

13 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 7251 of 2016

S.M. Sajjad Hossain, son of late Bozlur Rahman and late Jobeda Begum, Village-Khararia, P.O.-Khararia, Upazila-Kalia, District-Narail.

..... Petitioner.

Vs.

Chairman, National Freedom Fighter Council, Ministry of Freedom Fighter, Governemnt Paribahan Pool Bhavan Secretariat Link Road, Dhaka-1000 and others.

...Respondents.

Mr. Omar Sadat with
Mr. Md. Jahangir Zamadder, Advocates
..For the petitioner.

Mr. Md. Mokleshur Rahman, D.A.G
Ms. Shuchira Hossain, A.A.G with
Ms. Samira Tarannum Rabeya, A.A.G
..For the respondent No.2.

with
Writ Petition No. 11671 of 2016

In the matter of:
Md. Abul Hashnath Beg. Freedom Fighter
..... Petitioner.

Vs.

The Government of Bangladesh and others.

.....Respondents.

Ms. Nargis Tangima Khatun, Advocate
....For the petitioner.

with
Writ Petition No. 14203 of 2016

In the matter of:
Md. Ahamad Ali and others
..... Petitioners.

Vs.

Bangladesh and others.
...Respondents.

Ms. Salina Akter, Advocate
....For the petitioners.
with
Writ Petition No. 15155 of 2016

In the matter of:
Md. Rowshon Ali & others, Advocates
.. petitioners.

Vs.

Bangladesh and others.

Ms. Salina Akter, Advocate
.....For the petitioners.

Mr. Md. Mokleshur Rahman, D.A.G
Ms. Shuchira Hossain, A.A.G with
Ms. Samira Tarannum Rabeya, A.A.G
..For the respondent No.1.

with
Writ Petition No. 15572 of 2016

In the matter of:
Md. Abdul Mannaf and others.
..... Petitioners.

Vs.

Bangladesh and others.
.....Respondents.

Ms. Salina Akter, Advocate
....For the petitioners.
with

Writ Petition No. 16076 of 2016

In the matter of:
Neamat Ali Sheikh and others
..... Petitioners.

Vs.

Government of Bangladesh and others.
.....Respondents.

Mr. Sharif Ahmed, Advocate
....For the petitioners.
with
Writ Petition No. 625 of 2017

In the matter of:
Md. Rois-ul Mufassirin and others
..... Petitioners.

Vs.

Bangladesh and others.
...Respondents.

Mr. Md. Eunos Ali Akond, Advocate
....For the petitioners.

with
Writ Petition No. 4395 of 2017

In the matter of:
Md. Anamul Haque and others
..... Petitioners.

Vs.

The govt. of Bangladesh and others.
...Respondents.

Mrs. Nargis Tanzim Khatun, Advocate
....For the petitioners.

with
Writ Petition No. 14784 of 2017

In the matter of:
Md. Humayun Kabir and others
..... Petitioners.

Vs.

Government of Bangladesh and others.
...Respondents.

Mr. Sharif Ahmed, Advocate
....For the petitioners.
with
Writ Petition No. 13163 of 2017

In the matter of:
Jatindra Nath Sen and others
..... Petitioners.

Vs.

Government of Bangladesh and others.
...Respondents.

Mr. Sharif Ahmed, Advocate
....For the petitioners.

with

Writ Petition No. 13262 of 2018

In the matter of:
Md. Abul Kalam
..... Petitioner.

Vs.

The Secretary, Ministry of Freedom
Fighter and Liberator War Affairs,
Government of the People's Republic of
Bangladesh, Secretariat, Dhaka and others.
.....Respondents.

Mr. Md. Eunos Ali Akond, Advocate
....For the petitioner.

Mr. Md. Borhan Miah, Advocate
..For the respondent No.5.

with

Writ Petition No. 10736 of 2018

In the matter of:
Md. Siddiqur Rahman and others
..... Petitioners.

Vs.

Govermennt of People's of Bangladesh
and others.

...Respondents.

Mr. Shasti Sarker, Advocate

....For the petitioners.

with

Writ Petition No. 12353 of 2018

In the matter of:

Md. Saizuddin alias Haji Mohammad Saiz
Uddin Ahamed.

..... Petitioner.

Vs.

Govermennt of People's Republic of
Bangladesh and others.

...Respondents.

Mr. Shuvrojit Banerjee, Advocate

....For the petitioners.

with

Writ Petition No. 11821 of 2018

In the matter of:

B.M. Amdad Hossain

..... Petitioner.

Vs.

Govermennt of People's Republic of
Bangladesh and others.

...Respondents.

Mr. Shuvrojit Banerjee, Advocate

....For the petitioner.

with

Writ Petition No. 8708 of 2018

In the matter of:

Mahmud Hasan

..... Petitioner.

Vs.

Govermennt of Bangladesh and others.

...Respondents.

Mr. A.R.M. Kamruzzaman Kakon,
Advocate

....For the petitioner.

Heard on 24.01.2019, 10.04.2019 and
08.05.2019.

Judgment on: 19.05.2019.

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Razik-Al-Jalil

Age of freedom fighters;

It is well settled that in exercise of executive functions of the government, the government can issue circulars, notifications, paripatra etc. to keep its work transparent. Such notifications or circular etc. may be issued in order to give benefits of the enlisted freedom fighters, which is no doubt an appreciable job by the government. But in doing so, the government cannot amend the parent law, namely the definition of freedom fighter as provided by Article 2(h) of P.O. 94 of 1972.

When parliament itself cannot fix the age of freedom fighters as the fixing of such age of freedom fighters will be contrary to the Speech of Bangabandhu and the Declaration of Independence by Bangabandhu, which are part of the Constitution, the same Parliament cannot empower the government to fix such age. On this very simple ground, this empowerment "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে" as incorporated in the definition of 'বীর মুক্তিযোদ্ধা' under section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No.51 of 2018), has become ultra-vires the Constitution.

It has long been decided by various judicial pronouncements that which you cannot do directly, you cannot do the same indirectly. As stated above, when the Parliament itself cannot fix the age of the freedom fighters even by enactment of law without amending the Constitution, it cannot empower anybody including the government to fix such age of freedom fighters.

JUDGMENT

SHEIKH HASSAN ARIF, J

1. Since the questions of law and facts involved in the aforesaid writ petitions are almost same, they have been taken up together for hearing and are now being disposed of by this common judgment.

2. The petitioners, who are claiming themselves to be the enlisted and gazetted freedom fighters, have challenged in these writ petitions the actions of respondent authorities stopping their honorarium that they were receiving as freedom fighters as well as the memoranda issued on different dates by which minimum age of freedom fighters during liberation war have been fixed by the government.

3. Back Ground Facts:

3.1. Facts, relevant for disposal of the Rules, are that, according to the petitioners, they were juvenile/child freedom fighters and joined the war of liberation to liberate this country in response to the call of Bangabandhu Sheikh Mujibur Rahman. It is contended by them that they fought in different frontiers during liberation war under the leadership of different sector commanders and, accordingly, they made their marks as child/juvenile freedom fighters and even lost some of their juvenile colleagues in such war. That after the war of liberation i.e. after independence of Bangladesh, they were accordingly given certificates by the concerned authorities including the government and their names were published in ‘Muktibarta’, which is commonly known as ‘red book’ and, subsequently, their names were published as freedom fighters in the gazette of the government. It is contended by some of the petitioners that though they were physically fit enough to participate in the liberation war, their SSC certificates were subsequently prepared with wrong dates of birth showing less age as that was the practice at the relevant time as adopted by the teachers and parents. It is also contended that child/juvenile freedom fighters, warriors or soldiers are not new concept, rather it has long history going back to the World War-I and that the participation of the child and juvenile freedom fighters in the war of liberation has been recognized by various historians in this country who wrote on the history of liberation war, in particular the book “মুক্তিযুদ্ধে শিশু-কিশোরদের অবদান”, as written by Major Kamrul Hassan Bhuiyan. However, the petitioners have found in 2015 that the government started fixing the minimum age of freedom fighters at the time of liberation war by issuing different Paripotro, Nirdeshika and memo from time to time purportedly on the recommendation of the Jatiyo Muktijoddha Council.

