Report on a reference by the Government on Appeals and Revisions against orders

This is a reference by the Government under section 6 (Ena) of the Law Commission Act, 1996, in order to examine whether the provisions for appeal and revision against interlocutory orders in a suit or other proceeding can be abolished.

The reference sent to the Commission under Memo No. 227-আইন dated 9-5-2002 of the Ministry of Law, Justice and Parliamentary Affairs runs as follows:-

"বিষয়ঃ অন্তবর্তী কালীন আদেশ (Interlocutory orders) এর বির□দ্ধে রিভিশন/আপীল দায়েরের বিধান অবলুপ্তি/সংকোচন প্রসঙ্গে।

মূল মামলায় যে কোন ছোটখাট বিষয়ের উপর প্রদত্ত আদেশের বির□দ্ধে বিধান মাফিক রিভিশন/আপীল দায়েরের সুযোগ থাকায় মামলা সংশ্লিষ্ট কোন এক পক্ষ উ□চতর আদালতে প্রতিকার প্রার্থী হয়ে মূল মামলার নি□ত্তি দীর্ঘায়িত করে। ফলশ্র□তিতে উ□চতর আদালতে অনাকাঙ্খিত মামলাজট সৃষ্টি হয়েছে। ন্যায়বিচার নিশ্চিত করতে মামলার দীর্ঘ সুত্রিতা কমিয়ে সহনশীল পর্য্যায়ে আনা দরকার।

উপরে-বর্ণিত উদ্দেশ্য বাস্তবায়ন কল্পেঃ

(ক) অন্তবর্তী কালীন আদেশ (Interlocutory orders) এর বির□দ্ধে মূল মামলাটি শুনানীর পর্য্যায়ে বিবেচনার পর্যাপ্ত সুযোগ প্রদান এবং সেই সাথে উক্তর□প আদেশের বির□দ্ধে রিভিশন/আপীলের বিধান অবলুপ্ত করা যায় কিনা;

(খ) 'ক' দফায় বিধৃত সকল বিষয়ে রিভিশন/আপীলের বিধান অবলুপ্ত করা যুক্তিযুক্ত না হ'লে বিষয় ভিত্তিক বিধান করে রিভিশন/আপীলের আওতা সংকোচন;

(গ) পূর্বোক্ত দফা 'ক' ও 'খ' এর বাইরে কমিশন উপর্যুক্ত (sic) মনে করিলে অন্য কোন বিধান।------"

It appears from the reference that the Government have identified two consequential aspects of appeal and revision against "interlocutory orders" passed in a suit or other proceeding by the trial court. These two aspects are, first, taking advantage of the opportunity of preferring an appeal or a revision against an interlocutory order in a suit, any of the parties prefers such appeal or revision, as the case may be, to the appellate court or the court of revision and thereby delays the disposal of the original suit or proceeding and, secondly, filing of appeals and revisions piles up the number of litigations in the higher courts.

The Government further feels that in order to ensure fair justice the long delay in the disposal of cases is required to be eliminated and with this end in view, the Government have sought opinion of the Law Commission as to whether—

(a) the provisions regarding appeal and revision against interlocutory orders can be abolished and whether objection against interlocutory orders can be considered at the time of final hearing of the suit or the proceeding;

(b) alternative provisions (or subject-wise provisions) can be made if abolition of the provisions for appeal and revision is not justified; and

(c) any other appropriate provisions can be made.

At the very outset, it may be pointed out that the first part of reference (ক) running as follows, "অন্তবর্তী কালীন আদেশ (interlocutory orders) এর বির□দ্ধে মূল মামলাটি শুনানীর পর্য্যায়ে বিবেচনার পর্যাপ্ত সুযোগ প্রদান এবং----------" is somewhat incomprehensible and rather misconceived. It is difficult to understand how an objection against an interlocutory order can be considered at the time of final hearing of an action. It is not also understood which forum will consider such objection at the time of final hearing of the suit or the proceeding. Moreover, such order being " interlocutory" order i.e an order during the pendency of a suit or proceeding, any objection against such order must be disposed of before final disposition of the suit or proceeding and also before the suit or proceeding is taken up for final hearing and disposal and on this underlying principle the provisions for appeal and revision against interlocutory order have been devised in our procedural law that regulates the practice and procedure of the civil courts. The first part of reference (ক) need not, therefore, be answered.

The Code of Civil Procedure, 1908 (Act V of 1908) mainly regulates the practice and procedure of the civil courts which deal with civil litigations.

