

**Summary of Judgment
CIVIL APPEAL NOS. 593-594OF 2001**

**[From the judgment and order dated 1st January 2001 of the High Court Division in
Writ Petition No. 5897 of 2000]
IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION**

Mohammad Tayeeb

**Appellant
In C.A No, 593/2001**

MoulanaAbulKalam Azad

**Appellant
In C.A No, 594/2001**

-VERSUS-

Government of People's Republic of
Bangladesh, Represented by the
Secretary, Ministry of Religious Affairs and
Others

**Respondents
(in both appeals)**

FACTS

The Bangla Bazar Patrika, a national newspaper, reported the following story on 2 December 2000:

A, a resident of Naogaon District, out of anger uttered '*talaq*' to his wife B, but they continued their marital relationship. However, a local influential person, X, issued a 'fatwa' that the marriage between A and B had been dissolved after uttering '*talaq*' and that B had to enter into an interim marriage ('*hilla*' marriage¹) with her paternal cousin C.

On becoming aware of this news story, a Division Bench of the High Court Division (HCD), Supreme Court of Bangladesh, comprised of Mr. Justice Gholam Rabbani and Madam Justice Nazmun Ara Sultana issued a *suomotu* Rule upon the District Magistrate and Deputy Commissioner of Naogaon to show cause as to why he

¹ According to orthodox *shariah* law, if the parties to marriage desire to cohabit or to continue marital ties after dissolution of the marriage, the wife is required to be married to a third party and that marriage has to be consummated and dissolved as well. The second marriage with the third party is called a *hilla* marriage. However, according to Bangladeshi law, a *hilla* marriage is not required if the marriage is dissolved three times, consecutively following the processes of dissolution of marriage as described in Section 7 of Muslim Family Laws Ordinance 1961.

should not be directed “to do that which he is required by law to do, concerning the said incident and/or pass such other or further order or orders as the Court may deem fit and proper.”

The Deputy Commissioner of Naogaon, the sole respondent contested the case and explained how he discharged his duties as required by law. According to the Affidavit in Opposition filed by the Deputy Commissioner of Naogaon, the police investigated the matter on his directions and on the basis of an FIR² lodged by B herself, the police registered a case³ under the *Nario Shishu Nirjatan Daman Ain, 2000* (as amended 2003) [Suppression of Violence against Women and Children Act 2000]⁴. The police filed another case⁵ against six (6) persons who gave and enforced the fatwa, under Sections 494/509 and 508 of the Penal Code, 1860 read with Section 7 of the Muslim Family Laws Ordinance, 1961. The police arrested the four persons accused in both the cases. The victim B, was returned to her husband’s (A) house, with the assistance of the local Union Parishad.

Subsequently, the HCD bench made the Rule absolute by a judgment and order dated 1 January 2001⁶ and declared all fatwas, including the instant one, to be unauthorized and illegal. The Court further directed that the issuance of a fatwa by unauthorized person(s) should be made punishable by the Parliament, immediately. It also found that execution of a fatwa is a punishable offence under Sections 494, 508, 509 of the Penal Code and under Section 7 of the Muslim Family Laws Ordinance, 1961. The Court also made some recommendations relating to the need for a unified education system, and an enactment to control the freedom of religion, subject to law, public order and morality within the scope of Article 41(1) of the Constitution.

The Government did not file a petition for leave to appeal against this judgment.

² First Information Report filed with the police based upon which a criminal case is started.

³ Naogaon Police Station Case No. 01 dated 3rd December 2000

⁴ Suppression of Violence against Women and Children Act 2000.

⁵ Naogaon Police Station Case No. 02 dated 3rd December 2000

⁶ *Editor, Banglabazar Patrika and two others v District Magistrate and Deputy Commissioner, Naogaon*; reported in 6 MLR (HCD) 2001.

Two individuals, Mufti Mohammad Tayeeb and MoulanaAbulKalam Azad, who were dissatisfied with the judgment and order delivered by the HCD bench in W.P No. 5897 of 2000, filed petitions for leave to appeal separately as third parties. The Appellate Division granted them leave to appeal on 13 November 2001 (Civil Appeal Nos. 593 and 594 of 2001 respectively).

Grounds of Appeal

The appellants' lawyers submitted:

- There is no scope for issuing *suomotu* rule within the writ jurisdiction of the High Court.
- The High Court judgment is in conflict with the right to freedom of thought and freedom of religion. This is because a fatwa is defined as a private opinion having no force of law and originating from the Holy Quran and Hadith. As such banning all sorts of fatwas amounts to violation of fundamental rights guaranteed by Articles 39 (freedom of thought) and 41 (freedom of religion) of the Constitution.
- The recommendations made by the High Court are contradictory to the basic principles of the separation of powers as enshrined in the Constitution.

