCC 14);

¹² Bangladesh National Women Lawyers Association (BNWLA) Vs. Bangladesh reported in 14 BLC 2009 694;

cational institutions and work places but extend to all private and public places, railway and bus stations, public and private transports, streets, shops, markets, cinema halls, parks and so on. The above mentioned places are not exhaustive. With the above observations and findings, we issue the following directives/ guidelines in the context of the present scenario:

Directives/ Guidelines:

1. The euphemistic expression "Eve Teasing" should not be used anymore. The expression "sexual harassment" is the appropriate term to be used by all including the law enforcing agencies, government organizations/ establishments and the media (public or private) for describing the incidents or mischief of so called eve teasing and/or stalking;
2. The definition of Sexual Harassment as given by this court in the case of BNWLA Vs. Bangladesh reported in 14 BLC(2009) - 694 is hereby adopted with modification to suit the present need and scenario and that the modified definition stated hereinbelow including the definition of "stalking" shall apply to all places including bus, train, steamer, public and private transport terminals and stops, airports, streets, neighbourhoods, shops, markets, cinema halls etc, in addition to the workplaces and educational institutions. After the said modification, the definition of sexual harassment in the present context shall be as follows:

Definition of Sexual Harassment:

(i) Sexual Harassment includes-

- a. Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances.
- b. Attempts or efforts to establish physical relation having sexual implication by the abuse of administrative, authoritative or professional powers.
- c. Sexually coloured verbal representation;
- d. Demand or request for sexual favours;
- e. Showing pornography;
- f. Sexually coloured remark or gesture;
- g. Indecent gesture, teasing through abusive language, jokes having sexual implication.
- h. Insult through letters, telephone calls, cell phone calls, SMS, pottering[sic], notice, cartoon, writing on bench, chair, table, notice boards, walls of officer, factory, classroom, washroom having sexual implication.
- i. Taking still or video photographs for the purpose of blackmailing and character assassination.
- j. preventing participation in sports, cultural, organizational and academic activities on the ground of sex and /or for the purpose of sexual harassment.
- k. Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;
- l. Attempt to establish sexual relation by intimidation, deception or false assurance;
- m. 'Stalking' as defined below;

Definition of Stalking:

A male individual stalks a female if the male engages in a course of conduct-

(a) with the intention of causing sexual harassment or of arousing apprehension of sexual harassment in the female and

(b) that includes any of the following:

- i) following the female;
- ii) contacting the female by post, telephone, fax, text message (SMS/MMS/blogging/tweeting), email or other electronic communication or by any other means whatsoever;
- iii) causing an unauthorized computer function in a computer owned or used by the female or her family members;
- vi) entering or loitering outside or near the female's place of residence or place of business or work or any other place frequented by the female;
- v) keeping the female under surveillance;
- vi) acting in any other way that could reasonably be expected to arouse apprehension or fear in the female for her own safety or the safety of her family members.

Exceptions:

The following lawful acts are excluded from the above definition of stalking:

- a) the enforcement of the criminal law;
- b) the administration of any Act of Parliament;
- c) the enforcement of a law imposing a pecuniary penalty;

d) the execution of warrant;

e) the protection of the public revenue;

3. Every Police Station in Bangladesh will have separate cell or team, designated only for the purpose of dealing with complaints/instances of sexual harassments in the streets, public places, shops, markets, stations or terminals, bus, train, steamer (private or public) and any other transport and different neighbourhood areas. Particular attention should be given to the places and areas near schools, colleges and universities, parks, cinema halls, theatres, markets and shopping malls attended by the girls and women.
4. The above cells/teams under every Police Station shall report to the existing District Law and Order Committee of each district through their respective Superintendent of Police / Police Commissioner or an officer designated by the concerned SP or Police Commissioner for this purpose.
5. The District Law and Order Committee will time to time (at least once in a month) organize and hold a "Meet the People" session to be attended by the press and women and children rights activists and update them about the occurrences/ incidences of sexual harassment in the concerned district and the steps taken to punish the perpetrators and to prevent recurrence;
6. After consultation with the cyber café service providers, the Government shall, within a reasonable time, make it mandatory for the internet users in

the Cyber Cafes, to produce photo identity card. The Government will make it compulsory for the cyber café service providers to seek identity cards from users and record their names and addresses as well as login time and duration of use including the number of the computer used;

7. Government shall, on an urgent basis, complete its initiative to insert a new section in the Nari-O-Shishu Nirjatan Daman Ain, 2000 defining the mischief of 'Sexual Harassment' in the light of the definition given by us hereinabove and providing appropriate punishment for the same keeping in mind that the main aim of the law or any other measures should be preventive and not retributive;