The expression, "interlocutory order," has not been defined in the Code of Civil Procedure, 1908 although it has been used in a few places[19]. The expression, "order", has, however, been defined as follows:- " "order" means the formal expression of any decision of a Civil Court which is not a decree."[20] In this definition, all orders passed by a civil court other than a "decree" which has been defined as "the

[19] See the Code of Civil Procedure, 1908, section 94 (e), Order XXXIX.
[20] See Ibid, section 2 (14).

formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or
(b) any order of dismissal for default----------"[21] are included.

Since a decree finally determines the rights of the parties in a suit, it is passed at or after the final hearing of the suit and within it, rejection of plaint and order relating to restitution of property under section 144 of the Code of Civil Procedure, 1908 are included. All other orders passed during the period which intervenes between the filing of a suit and the passing of the decree therein are interlocutory orders.

Section 94 of the Code of Civil Procedure, 1908, specifically empowers the court to make certain orders "in order to prevent the ends of justice from being defeated. "These are (a) arrest before judgment; (b) attachment before judgment; (c) temporary injunction; (d) appointment of receiver; and (e) other interlocutory orders.[22]

Section 104 of the Code of Civil Procedure 1908 provides for appeal against: (a) an order under section 35A; (b) an order under section 95; (e) an order under any of the provisions of the Code of Civil Procedure, 1908, imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree and (d) any order made under rules from which an appeal is expressly allowed by rules.[23]

The items mentioned in clause (d) above have been provided in Order 43 rule 1 wherein orders against which appeal lies have been specified. There are 26 such appealable orders which also cover arrest before judgment, attachment before judgment, temporary injunction and appointment of receivers provided for in section 94 of the Code of Civil Procedure, 1908. These 26 appealable orders need not be

[21] See Ibid, section 2 (2).
[22] See Supra Note 1, section 94; Order 34, rules 1 to 4 ; Order 38, rules 5 to 10; Order 39, rule 7; Order 39, rules1 to 5; Order 40, rules 1 to 5; Order 39, rules 6 to 10
[23] Ibid, section 104.

reproduced so as to avoid prolixity[24]. An examination of these orders shows that the legislative wisdom dictated that these orders, either way, are likely to affect the interests of the litigants very vitally during the pendency of the suit and as such, it was felt unwise to vest the trial court with absolute power in respect of these orders. If the provision for appeal against these orders is abolished the trial court's order relating to them will be final and as such, in respect of these orders the trial court will enjoy absolute power without accountability. As a result, the litigant against whom such orders are passed may suffer such irreparable damage as may not be recouped even if such party ultimately succeeds in the suit. Say, a party's prayer for temporary injunction for restraining the other party from altering, changing or damaging the property in suit is refused by the trial court whose order will be absolute if the provision for appeal against it is abolished. If the party praying for temporary injunction ultimately succeeds, such party may find the property in suit materially damaged by the time the suit is disposed of. The same may happen in the case of a prayer for attachment before judgment or a prayer for appointment of a receiver or other appealable orders.

We appreciate the concern of the Government in view of the inordinate delay which has become an intolerable malady in the judicial system in this country. It is also true that in some cases unscrupulous litigants sometimes try to cause delay in the disposal of a suit by preferring an appeal against an appealable order and then keeping the appeal pending in the appellate court by employing various types of machinations. The proper remedy for such problems lies in proper case management and vigilance by the appellate courts and not in doing way with the remedy of appeal against appealable orders altogether. We feel that if the trial court is vested with absolute power by abolishing the provision for appeal in respect of the appealable orders, the cause of justice will suffer irreparable damage.

We have also examined the provisions of appeal against orders in the laws of India, Pakistan and Sri Lanka.

India inherited the same Code of Civil Procedure as Bangladesh. So also is the case with Pakistan. The Sri Lankan Civil Procedure Code closely resembles various

[24] For details of these orders, see Ibid, Order 43, rule 1.

provisions of the Indian, Pakistan and Bangladesh Code of Civil Procedure. India brought extensive amendments to her Code of Civil Procedure in 1976.[25] In the Indian Code of Civil Procedure, there are 19 appealable orders. By the amendment in 1976 certain orders were included as appealable orders.[26] Moreover, in addition to the above, various State Governments in India made further additions to the list of appealable orders. In the Pakistan Code of Civil Procedure, there are 24 appealable orders.[27] The Sri Lankan Civil Procedure Code which was also extensively amended in 1977 provides for appeal against "any order made by any original court in course of any civil action, proceeding or matter."[28] Sri Lanka appears to have made the scope of appeal against interlocutory orders much wider than Bangladesh, India and Pakistan. It appears that although the problems of delay and back-log are as acute in these countries as in Bangladesh, the legislative perception in these countries is against vesting of absolute power in the trial court in respect of interlocutory orders.