3.2. It is commonly contended by them that since they have fought the war of liberation responding to the call of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman, who did not make such call with any discrimination

or to any particular group of citizens, rather to all the citizens of Bangladesh irrespective of their age, and since the such call of Bangabandhu and his declaration of independence have become part of the Constitution, government is not empowered to change the status of the petitioners as freedom fighters by fixing a minimum age at any particular time for being such freedom fighters.

- 3.3. By obtaining the Supplementary-Rule challenging the definition of ‘Valiant Freedom Fighters’ as provided by Section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular the empowerment of the government by such definition to fix the date of freedom fighters, it is contended in Writ petition No. 7251 of 2016 that this provision is ultra-vires the Constitution inasmuch as that the same has empowered the government to fix the date of the freedom fighters retrospectively who fought the war of liberation in 1971. It is contended therein that this empowerment of the government by the Legislature cannot be done inasmuch as that the same has given unguided power to the government and that the same is contrary to the historic speech of Bangabandhu Sheikh Mujibur Rahman and his declaration of independence as incorporated in the Constitution. It is also contended that such power cannot be given to the government inasmuch as that the same has given the power on the executives to fix the date of freedom fighters retrospectively, in particular when the executives are not in a position to determine such age after 45 years of the liberation war as to whether a freedom fighter at certain age was competent to participate in the liberation war.
- 3.4. With the above backgrounds, the petitioners obtained the aforesaid Rules challenging the said memos fixing the minimum date of freedom fighters as well as the provisions of Section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No. 51 of 2018) in so far as the same relates to the empowerment of the government to fix the age of the Freedom Fighters time to time.
- 3.5. The Rules are opposed by the government by filing affidavit-in-opposition and supplementary-affidavit-in-opposition in one writ petition, namely in Writ Petition No. 15155 of 2016, contending mainly that after enactment of the Freedom Fighters Council Act, 2002, in particular the provisions under Section 7(jha) therein, the Jatiyo Muktiyoddha Council (JAMUCA) has been conferred with the power by the Parliament to prepare the list of genuine freedom fighters and to determine the forgery in the certificates of the freedom fighters and, accordingly, to recommend the government for cancellation of such freedom fighters’ certificates. In doing so, it is contended, JAMUCA initially recommended the government for fixing the minimum age of freedom fighters at 13 years on 26.03.1971 and, subsequently, made further recommendations to change the said age and finally the same was changed on such recommendation to 12 years 6 months on a particular date in 1971. Therefore, it is contended that, since JAMUCA has been empowered by the Parliament to detect exploitation of the benefits of freedom fighters given by the government time to time and to detect the forged certificates of freedom fighters in order to publish the list of genuine freedom fighters and to recommend accordingly, the government has fixed the said ages on

JAMUCA's recommendation and, as such, has committed no illegality. However, by a subsequently filed supplementary-affidavit dated 06.05.2019 in Writ Petition No.15155 of 2016, it is contended by this respondent that such age limit will only be applicable to the new enlistment of freedom fighters, and not to the freedom fighters who have already been enlisted and gazetted.

- 3.6. It is also contended by this respondent that with the enactment of Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular with the conferment of power on the government by the definition of 'Valiant Freedom Fighters' as provided by Section 2(11) of the said Act, the government became empowered to fix such ages of freedom fighters time to time. Therefore, according to this respondent, no illegality has been committed and that such empowerment by the Parliament should not be held to be ultra-vires the Constitution.

4. **Submissions:**

- 4.1. Learned advocates appearing for the petitioners, namely Mr. Omar Sadat, Mr. A.B.M. Altaf Hossain, Ms. Salina Akter, Mrs. Nargis Tanzim Khatun, Mr. Md. Eunus Ali Akond, Mr. Sharif Ahmed, Mr. Shasti Sarker, Mr. Shuvrojit Banerjee and Mr. A.R.M. Kamruzzaman Kakon have argued the cases at length in favour of the petitioners. However, main legal submissions in this bunch of cases has been made by Mr. Omar Sadat by referring to various provisions of the Constitution as well as enactments and notifications, circulars, Nirdeshika etc. as issued by the government from time to time. The basic submissions of Mr. Omar Sadat, learned advocate, which have been adopted by the learned advocates of the other petitioners in all writ petitions, are as follows:

- 1) That the definition of the term 'freedom fighters' was given by Bangladesh (Freedom Fighters) Welfare Trust Order, 1972 (P.O. 94 of 1972) immediately after the liberation of this country in exercise of the power of the then President Bangabandhu Sheikh Mujibur Rahman and the said definition did not restrict anything as regards the age of the freedom fighters. Therefore, according to him, that definition as provided by the said P.O. 94 of 1972 cannot be changed by the government without amending the said law;
- 2) That the said P.O. 94 of 1972 has empowered the government or the Board to make Rules and Regulations for proper working of the said Presidential Order. However, no such Rules and/or Regulations having been framed by the government, the definition of freedom fighter as provided by the said Presidential Order has been changed by the Government by different circulars time to time without any lawful authority and as such the same cannot stand in the eye of law;
- 3) By referring to the provisions under the Constitution, in particular the Preamble of our Constitution and the provisions under the 6th Schedule of the Constitution as incorporated vide Article 150(2) containing particularly therein the historic speech of Bangabandhu Sheikh Mujibur Rahman as delivered on 7th March, 1971, the telegraphic declaration of independence as given by Bangabandhu Sheikh Mujibur Rahman in the early morning of 26th March, 1971 and the proclamation of independence as given by the Mojibnagar

Government on 10th April, 1971, he submits that the same having become part of the Constitution and since in the said speeches and proclamations, the people at large of this country were urged to participate in the liberation war to liberate the country from Pakistany occupying forces and since the petitioners participated in the said liberation war on such call of Bangabandhu Sheikh Mujibur Rahman irrespective of their ages, religions cast etc., the Government cannot now change basic tenor of such historic speech and proclamations of Bangabandhu Sheikh Mujibur Rahman as well as the definition of freedom fighters impliedly given therein through such speech and proclamations without amending the Constitution. Therefore, according to him, since the fixation of ages of freedom fighters at different times by the government, either on its own or on the recommendation of JAMUCA, being made contrary to the provisions of the Constitution, the same are nothing but nullity in the eye of law;