8. Government shall take immediate steps to enact law for introduction of witness and victim protection system for effective protection of victims and witnesses of sexual harassment as well as the people who come forward to resist sexual harassment. The law will provide measures for taking account of the mental trauma of the victims and for redressing the same;

9. Government shall take immediate steps to formulate law or amend the existing law for incorporating specific provisions giving evidential value to the audio/video recorded statements of victims or witnesses of sexual harassment so that the perpetrators can be punished solely on the basis of such recorded evidence of sexual harassment in case of unwillingness of the victim or other witnesses to give

evidence fearing further attack and humiliation and/or torture.

10. The four directives issued by this court at the time of issuance of the Rule in this writ petition shall remain operative unless they are in conflict with the above directives.

Before concluding, we should note our appreciation for the contributions of Ms. Fahima Nasrin and other learned advocates for the BNWLA, as in this kind of cases -- where the victims do not come forward before the courts -- the presence of public spirited lawyers like them is the demand of the time. We also thankfully acknowledge the book published by BNWLA¹³ titled "Eve-Teasing: The Social Menace" -- containing results of research and recommendations of the experts -- as the same has enlightened us to a great extent. Effective assistance of Mr. Md. Motaher Hosain, learned D.A.G representing respondent No. 2 (Ministry of Law, Justice and Parliamentary Affairs), is also highly appreciated.

With the above directives and observations, the Rule issued in the instant writ petition is made absolute without any order as to costs.

Let a copy of this judgement be communicated to the Ministry of Law, Justice and Parliamentary Affairs, Ministry of Children and Women Affairs and Ministry of Home Affairs for information and necessary actions to be taken in the light of the directives/guidelines hereinabove.

MMHS.

¹³ Edited by Advocate Salma Ali, Executive Director BNWLA;

2011 BLD (HCD) 31

A. K. M. Fazlur Rahman, and Md. Emdadul Haque Azad, JJ

MD. AWALUR HASAN AND ANOTHER

v.

THE STATE *

Non performance of a contract or breach of contract is a civil liability.

The petition of complaint discloses no intentional intention of accused-petitioners to deceive the complainant. No where in the petition of complaint it is alleged that though the accused had no intention to sell the land and building they falsely promised to sell the land with building to have the money. The subsequent conduct of the accused also does not show that they had intention to defraud the complainant. (Para—8)

It is purely a breach of civil contract. The accused persons allegedly contracted to sell their land and building to the complainant for Taka 14 lac and received Taka 2 lac as earnest money agreeing to execute and get the sale deed registered on receipt of balance consideration, but ultimately refused to sell the land and building. It is a clear case of non-performance of contract or breach of contract, which is a civil liability. There is no criminal liability. The complainant allegedly paid Taka 2 lac as earnest money, which became the money of the accused. That money was not entrusted with the accused keeping its ownership with the complainant. So there is no criminal breach of trust. The ingredients of cheating also are absent. There is nothing to show that the complainant gave the accused

persons the money on the promise of the accused persons to sell their land with building to the complainant though they had not such intention to sell the building. Having regard to the above context the allegations made in the petition of complaint even if accepted as true do not constitute any offence of criminal breach of trust punishable under section 406 or cheating punishable 420 of the Penal Code. Therefore, the proceeding of the case if prolonged would be harassment of the accused-petitioners and as such it is a sheer abuse of process of the Court. Therefore the proceeding of the case is liable to be quashed to secure ends of justice. (Para—9)

Mr. M. M. Zulfikar Ali Hyder, Advocate, For the petitioners.

Mr. Zahirul Haque Zahir, Deputy Attorney General, For the State.

Judgment delivered on 4 February, 2010.

Judgment

A.K.M. Fazlur Rahman, J: On an application under section 561A of the Code of Criminal Procedure filed by accused-petitioners this Rule was issued calling upon the opposite parties to show cause as to why the proceeding of C.R. Case No. 1091 of 2004 under sections 406 and 420 of the Penal Code pending in the Court of the Metropolitan Magistrate, Dhaka should not be quashed.