Considering various aspects and particularly, the experience of this country and the experience of the neighbouring countries, we are of the opinion that it will not be advisable to abolish the provisions for appeal against certain orders as provided in the Code of Civil Procedure, 1908.

The Code of Civil Procedure, 1908, has provided for revision of orders which are not appealable to it, by the High Court Division. The relevant provision in this respect is section 115 of the Code of Civil Procedure, 1908, which runs as follows:- "Revision- The High Court Division may call for the record of any case which has been decided by any Court subordinate to the High Court Division and in which no appeal lies thereto, and if such subordinate Court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice, the High Court Division may make such order in the case as it thinks fit".[29]

The High Court Division alone is empowered to entertain a revision against any order passed by a court subordinate to it other than an order from which an appeal lies thereto and may revise such order if

(a) such subordinate court has committed an error of law;

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[25] See (Indian) Act 104 of 1975
[26] See Ibid, order XLIII, rule 1
[27] See (Pakistan) Code of Civil Procedure, 1908, Order XLIII, rule 1.
[28] See (Sri Lankan) Civil Procedure Code, section 754 (2).
[29] See Supra note 1, section 115.

(b) such error of law has resulted in an error in the decision; and

(c) such decision has occasioned a failure of justice.

All the above three conditions must be fulfilled before an order can be revised by the High Court Division. It is clear that the High Court Division has been vested with this extra-ordinary revisional jurisdiction in order to prevent gross miscarriage of justice resulting from two other indispensable factors: (a) commission of error of law and (b) error in decision in view of such error of law. The three conditions are inter-linked and if one of them is missing the order in question cannot be revised. In such conditions, many a revisional matters may be disposed of summarily even without calling for the records of the trial court. In this way, the revisional court can eliminate delay by exercising proper discretion and management. The revisional jurisdiction of the High Court Division is aimed at rectifying gross errors of law and decision and the resultant miscarriage of justice at the preliminary stage of a proceeding. If these are left for rectification at the appellate stage after passing of the decree, sufferings of the litigants will be multiplied because, an error which could be rectified by the High Court Division in its revisional jurisdiction at the preliminary stage of a suit, will have to be rectified in appeal resulting in the remand of the suit in many cases thereby prolonging delay in disposal instead of reducing it.

India, Pakistan and Sri Lanka provide for the revisional jurisdiction of the superior court.[30]

We have also carefully considered whether the provision for revision of orders passed in appeals against appealable orders by the courts subordinate to the High Court Division may be abolished. It appears that if the provision for revision of such orders by the High Court Division is abolished, the aggrieved parties are likely to take recourse to the writ jurisdiction of the High Court Division for challenging these orders by invoking paragraph (ii) of sub-clause (a) of clause (2) of article 102 of the Constitution. [31] They cannot do it at the present moment as an alternative remedy by way revision under section 115 of the Code of Civil Procedure, 1908, is available to them. As such, discontinuance of the provision of revision against orders passed in appeals against appealable order will hardly be a remedy against delay in disposal of

[30] See Supra note 1, section 115; note 9, section 115; and note 10, section 753.
[31] See Constitution of the People's Republic of Bangladesh, article 102 (2) (a) (ii).

the original suit or proceeding or accumulation of cases in the higher courts which, in absence of its power of revision of orders passed in appeals against appealable orders by the lower appellate courts, is likely to be flooded with writ petitions. So long as the Constitution exists, the jurisdiction of the High Court Division can not be totally excluded in view of articles 102 and 109 of the Constitution by abolishing its revisional power under section 115, the Code of Civil Procedure, 1908.

Considering the question from every angle, we are of opinion that the existing provisions for appeals against appealable orders and revision may not be disturbed.

In response to the reference made by the Government the recommendations of the Commission are, therefore, as follow:-

Recommendations

(1) The provision relating to appeals against orders as provided in the Code of Civil Procedure, 1908(Act V of 1908), may remain as they are.

(2) The provision relating to revision as provided in section 115 of the Code of Civil Procedure, 1908, may remain as it is.

(3) Administrative steps may be taken for quick disposal of appeals and revisions against orders.

(Justice A.K.M. Sadeque)
Member

(Justice Naimuddin Ahmed)
Member

(Justice A.T.M. Afzal)
Chairman