- 4) That since the aforesaid declaration of independence and speech of the father of the nation became part of the Constitution, the same cannot be changed by mere enactment of law in the Parliament, in particular by enacting Bangladesh Freedom Fighters Welfare Trust Act, 2018, thereby changing the definition of freedom fighters as given by such speech and declaration of independence. Therefore, since the provision under Section 2(11) of the said Act, 2018 has changed the said definition as incorporated in the Constitution without amending the Constitution, the same has become void ab initio in view of the provisions under Article 7(2) of the Constitution;
- 5) That since the Freedom Fighters Welfare Trust Act, 2018, in particular Section 2(11) of the same, has given unguided power on the government to fix the age of the freedom fighters who participated in the war of liberation in 1971, such unguided and unbridled power cannot be delegated by the Parliament and as such the delegation of legislative power to the executives is beyond the scope of the Constitution. Accordingly, the said empowerment of the government is ultra-vires the Constitution.
- 6) That since child warriors, soldiers, freedom fighters is nothing new in this world, rather it has histories as back as to the World War-1 wherein some children of 8 years, 9 years and 12 years fought the war with gallantry and were awarded different gallantry certificates, some children and juveniles in Bangladesh were also not exception as they participated in the liberation war and were awarded certificates for their gallantry. In this regard, he has referred to the awarding of 'Bir Protik' in favour of one such child freedom fighter named Shahidul Islam (Lalu). He then referred to a detailed report published on the said Shahidul Islam (Lalu) in Daily Ittefaq on 10.12.2014 showing him in a picture on the lap of Bangabandhu Sheikh Mujibur Rahman surrounded by Kader Siddique Bir Uttom and other freedom fighters;
- 7) Further referring to a decision of our Appellate Division in **Freedom Fighters Trust vs Mominul Haq, 14 BLC (AD) 2009-41**, Mr. Sadat submits that since the petitioners' entitlement to receive honourarium regularly being curtailed without any prior show cause notice or enquiry being conducted against them

on the basis of any allegation, such stoppage of honourarium and cancellation of benefits are without lawful authority being violative of principle of natural justice;

- 8) By referring to some schemes as adopted by the Indian Government to give benefit to their freedom fighters, learned advocate submits that when our neighboring country is providing more and more benefits to the freedom fighters, who agitated and fought against the British Regime, our government is reducing such benefits time to time by putting forward various hurdles for the freedom fighters who have once been recognized as freedom fighters and gazetted as such;
- 9) That if the provisions under Section 2(11) of Bangladesh Freedom Fighters Welfare Trust Act, 2018 are allowed to remain in the statute book, any future government, with hidden anti-liberation agenda, might take the advantage of the said provisions and might further curtail the entitlement of the freedom fighters as the said provision has given unguided power on the government to determine the age of the freedom fighters retrospectively. According to him, if such practices of empowerment of government is allowed, one day might come when the freedom fighters will be declared as Razakars;
- 10) As against above submissions, Mr. Mokleshur Rahman, learned Deputy Attorney General representing the Government, submits that under the Jatiyo Muktijoddha Council Act, 2002, JAMUCA was empowered by the Parliament to detect the forgery in the certificates of freedom fighters and to enlist the genuine freedom fighters and, accordingly, to recommend the government for cancellation of any such certificates. Therefore, according to him, since the JAMUCA has time to time recommended the government to fix the age of the freedom fighters to prevent the illegal exploitation of different benefits given to the freedom fighters, the government has committed no illegality in complying with such recommendation of JAMUCA and, accordingly, in fixing such minimum ages of freedom fighters. He submits that with the new enactment of Bangladesh Freedom Fighters Welfare Trust Act, 2018, in particular the provisions under Section 2 (11) therein, the government has been finally empowered by the Parliament to fix such ages of freedom fighters.

5. Discussions, Findings and Orders:

- 5.1. Before going into the merit of the arguments of the parties, let us first discuss the history of the definition of the term 'freedom fighters' as has recognized by the presidential orders, our Constitution and different laws. Even before the Bangladesh Constitution came into being physically, the then President of Bangladesh Bangabandhu Sheikh Mujibur Rahman issued President Order No. 94 of 1972 on 7th August, 1972, wherein the term 'freedom fighter' was defined for the first time under Article 2(h) in the following terms:

“2(h) freedom fighter” means any person who had served as a member of any force engaged in the war of liberation but shall not include members of the defence Services or the Police or the Civil Armed Forces:”

5.2. Under the said P.O. 94 of 1972, in particular Articles 16 and 17 thereof, the government and the Freedom Fighters Welfare Board respectively were empowered to make Rules and Regulations, not inconsistent with the provisions of the said Presidential Order, for carrying out the purposes of the said P.O. Admittedly, no such Rules and Regulations have ever been framed under the said Presidential Order. The said Presidential Order went through various amendments subsequently, but the relevant amendment in 1980 vide Act No. 41 of 1980 is relevant in that by this amendment, the definition of 'freedom fighter' has been amended by excluding two other categories or persons from the said definition, namely the government pensioners and any other persons having any regular source of income. However, these subsequent amendments are not very much relevant for the purpose of these writ petitions.

5.3. The Government Servant (Seniority of Freedom Fighters) Rules, 1979:
This Rules of 1979 was framed by the President (circulated vide notification dated 24.12.1979) in exercise of the power of the President under Article 133 of the Constitution. It has been stated in the preamble of the said Rules that the same was framed after consultation with the Public Service Commission as required by Clause (2) of Article 140 of the Constitution. It appears that this Rules of 1979 was in fact framed to recognize or declare the government officials as freedom fighters who played role in favour of liberation of Bangladesh during the war of liberation. Amongst others, Rule 4 of the said Rules gave two years anti-dated seniority to the government servants who were determined as freedom fighters as per the definition given by Rule 3 of the said Rules. The said definition, as provided by the said Rules under Rule 3, is quoted below:

“3. Definition.-In these rules, unless there is anything repugnant in the subject or context, “Freedom Fighter” means any of the following persons who being employee on the 25th March, 1971, of the erstwhile Government of Pakistan or of the Government of East Pakistan/West Pakistan participated in the War of Liberation, namely:

(ii) Those who officially reported to the Government of Bangladesh at Mujibnagar and were accepted by the Government of Bangladesh;

(iii) Those who abstained from their duty under the occupation regime and did not receive salary from that regime with a view to participating in the liberation struggle, whether staying inside or outside Bangladesh, for a continuous period of not less than three months immediately preceding the 3rd of December, 1971, and did not serve under any other Government or under any organization which was not under the control of the Government of Bangladesh but could not formally report to the Government of Bangladesh at Mujibnagar;

(iv) Those who expressly declared their allegiance to the Government of Bangladesh from abroad and thereby defected from service under the else while Central or Provincial Government before the 31st of October, 1971.

(v) Those who worked for the liberation struggle and carried out instructions of the Government of Bangladesh at Mujibnagar during the period from the 17th April to the 10th December, 1971 but has not openly declared their allegiance to the Government of Bangladesh from abroad for tactical reasons and under clear and recorded instructions from, the Government of Bangladesh at Mujibnagar; and

(vi) those who suffered imprisonment or detention in the hands of occupation army and on release were not reinstated or were dismissed or removed from Service or did not join Service before 16th December, 1971”.

- 5.4. Therefore, it appears that, for a particular purpose of giving benefit to the government servants who played Role in favour of the Mujibnagar government or played role in various countries in favour of the liberation war of Bangladesh, the government has given them recognition as ‘freedom fighters’ by incorporating them in the above quoted definition. In this regard, Article 133 of the Constitution may be quoted below:

“133. Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic: Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law”.

It appears from the above proviso to Article 133 that the Constitution has empowered the Hon’ble President to make Rules regulating the appointment and conditions of service of the public servants until any law in that behalf is made. Therefore, in exercising the power to make Rules regulating the appointment condition of service of the public servant, whether the president can give a new definition of ‘freedom fighters’ by Rule 3 of the said Rules of 1979 remains a big question, in particular when the definition of freedom fighter as given by PO 94 of 1972 was still operative at the relevant time. However, since this issue is not relevant in these writ petitions, we do not need to go any further thereon.