2. The facts relevant for disposal of the Rule, in short, is that the opposite party no. 1 filed a petition of complaint before the Chief Metropolitan Magistrate, Dhaka, against the accused-petitioners alleging that the accused-petitioners contracted to sell their land and

building standing thereon described in the schedule of the petition of complaint to him for consideration of Taka 14 lac and on receipt of Taka 2 lac as earnest money executed a deed of agreement agreeing to execute and get the deed of sale registered on receipt of balance consideration. But they did not make over the possession of the building to him and execute and get the deed of sale registered on receipt of the balance consideration as agreed upon. Lastly they refused to execute and get the deed of sale registered. Thus they deceived him and misappropriated Taka 2 lac and committed the offence of cheating and criminal breach of trust.

3. The Metropolitan Magistrate on receipt of the petition of complaint after examining the complainant under section 200 of the Code of Criminal Procedure took cognizance of the offence under sections 406 and 420 of the Penal Code against the accused-petitioners and issued processes against them. They appeared before the Magistrate and obtained bail. Thereafter, they filed an application for discharging them under section 241A of the Code of Criminal Procedure on the ground that the allegations made against them neither attract the offence of criminal breach of trust nor cheating and it is a civil dispute. The learned Metropolitan Magistrate rejected that application and framed charge under sections 406 and 420 of the Penal Code against them. Then the accused-petitioners filed this application under section 561A of the Code of Criminal procedure for quashing the proceeding on the ground that even if the allegations made in the petition of complaint are taken as their face value and accepted as true, do not

constitute any offence. As such further proceeding of the case is nothing but harassment and is sheer abuse of process of the Court. Therefore, to secure ends of justice the case should be quashed. On such application the accused-petitioners obtained this Rule and an order staying further proceeding of the case.

4. Mr. M. M. Zulfikar Ali Hyder, the learned Advocate appearing on behalf of the accused-petitioners supports the Rule. He submits that the petition of complaint does not disclose that the petitioners had initial intention to deceive the complainant or that the accused-petitioners in fact having no intention to sell the land and building fraudulently induced the complainant to part with Taka 2 lac promising to execute and get the deed of sale registered, though he had no such intention. He further submits that it being pure and simple breach of contract is a civil dispute and there is no criminal liability. The alleged act of failure to perform the contract for sale does not constitute an offence of 'criminal breach of trust' or 'cheating'. Therefore, further prolongation of the proceeding is harassment of the accused. Thus the case being abuse of process of the Court should be quashed to secure ends of justice.

5. No one appears on behalf of the complainant-opposite party no. 1 to oppose the Rule.

6. Mr. Zahirul Huq Zahir, the learned Deputy Attorney General, appearing on behalf of the opposite party no. 2 (State) opposes the Rule. He submits that even a transaction based on contract, apart from civil liability there may be elements of an offence or of-

fences for which a party to the contract may be prosecuted. In this case the complainant was induced by the accused-petitioners to part with Taka 2 lac on the false promise to sell the land with building to him. Thus a prima-facie case under section 420 of the Penal Code has been made out.

7. We have given our anxious consideration on the above submissions of the learned Advocate for the accused-petitioners and the learned Deputy Attorney General for the opposite party no. 2 (state) and carefully examined the petition of complaint.

8. The petition of complaint discloses no initial intention of accused-petitioners to deceive the complainant. No where in the petition of complaint it is alleged that though the accused had no intention to sell the land and building they falsely promised to sell the land with building to have the money. The subsequent conduct of the accused also does not show that they had intention to defraud the complainant.

9. It is purely a breach of civil contract. The accused persons allegedly contracted to sell their land and building to the complainant for Taka 14 lac and received Taka 2 lac as earnest money agreeing to execute and get the sale deed registered on receipt of balance consideration, but ultimately refused to sell the land and building. It is a clear case of non-performance of contract or breach of contract, which is a civil liability. There is no criminal liability. The complainant allegedly paid Taka 2 lac as earnest money, which became the money of the accused. That money was not entrusted with the accused keeping its owner-

ship with the complainant. So there is no criminal breach of trust. The ingredients of cheating also are absent. There is nothing to show that the complainant gave the accused persons the money on the promise of the accused persons to sell their land with building to the complainant though they had not such intention to sell the building. Having regard to the above context the allegations made in the petition of complaint even if accepted as true do not constitute any offence of criminal breach of trust punishable under section 406 or cheating punishable 420 of the Penal Code. Therefore, the proceeding of the case if prolonged would be harassment of the accused-petitioners and as such it is a sheer abuse of process of the Court. Therefore the proceeding of the case is liable to be quashed to secure ends of justice.

10. In the result, the Rule is made absolute. The proceeding of C.R. Case No. 1091 of 2007 under sections 406/420 of the Penal Code pending in the Court of the Metropolitan Magistrate, Dhaka is hereby quashed.

SMZH.