JUDGMENT OF THE APPELLATE DIVISION

Mr. Justice Sayed Mahmud Hossain delivered the judgment for the majority of the Court, allowing the appeal in part. Four (4) other judges, including Mr. Justice A.B.M. KhairulHaque, the then Chief Justice; Justice Mr. Muzammel Hossain, the previous Chief Justice, Mr. Justice Surendra Kumar Sinha, the present Chief Justice, Mr. Justice Md. Imman Ali agreed with his judgment. Mr. Justice Md. Wahhab Miah disagreed with the majority and delivered a dissenting judgment.

Judgment and Order by Majority, Appellate Division

Considering the submissions of the *Ulema Karims*,⁷ learned Senior Advocates for both the appeals,⁸ the amici curiae,⁹ the interveners,¹⁰ the impugned judgment and the materials on record, both the appeals were allowed in part on 12 May 2011 by a short Order. The full text of judgment was released on 25th January 2015. Significant portions of the judgment and order are set out below:

Re: Power to issue *suomotu* rule

- Where the fundamental rights of a citizen are infringed, the HCD has jurisdiction to issue *asuomotu* rule:¹¹
- A newspaper report, postcard, or other written material may be treated as an “application” in order to overcome the obstacle of filing an application.
- Before issuance of *asuomoto* rule, the HCD must record its satisfaction in clear terms about the exercise of such power and the HCD shall exercise such power cautiously.

Re: Blanket ban on issuing all sorts of fatwa

1. Fatwa on religious matters only may be issued subject to the following stipulations:
 - Must only be issued by educated persons¹²

⁷According to the Court’s direction five (5) *Ulema Karims* were nominated by the Islamic Foundation Bangladesh and the *Ulema Karims* namely Mufti Md. Tufiatullah, Mufti Md. Ruhul Amin, Moulana Kafiluddin Sarker, Mufti Mizanur Rahman Sayeed, Dr. Mufti Abdullah Al-Maruf then placed their submissions before Appellate Division as learned amicus curiae.

⁸ Mr. Nazrul Islam and Mr. Abdur Razzaq appeared for appellants and Dr. Kamal Hossain with Ms. Sara Hossain, Mr. Mahbubey Alam, Attorney General with Mr. MK Rahman, Addl. Attorney General appeared for the respondents.

⁹Nine Senior Advocates of the Supreme Court Mr. T. H. Khan, Mr. Rafique-ul Huq, Mr. Dr. Zahir, Mr. A.B.M. Nurul Islam, Mr. Mahmudul Islam, Mr. Rokanuddin Mahmud, Dr. Rabia Bhuiyan, Mr. M. I. Farooqui, Mr. A. F. Hassan Ariff delivered submissions before the AD.

¹⁰Mr. M. Amirul Islam, Senior advocate and Ms. Tania Amir appeared as interveners.

¹¹The Supreme Court being the guardian of the Constitution, resumes the power to issue *suo moto* rule from the spirit of fundamental principles of State Policy, fundamental rights as guaranteed in Articles 27, 28(2), 31, 32 of the Constitution and article 148 where Oath of office of judges has been inscribed.

¹²The Appellate Division did not create any special class of persons empowered to give fatwa. Educational curriculum of Bangladesh does not recognize “*Mufti*” as a person with any authority to give a legal decision, though the word “*Mufti*” is popular across the subcontinent.

- The fatwa issued may only be accepted voluntarily by the person upon whom it issued
 - Coercion or undue influence in any form to pressure an individual to accept a fatwa is forbidden
2. No person can pronounce a fatwa that violates or affects the rights, reputation or dignity of any person protected by the laws of the land.
 3. No punishment, including physical or mental violence, may be imposed or inflicted on any person in pursuance of a fatwa.
 4. If any fatwa is issued violating these restrictions, it will amount to contempt of court and the offenders will be punished accordingly.

Re: Principle of Separation of Powers

1. The recommendation of the HCD as to a unified education system and an enactment to control freedom of religion under 41(1) of the Constitution is merely asincere wish of the learned judges of the HCD and it is upto the legislature to bring about necessary enactment in this regard.
2. This asincere wish cannot be regarded as an encroachment upon the domain of the legislature. The legislature is always at liberty to do what it thinks fit according to its wisdom.
3. The Supreme Court has, on many occasions made recommendations for amendment of certain laws.¹³

Re: Fatwa imposed upon B

1. The declaration of the High Court Division that the impugned fatwa is void and unauthorized is maintained. The marriage between A and B was not dissolved by uttering '*talaq*'.

Re: Order as to costs

1. There were no orders as to costs.

¹³For example the Court mentioned the case *Khandoker Delwar Hossain, Secretary, BNP and others v Bangladesh Italian Marble Works Ltd, Dhaka and Others* ("Fifth Amendment Case"), reported in (2010) BLD.