- 5.5. Jatiyo Muktijoddha Council Ain, 2002

Subsequently, Parliament enacted the above Act in 2002 (Act No. 08 of 2002) and gazetted the same on 07.04.2002 in order to establish or create a Council under the name ‘Jatiyo Muktijoddha Council’ (JAMUCA). Amongst various other acts, Section 7 (Jha) of the said Act provides that JAMUCA shall prepare the list of genuine freedom fighters and shall detect the forgery in the certificates of freedom fighters and, accordingly, shall recommend the government for cancellation of such certificates. Neither this Act No. 08 of 2002 has defined the term ‘freedom fighter, nor the same Act has amended the already existing definition of the term ‘freedom fighter’ as provided by Article 2(h) of P.O. 94 of 1972. This Act has not also given any power on JAMUCA to redefine the term ‘freedom fighter’. It has only empowered JAMUCA to prepare the list of genuine freedom fighters, to check the certificates of such freedom fighters, to detect the forgery therein and to recommend the government for cancellation of such certificate, if they are found to be forged certificates. Therefore, we have not found anything in this Act under which JAMUCA can recommend the government for fixation of the minimum age of freedom fighters, in particular when such fixation will in fact change the definition of the term ‘freedom fighter’ as provided by Article 2(h) of the P.O. 94 of 1972. On the other hand, like P.O. 94 of 1972, Sections 25 and 26 of this Act have empowered the Government and Council respectively to make Rules and Regulations for carrying out the purpose of the said Act. Admittedly, no

such Rules or Regulations have yet been framed either by the government or by the JAMUCA.

5.6. Bangladesh Muktiyoddha Kalyan Trust Act, 2018 (Act No. 51 of 2018):
Finally, the Parliament has enacted this Act No. 51 of 2018 and gazetted the same on 08.10.2018. By this Act, Presidential Order No. 94 of 72 has been repealed and, accordingly, the term ‘freedom fighters’ has been renamed and redefined by Section 2 (11) in the following terms:

- ২(১১) “বীর মুক্তিযোদ্ধা” অর্থ জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়া যাঁহারা দেশের অভ্যন্তরে গ্রামে-গঞ্জে যুদ্ধের প্রস্তুতি ও অভ্যন্তরীণ প্রশিক্ষণ গ্রহণ করিয়াছেন এবং ১৯৭১ খ্রিস্টাব্দের ২৬ মার্চ হইতে ১৬ ডিসেম্বর পর্যন্ত বাংলাদেশের মহান স্বাধীনতা অর্জনের লক্ষ্যে পাকিস্তানি হানাদার বাহিনী ও জামায়াতে ইসলামী এবং তাহাদের সহযোগী রাজাকার, আলবদর, আলশামস বাহিনীর বিরুদ্ধে মুক্তিযুদ্ধে সক্রিয় অংশগ্রহণ করিয়াছেন এইরূপ সকল বেসামরিক নাগরিক এবং সশস্ত্র বাহিনী, মুজিব বাহিনী, মুক্তি বাহিনী ও অন্যান্য স্বীকৃত বাহিনী, পুলিশ বাহিনী, ই.পি.আর. নৌ কমান্ডো, কিলো ফ্লাইট আনসার বাহিনীর সদস্য এবং নিম্নবর্ণিত বাংলাদেশের নাগরিকগণ, উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়সসীমার মধ্যে, বীর মুক্তিযোদ্ধা হিসাবে গণ্য হইবেন, যথা:-
- ক) যে সকল ব্যক্তি মুক্তিযুদ্ধে অংশগ্রহণের লক্ষ্যে বাংলাদেশের সীমানা অতিক্রম করিয়া ভারতের বিভিন্ন প্রশিক্ষণ ক্যাম্পে তাহাদের নাম অন্তর্ভুক্ত করিয়াছিলেন;
- খ) যে সকল বাংলাদেশি পেশাজীবী মুক্তিযুদ্ধের সময় বিদেশে অবস্থান কালে মুক্তিযুদ্ধের পক্ষে বিশেষ অবদান রাখিয়াছিলেন এবং যে সকল বাংলাদেশি নাগরিক বিশ্বজনমত গঠনে সক্রিয় ভূমিকা পালন করিয়াছিলেন;
- গ) যাঁহারা মুক্তিযুদ্ধকালীন গঠিত গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) অধীন কর্মচারী বা দূত হিসাবে দায়িত্ব পালন করিয়াছিলেন;
- ঘ) মুক্তিযুদ্ধে অংশগ্রহণকারী ও গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) সহিত সম্পৃক্ত সকল এম.এন. এ (Member of National Assembl) বা এম.পি.এ (Member of Provincial Assembly), যাঁহারা পরবর্তীকালে গণপরিষদের সদস্য (Member of Constituent Assembly) হিসাবে গণ্য হইয়াছিলেন;
- ঙ) পাকিস্তানি হানাদার বাহিনী ও তাহাদের সহযোগী কর্তৃক নির্যাতিতা সকল নারী (বীরাজনা); তবে সন্দেহহীনভাবে প্রমাণিত নির্যাতিতা নারী বা বীরাজনার ক্ষেত্রে সরকার কর্তৃক নির্ধারিত বয়সসীমা প্রযোজ্য হইবে না;
- চ) স্বাধীন বাংলা বেতারকেন্দ্রের সকল শিল্পী ও কলা-কুশলী এবং দেশ ও দেশের বাহিরে মুক্তিযুদ্ধের স্বপক্ষে দায়িত্ব পালনকারী সকল বাংলাদেশি সাংবাদিক;
- ছ) স্বাধীনবাংলা ফুটবল দলের সকল খেলোয়াড়;এবং
- জ) মুক্তিযুদ্ধকালে আহত বীর মুক্তিযোদ্ধাগণের চিকিৎসাসেবা প্রদানকারী মেডিক্যাল টিমের সকল ডাক্তার, নার্স ও চিকিৎসা-সহকারী;

(Underlines supplied)

By this Act, in particular Section 2(14), the term ‘Muktiyoddho’ (Liberation War) has for the first time been defined by the Parliament, which is also quoted below:

২(১৪) “মুক্তিযুদ্ধ” অর্থ জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়া পাকিস্তানি হানাদার বাহিনী ও জামায়াতে ইসলামী এবং তাহাদের সহযোগী রাজাকার, আলবদর, আলশামস বাহিনীর বিরুদ্ধে গণপ্রজাতন্ত্রী বাংলাদেশের স্বাধীনতার জন্য ১৯৭১ খ্রিস্টাব্দের ২৬ মার্চ হইতে ১৬ ডিসেম্বর পর্যন্ত সংঘটিত যুদ্ধ;

(Underlines supplied)

5.7. Therefore, it appears from the above definition of the term ‘Liberation War’ (মুক্তিযুদ্ধ) that the Liberation War is the war which took place in Bangladesh between a period from 26 March, 1971 to 16 December, 1971 in response to the declaration of independence as given by the father of the nation Bangabandhu Sheikh Mujibur Rahman and the war which took place against the Pakistani occupying forces, Jamati Islami and their associate forces Razakar, Al-Bodor, Al-Shams. Therefore, this definition of ‘Liberation of

War' again has recognized the 'Declaration of Independence' as given by the Father of the Nation and participation of the mass people of this Country in such Liberation War in response to such declaration.

5.8. However, the definition of "Valiant Freedom Fighter" (বীর মুক্তিযোদ্ধা) as provided by Section 2(11), has, amongst others, incorporated a new element therein in that it has empowered the government, by the terms "উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে", to determine the allowable age of the freedom fighters who participated in the Liberation War during the said period. Apart from the above four Legislations (three parent laws and one delegated legislation), we have not found any other parent law or delegated legislation dealing with the said definition of the term 'freedom fighters'. However, we have found some Nitimala, Nirdeshika or Paripatra issued by the government during a period from November, 2013 to 11.02.2018 by which the government has redefined and amended the term 'freedom fighters'. The said Nitimala, Nirdeshika, Paripatra etc (most relevant ones) are discussed below one after another.

5.9. In November, 2013, the government, through the Ministry of Liberation War, circulated a Nitimala under the title বীর মুক্তিযোদ্ধাদের সম্মানীভাৱা বিতরণ নীতিমালা, 2013. There is no reference in the said Nitimala, either in the preamble or in the body, as to under what authority or exercise of what power of the parent law such Nitimala was framed and circulated. It appears from the said Nitimala of 2013 that the same was in fact circulated by the government in order to give certain benefits, namely the honorarium, to the freedom fighters, and initially Tk. 3000/- per month was fixed as honorarium to be paid to the freedom fighters. By this Nitimala of 2013, different committees down to the Upazilla level were constituted for distribution of such honorarium or benefits to the freedom fighters.

5.10. There is nothing wrong on the part of the government to frame such Nitimala in order to give benefits to the best Children of the Nation. Rather, it is one of the highly appreciable steps taken by the government to provide some benefits to the freedom fighters which the previous governments hardly gave. However, the problem arose when this Nitimala determined a standard under the title মুক্তিযোদ্ধা চিহ্নিতকরণের মানদণ্ড (standard for identifying freedom fighters) at Clause 4 of the said Nitimala. The said মানদণ্ড (standards) under Clause 4 of the said Nitimala are quoted below:

০৪. মুক্তিযোদ্ধা চিহ্নিতকরণের মানদণ্ডঃ

মুক্তিযোদ্ধা নীতিমালার আওতায় মুক্তিযোদ্ধা বলতে নিম্নবর্ণিত ব্যক্তিগণকে বুঝাবেঃ-

১. মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে যাঁদের নামে মুক্তিযোদ্ধা সনদপত্র/মুক্তিযোদ্ধা সাময়িক সনদপত্র ইস্যু করা হয়েছে;
২. মাননীয় প্রধানমন্ত্রী কর্তৃক স্বাক্ষরিত বাংলাদেশ মুক্তিযোদ্ধা সংসদ, কেন্দ্রীয় কমান্ড কাউন্সিল হতে সনদধারী ব্যক্তিগণ;
৩. যাঁদের নাম মুক্তিবার্তা চূড়ান্ত তালিকায় (মুক্তিবার্তা লালবই) অন্তর্ভুক্ত আছে;
৪. যাঁদের নামে মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে গেজেট প্রকাশ করা হয়েছে; এবং
৫. মুক্তিযোদ্ধা হিসেবে মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে চূড়ান্তভাবে প্রকাশিত ডাটাবেইজে যাঁদের নাম অন্তর্ভুক্ত আছে।

5.11. Therefore, it appears that the government has set some standards for determining the freedom fighters in order for giving them benefits under the said Nitimala and by setting up such standards, the government has, knowingly or unknowingly, amended the then existing definition of "freedom

fighter”, as provided by P.O. 94 of 1972. Not only that, by setting up such standards (or amending the said definition), the government has not made any reference to any power conferred on it by the Parliament under which such amendment was made.

- 5.12. The twist in the definition of the ‘freedom fighters’ has not ended there. By a further circular dated 02.09.2015 (which is specifically impugned in these writ petitions), as issued under the signature of one Assistant Secretary of the Ministry of Liberation, the government has given an instruction to the concerned officials of the government as regards formation of the Zilla Committee, Upazilla Committee etc. for giving benefits to the freedom fighters probably pursuant to the said Nitimala of 2013, (though no mention of the said Nitimala has been made therein). In this impugned circular dated 02.09.2015, the definition of the ‘freedom fighters’ has again been changed in the following terms:

(৩) ভাতা প্রাপ্তির ক্ষেত্রে বিবেচ্য-

ক) যাঁদের নাম মুক্তিবর্তা চূড়ান্ত তালিকায় (মুক্তিবর্তা লালবই) অন্তর্ভুক্ত আছে (সবুজ তালিকা গ্রহণযোগ্য নয়);

খ) যাঁদের নাম ভারতীয় তালিকায় অন্তর্ভুক্ত আছে;.....

গ) মাননীয় প্রধানমন্ত্রী কর্তৃক প্রতিস্বাক্ষরিত বাংলাদেশ মুক্তিযোদ্ধা সংসদ, কেন্দ্রীয় কমান্ড কাউন্সিল হতে সনদধারী মুক্তিযোদ্ধাগণ;

ঘ) মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয় হতে যাঁদের নামে মুক্তিযোদ্ধা সাময়িক সনদপত্র ইস্যু করা হয়েছে এবং যাঁদের নামে এ মন্ত্রণালয় কর্তৃক গেজেট প্রকাশ করা হয়েছে (তবে এক্ষেত্রে সাময়িক সনদপত্রধারীদের অবশ্যই গেজেট থাকতে হবে এবং গেজেটের নাম ঠিকানার সাথে সাময়িক সনদের মিল থাকতে হবে)

(৪) এছাড়াও মুক্তিযোদ্ধা সম্মানী ভাতা বিতরণে নিম্নবর্ণিত বিষয়সমূহ বিবেচনা করতে হবে-

ক) বিভিন্ন কারণে কারনিক ভুল হিসেবে নামের বানানে ই কার, ঙ কার, মৃত/মরহুম, মিয়া/মিঞা, সৈয়দ/ছেয়দ ইত্যাদি কারণিক ভুল হিসেবে বিবেচ্য;

খ) নাম ঠিকানার ক্ষেত্রে মৌলিক পার্থক্য/ভুল থাকলে ভাতা প্রদান না করে এ ধরনের বিষয় সিদ্ধান্তের জন্য মন্ত্রণালয়ে প্রেরণ করতে হবে;

গ) সনদ, গেজেট, জন্ম সনদ, মুক্তিবর্তা/ভারতীয় তালিকা নম্বর প্রমাণকসমূহের আলোকে ভাতা প্রাপ্তির লক্ষ্যে মুক্তিযোদ্ধার তথ্যাদি যাচাই-বাছাই করতে হবে;

ঘ) মহানগর, জেলা ও উপজেলা পর্যায়ে গঠিত কমিটি মুক্তিযোদ্ধা সম্মানী ভাতা বিতরণ কার্যক্রম গ্রহণ করবেন এবং এ সংক্রান্ত প্রতিবেদন মন্ত্রণালয়ে প্রেরণ করবেন;

ঙ) ভাতা প্রাপ্তির ক্ষেত্রে ভাতাভোগীর বয়স ২৬/০৩/১৯৭১ তারিখে ন্যূনতম ১৩ বৎসর হতে হবে। বয়স প্রমানের ক্ষেত্রে এসএসসি সনদকে সর্বাধিক গুরুত্ব দিতে হবে। এসএসসি সনদ না থাকলে সেক্ষেত্রে পাসপোর্টে উল্লেখিত বয়স বিবেচনায় নেয়া যেতে পারে অথবা নির্ধারিত ফরমে জন্ম সনদ ও এনআইডি মিলিয়ে বয়সের ক্ষেত্রে সিদ্ধান্ত নিতে হবে। মৃত মুক্তিযোদ্ধার ক্ষেত্রে যথাযথ কর্তৃপক্ষের নিকট হতে নিধারিত ফরমে মৃত্যুসনদ দাখিল করতে হবে।

It appears from Clause (4) (Uma) of the above circular that the government has, for the first time, fixed the minimum age of the freedom fighters at 13 years as on 26.03.1971. Further, it has been directed by the government that for determining such age, the SSC certificates shall have importance and, in the absence of such certificates, passports and other documents may be relied upon.

This fixation of minimum age has not stopped there. By another memo dated 25.04.2016, Clause 4(Uma) of the said Circular dated 02 September, 2015 has been amended in the following terms.

“ক) সূত্রের পরিপন্থে ৪ নং এনমিকের ‘P’ অনুচ্ছেদে ২৬.০৩.১৯৭১ তারিখের পরিবর্তে ১৭.০২.২০১৬ তারিখে অনুষ্ঠিত জাতীয় মুক্তিযোদ্ধা কাউন্সিলের ৩৪ তম সভায় ‘যে সকল বীর মুক্তিযোদ্ধার নাম ভারতীয় তালিকায়, লাল মুক্তিবর্তায় আছে এবং যাদের মাননীয় প্রধানমন্ত্রীর প্রতিস্বাক্ষরিত সনদ আছে তাদের ক্ষেত্রে ৩০.১১.১৯৭১ তারিখে মুক্তিযুদ্ধকালীন বয়স ১৩ বছর নির্ধারণ করা হয়। অন্যান্যদের ক্ষেত্রে মুক্তিযোদ্ধার বয়স পূর্বের ন্যায় ২৬.০৩.১৯৭১ তারিখে ১৩ বছর বলবৎ থাকবে।”

(Underlines supplied)

5.13. Therefore, by the above amendments, two categories of freedom fighters were created and two dates were fixed for the said two categories of freedom fighters. One category being the category whose names were published in the Indian list of freedom fighters and whose certificates were attested by the Hon’ble Prime Minister, the other category being the general freedom fighters. There is nothing on record to justify this creation of two categories of freedom fighters. We have not been able to know the position of JAMUCA as regards fixation of these dates and minimum ages. Apart from the statement in the affidavit-in-opposition of the government that they have done so on the recommendation of JAMUCA, JAMUCA itself has not cared to respond to the Rules issued by this Court. Therefore, we have not come to know as to on what basis these dates and ages were recommended by JAMUCA or these two categories of freedom fighters were created by JAMUCA, in particular when JAMUCA was not given any power under the JAMUCA Act, 2002 to amend the definition of ‘freedom fighters’ or to create different categories of freedom fighters.

5.14. Now another twist was in offing. Vide gazette notification dated 10.11.2016, a decision of the government vide notification dated 06.11.2016 was published. It was contended therein that the definition of Muktijoddha and the age of Muktijoddha were re-determined by the government on the recommendation of JAMUCA. The concerned gazette is reproduced below:



বাংলাদেশ

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার, নভেম্বর ১০, ২০১৬

গেজেট

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

মুক্তিযুদ্ধ বিষয়ক মন্ত্রণালয়

প্রজ্ঞাপন

তারিখ : ২২ কার্তিক ১৪২৩ বঃ/০৬ নভেম্বর ২০১৬ খ্রিঃ

বিষয় : “মুক্তিযোদ্ধা” এর সংজ্ঞা ও বয়স নির্ধারণ।

নং ৪৮.০০.০০০০.০০৪.৪৯.২৩৩.০৯-১৮৩২-জাতীয় মুক্তিযোদ্ধা কাউন্সিলের সুপারিশের আলোকে প্রকৃত মুক্তিযোদ্ধাগণের একটি নির্ভরযোগ্য ও গ্রহণযোগ্য তালিকা প্রণয়নের লক্ষ্যে “মুক্তিযোদ্ধা” এর সংজ্ঞা ও বয়স নিম্নরূপ নির্ধারণ করা হ'লঃ

সংজ্ঞা : “জাতির পিতা বঙ্গবন্ধু শেখ মুজিবর রহমান কর্তৃক স্বাধীনতার ঘোষণায় সাড়া দিয়ে ১৯৭১ সালের ২৬ শে মার্চ হতে ১৬ ডিসেম্বর পর্যন্ত সময়ের মধ্যে যে সকল ব্যক্তি বাংলাদেশের মহান স্বাধীনতা অর্জনের লক্ষ্যে মুক্তিযুদ্ধে অংশগ্রহণ করেছেন তাঁরাই মুক্তিযোদ্ধা হিসেবে গণ্য হবেন”। যথাঃ

ক) যে সমস্ত ব্যক্তি মুক্তিযুদ্ধে অংশগ্রহণের জন্য বাংলাদেশের সীমানা অতিক্রম করে ভারতের বিভিন্ন ট্রেনিং/প্রশিক্ষণ ক্যাম্পে নাম অন্তর্ভুক্ত করেছেন;

খ) যে সকল বাংলাদেশী পেশাজীবী মুক্তিযুদ্ধের সময় বিদেশে অবস্থানকালে মুক্তিযুদ্ধের পক্ষে বিশেষ অবদান রেখেছেন এবং যে সকল বাংলাদেশী বিশিষ্ট নাগরিক বিশেষ জনমত গঠনে সক্রিয় ভূমিকা রেখেছেন;

গ) যাঁরা মুক্তিযুদ্ধকালীন সময়ে গঠিত গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) অধীনে কর্মকর্তা/কর্মচারী হিসেবে দায়িত্ব পালন করেছেন;

ঘ) সশস্ত্র বাহিনী, পুলিশ, ইপিআর, আনসার বাহিনীর সদস্য যাঁরা মুক্তিযুদ্ধে সক্রিয় অংশগ্রহণ করেছেন;

ঙ) মুক্তিযুদ্ধে অংশগ্রহণকারী ও গণপ্রজাতন্ত্রী বাংলাদেশ সরকারের (মুজিবনগর সরকার) সাথে সম্পৃক্ত এমএনএগণ (MNA) ও এমপিএগণ (MPA) (গণপরিষদ সদস্য);

চ) পাকিস্তানি হানাদার বাহিনী ও তাদের সহযোগী কর্তৃক নির্যাতিত নারীগণ (বীরঙ্গনা);

ছ) স্বাধীন বাংলা বেতার কেন্দ্রের শিল্পী ও কলাকুশলীবৃন্দ এবং দেশ ও দেশের বাহিরে দায়িত্ব পালনকারী বাংলাদেশী সাংবাদিকগণ;

জ) স্বাধীন বাংলা ফুটবল দলের খেলোয়াড়বৃন্দ;

ঝ) মুক্তিযুদ্ধকালে আহত মুক্তিযোদ্ধাদের চিকিৎসাসেবা প্রদানকারী মেডিক্যাল টিমের ডাক্তার, নার্স ও সহকারীবৃন্দ।

০২। মুক্তিযোদ্ধা হিসেবে নতুনভাবে অন্তর্ভুক্তির ক্ষেত্রে মুক্তিযোদ্ধার বয়স ২৬-০৩-১৯৭১ তারিখে ন্যূনতম ১৩ বছর হতে হবে।

০৩। জনস্বার্থে প্রজ্ঞাপনটি জারী করা হল এবং উহা অবিলম্বে কার্যকর হবে।

রাষ্ট্রপতির আদেশক্রমে

মোঃ মাহবুবুর রহমান ফারুকী

উপসচিব।

(Underlines supplied)

By this gazette notification, in particular Clause 2 thereof, the government fixed the minimum age of freedom fighters at 13 years on 26.03.1971 and it was provided therein that such age limit would apply only in respect of new enlistment of freedom fighters. Therefore, it appears that the government has shifted from its earlier position as regards determination of the minimum age of freedom fighters who were already enlisted. Now the government declares that this age fixation will only apply in respect of new enlistment as freedom fighters.

5.15. The surprises did not end there as further surprises were in the pipe line. By a Paripatra, as issued by the government vide memo dated 19.06.2017, regarding the entitlement of freedom fighters quota and benefit at the time of recruitment, admission and PRL in respect of employees of different Ministries, establishments, bodies and universities, the government again shifted its position. According to this Paripatra, to avail of the benefits of such freedom fighters quota at the time of appointment, admission or obtaining PRL, the age of the freedom fighters must be minimum 13 years on or before 30.11.1971. There is nothing in the said Paripatra as to whether this re-fixation of date has been done on the recommendation of JAMUCA. This Paripatra dated 19th June, 2017 was to be amended by memo dated 17.01.2018 issued by the government whereby the government re-fixed the said minimum age of

freedom fighters at 12 years 6 months as on 30.11.1971 or before and this amending circular has been notified vide notification dated 21.01.2018 and published in the gazette on 31.01.2018, which have been impugned by the petitioners by way of Supplementary Rules issued by this Court. By this gazette notification, Clause 2 of the earlier notification dated 06.11.2016 (published in gazette on 10.11.2016) has been substituted in the following terms:

- 5.16. “মুক্তিযোদ্ধার বয়স ৩০.১১.১৯৭১ তারিখে কিংবা তার পূর্বে কমপক্ষে ১২ বছর ০৬ মাস হতে হবে।”
Therefore, it appears that while the earlier gazette notification dated 10.11.2016 fixed the age at 13 years as on 26.03.1971 making it applicable only to those freedom fighters who would be enlisted as new freedom fighters, by this subsequent amendment as published in the gazette on 31st January, 2013, the amended age of 12 Years 6 months as on 30.11.1971 was made applicable to all freedom fighters. Therefore, since it is evident from this gazette notification dated 31st January, 2018 that this age criteria will apply to all freedom fighters, the position taken by the respondent No.1 in supplementary-affidavit dated 06.05.2019 in Writ Petition No.15155 of 2016 is not correct. By a subsequent notification, being Paripatra dated 11.02.2018, the government has reaffirmed its position as regards fixation of such date of freedom fighters in the following terms:

“ভাতা প্রাপ্তির ক্ষেত্রে মুক্তিযোদ্ধার বয়স ৩০/১১/১৯৭১ খ্রিষ্টাব্দ তারিখে কিংবা তার পূর্বে কমপক্ষে ১২ বৎসর ০৬ মাস হতে হবে, অর্থাৎ কোন বীর মুক্তিযোদ্ধার জন্ম তারিখ ৩০.০৫.১৯৫৯ খ্রিষ্টাব্দের পর বিবেচিত হবে না”

(Underlines supplied)

Interestingly, by this Paripatra, the government has also fixed the required date of birth of the freedom fighters being 30.05.1959 or before.

- 5.17. As stated above, there is nothing in the above mentioned circulars, Paripatra, Nitimala etc. that the same were issued by the government either in exercise of its power under any parent law as enacted by the Parliament or by any delegated legislation. It has also not been mentioned in the said Circular, Paripatra or Nitimala that the government fixed the said ages or dates in exercise of any power conferred on it under any Act of Parliament. In particular to the latest notification being dated 2 April, 2018 and the Bangladesh Muktijoddha Kallyan Trust Act, 2018 being published in the gazette on 08 October, 2018, it cannot be said that the said Circulars, Paripatra, Nitimala, as issued by the government for fixing or re-fixing the age of freedom fighters, were issued under its power conferred on it by Section 2(11) of the said Act No. 51 of 2018. This being so, we have miserably failed to find any single reference either in the said notifications, circulars, Paripatra, Nitimala or even in the affidavit-in-opposition of the respondent No.1-governemnt that the said fixation of ages or dates by the government time to time was done in exercise of any power as delegated by parliament, in particular when such circulars have defined, redefined and amended the definition of the term ‘freedom fighter’ as provided by Article 2(h) of the P.O. 94 of 1972. Neither the P.O. 94 of 1972 nor the Act No. 08 of 2002 (Jatiyo Muktijoddha Council Act, 2002) has also given any power to the government to amend the definition of the term ‘freedom fighter’ by way of fixing the minimum age of freedom fighters retrospectively.

- 5.18. It is well settled that in exercise of executive functions of the government, the government can issue circulars, notifications, Paripatra etc. to keep its work transparent. Such notifications or circular etc. may be issued in order to give benefits to the enlisted freedom fighters, which is no doubt an appreciable job by the government. But in doing so, the government cannot amend the parent law, namely the definition of 'freedom fighter' as provided by Article 2(h) of P.O. 94 of 1972. However, we have frustratingly noted that the government not only acted whimsically, it also acted without jurisdiction in determining the age of the freedom fighters retrospectively without any such power being conferred on them by any parent law. Nothing has been stated in the said notifications, circulars or gazette as to how such dates were fixed and what was the reason in fixing such dates. There is nothing in the affidavit-in-opposition of the government as to why it was felt by the government or JAMUCA that a boy below the age of 12 years and 06 months could not be a freedom fighter, in particular when we have found in various books and documents, as referred to by the learned advocate Mr. Omar Sadat, that there is a long history in this world in support of child freedom fighters, soldiers and warriors, particularly when we have taken note of the fact that Shahidul Islam (Lalu), a valiant freedom fighter who was awarded Bir Pratik, was only 10 years of age when he took part in our liberation war.
- 5.19. Now with these circulars and Nitimala fixing minimum ages of freedom fighters being 12 years 06 months on a particular date in 1971, the Bir Protik award of Shahidul Islam (Lalu) would become non-existent. We do not find any proper words to express our anger as against such unreasonable acts of the government. It is recorded in the government documents that the said Shahidul Islam (Lalu) was awarded Bir Protik by none other than the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. His picture in the lap of Bangabandhu Sheikh Mujibur Rahman was published in the Daily Ittefaq on 10.12.2014. Even after publication of such news in 2014, we are surprised to note that the government has staved the impugned scheme of fixing and re-fixing the minimum age of freedom fighters. We are of the view that the individuals concerned in fixing these ages of freedom fighters time to time by ignoring the facts, that there was a Bir Protik who was aged 10 years at the time of liberation war, should be made accountable for their such negligent act, in particular when they did not have any legislative backing to do such acts. By such acts of fixing and re-fixing the 'freedom fighters' age and amending the definition of 'freedom fighters' without any legislative backing, the said officials have insulted the very feeling of the people of this country and the very respect of the people of this country towards the freedom fighters. Therefore, we are of the view that, these notifications, circulars etc cannot stand in the eye of law and the same should be declared without lawful authority in clear terms.
- 5.20. Now the issue of definition of the term 'freedom fighter', as given by the Parliament in 2018 by enacting বাংলাদেশ মুক্তিযোদ্ধা কল্যাণ ট্রাস্ট আইন, ২০১৮, (Bangladesh Freedom Fighters Welfare Trust Act, 2018) in particular the definition provided therein under Section 2(11) under the title বীর মুক্তিযোদ্ধা (Valiant Freedom Fighters). By this definition, a power has been conferred on

the government to determine the age of the freedom fighters in the following terms: “উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে”. The question is: when the majority of the people of this country, irrespective of their age, religion, cast etc., participated in the liberation war in response to the call of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman, can the Parliament now say that the government is allowed to fix the age of freedom fighters who took part in the war of liberation in 1971.

- 5.21. As referred to by the learned advocate Mr. Omar Sadat vehemently, it appears that the historic speech of 7th March, 1971, as delivered by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman in the Race Course Maidan, Dhaka, the telegraphic Declaration of Independence as given by the Bangabandhu in the early morning of 26th March, 1971 and the Proclamation of Independence as given by the Mujib Nagar Government on 10th April, 1971 have been incorporated in the Constitution under 5th, 6th and 7th Schedule by Article 150(2) of the Constitution. The final call of Bangabandhu Sheikh Mujibur Rahman in his historic speech on 7th March, 1971 was as follows: “প্রত্যেক গ্রাম, প্রত্যেক মহল্লায় আওয়ামী লীগের নেতৃত্বে সংগ্রাম পরিষদ গড়ে তোল এবং তোমাদের যা কিছু আছে, তাই নিয়ে প্রস্তুত থাকো। মনে রাখবা, রক্ত যখন দিয়েছি, রক্ত আরো দিবো। এই দেশের মানুষকে মুক্ত করে ছাড়বো ইনশাআল্লাহ। এবারের সংগ্রাম আমাদের মুক্তির সংগ্রাম, এবারের সংগ্রাম স্বাধীনতার সংগ্রাম। জয় বাংলা।”

The resonance of this call of independence is very much evident in his telegraphic Declaration of Independence, being the last words of Bangabandhu immediately before his arrest after the crack down on the night of 25th March. The same is quoted below:

“ইহাই হয়ত আমার শেষ বার্তা, আজ হইতে বাংলাদেশ স্বাধীন। আমি বাংলাদেশের জনগণকে আহবান জানাইতেছি যে, যে যেখানে আছ, যাহার যাহা কিছু আছে, তাই নিয়ে রুখে দাঁড়াও, সর্বশক্তি দিয়ে হানাদার বাহিনীকে প্রতিরোধ করো। পাকিস্থানী দখলদার বাহিনীর শেষ সৈন্যটিকে বাংলার মাটি হইতে বিতাড়িত না করা পর্যন্ত এবং চূড়ান্ত বিজয় অর্জন না করা পর্যন্ত লড়াই চালিয়ে যাও।”

(Underlines supplied)

The historic speech of Bangabandhu on the 7th March, 1971 and his Declaration of Independence on 26th March, 1971 have been recognized by the Mujibnagar Government in its Proclamation of Independence dated 10th April, 1971.

- 5.22. The admitted position is that these historic speech and declarations are now part of the Constitution. Now the question arises when a part of the Constitution by which the people of this country were urged upon to stand against the Pakistani Army with whatever means they had, and on the said call when some children participated in the war of liberation with whatever they had, can they now be said or declared as non-freedom fighters by any Act of Parliament? The answer is ‘No’. Without amending the Constitution, such enactment cannot be made by the Parliament. Therefore, when Parliament itself cannot fix the age of freedom fighters as the fixing of such age of freedom fighters will be contrary to the Speech of Bangabandhu and the Declaration of Independence by Bangabandhu, which are part of the Constitution, the sane Parliament cannot empower the government to fix such age. On this very simple ground, this empowerment “উক্ত সময়ে যাহাদের বয়স সরকার

কর্তৃক নির্ধারিত বয়স সীমার মধ্যে”, as incorporated in the definition of ‘বীর মুক্তিযোদ্ধা’ under section 2(11) of the said Act No. 51 of 2018, has become untra-vires the Constitution. It has long been decided by various judicial pronouncements that which you cannot do directly, you cannot do the same indirectly. As stated above, when the Parliament itself cannot fix the age of the freedom fighters even by enactment of law without amending the Constitution, it cannot empower anybody including the government to fix such age of freedom fighters.

5.23. Apart from above, it appears from this very definition of বীর মুক্তিযোদ্ধা, as provided by Section 2(11), that by such empowerment the Parliament has given unbridled and unguided power to the government. No guidelines have been indicated by the Parliament or no guidelines have been framed by the government either by any valid Rules or Regulations. This empowerment of unbridled and unguided power on the government is also hit by the doctrine of reasonableness, and no such unbridled and unguided power can be given to any delegatee by the Parliament as has been established by our Apex Court in **Dr. Nurul Islams’ Case, 33 DLR (AD) 201**. Therefore, from the above analysis of the said definition of বীর মুক্তিযোদ্ধা, in particular the said conferment of power “উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে” as provided therein, this Court is of the view that the same is ultra-vires the Constitution. Accordingly, the same has become void ab initio.

5.24. In the course of hearing, it has come to our notice that a division bench of the High Court Division in **S.M. Sohrab Hossain vs. Bangladesh, 69 DLR-285** expressed a different view. While deciding a case on a Rule issued whether there was any definition of the term ‘freedom fighters’, the said bench has observed under paragraph 16 of the said reported case as follows:

16. That being the position we have found that from the beginning of 1972 definition of “Freedom Fighter” was very much there and time to time its scope and ambit had been elaborated or restricted, for practical purposes. By any stretch of imagination it cannot be said that there is no definition of “Freedom Fighter”. It may be suggested that for all practical purposes the government may further modify the definition of “Freedom Fighter” as it exists should it require. But certainly it is within the domain and competence of the policy of the government as well as the legislature.

(Underlines supplied)

5.25. After examination of above decision, it appears that the Rule in the concerned writ petition was issued in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why direction shall not be given upon the respondents to provide the definition of ‘freedom fighters’ before preparing and publishing the final list of the Freedom Fighters.”

5.26. Therefore, it appears that a writ of mandamus was filed seeking direction on the government to provide definition of the term ‘freedom fighter’ and after hearing the Rule issued therein, the said division bench found that there already existed a definition of the term ‘freedom fighter’ in P.O. 94 of 1972. Therefore, it was not necessary to provide any further definition. In taking such view, the said division bench of this Court has made the above quoted

observation under paragraph 16 of the reported case which was not the ratio of the said case. Rather, it was the obiter dicta as because it was not an issue in that writ petition as to whether the government was empowered to modify the definition of the term “freedom fighter” as provided by P.O. 94 of 1972. The only issue in that writ petition was whether the government or the concerned respondents should be directed to provide definition of “freedom fighters” before preparing and publishing the final list of freedom fighters. Therefore, the view expressed therein under paragraph-16 of the reported case cannot be regarded as stare decisis for this bench in deciding the issues in these cases, in particular when the issue in these writ petitioners is whether the government can fix, re-fix and amend the definition of the term ‘freedom fighter’. Therefore, the said obiter is not binding on this bench and as such we are not required to refer this matter to a larger bench as because we are disagreeing vehemently with the said obiter of the said division bench.

5.27. In view of the above facts and circumstances of the cases, we find merit in the Rules and Supplementary Rules and as such the same should be made absolute.

5.28. The Orders of the Court:

- 1) Rules and Supplementary-Rules are made absolute.
- 2) Thus, all the circulars, in particular the circulars dated 02.09.2015 and 31.01.2018, in so far as the same relate to the fixing and re-fixing the minimum age of freedom fighters, are hereby declared to be without lawful authority. Consequently, the stoppage of the honorariums of the petitioners, who have already been gazetted as freedom fighters, is also declared to be without lawful authority. The government and the concerned authorities are directed to continue payment of the honorarium of the said freedom fighters as before with all arrears within thirty days from receipt of the copy of this judgment/orders.
- 3) The definition of the term বীর মুক্তিযোদ্ধা (Valiant Freedom Fighters), as provided by section 2(11) of the Bangladesh Freedom Fighters Welfare Trust Act, 2018 (Act No. 51 of 2018), in so far as the same relates to the conferment of power on the government to determine the age of the freedom fighters at the relevant time (“উক্ত সময়ে যাহাদের বয়স সরকার কর্তৃক নির্ধারিত বয়স সীমার মধ্যে”) is concerned, is hereby declared to be ultra-vires the Constitution and as such the same has become void ab initio.

At the end, we highly appreciate the laborious job of Mr. Omar Sadat, learned advocate and his associates preceded by their laborious research in order to assist this Court. Our judgment has been enriched by their tremendously good performance.

Communicate this.