

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO.4403 OF 2010

IN THE MATTER OF:

An application under Article 102(2)(a)(i) of the Constitution of the People's Republic of Bangladesh.

AND

IN THE MATTER:

Raghib Rauf Chowdhury, Barrister-at-Law and Advocate of the Supreme Court of Bangladesh, son of Abdur Rauf Chowdhury of House no.44, Road no.3/4, Dhanmondi, Dhaka.

.....**Petitioner**

-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Dhaka and others **Respondents**

Mr. Hassan M.S. Azim, Advocate with **Mr. Raghib Rauf Chowdhury**, Advocate (In person), **Mr. Mirza Al-Mahmood**, AdvocateFor the petitioner

Mr. Mahbubey Alam, Attorney General (Appeared as requested by the Court)

Dr. Kamal Hossain, Senior advocate, **Mr. Rokunuddin Mahmud**, Senior advocate, **Mr. Shafique Ahmed**, Senior advocate & **Mr. A.F. Hasan Ariff**, Senior advocateAmicus curiae

Present:
Mr. Justice Obaidul Hassan
And
Justice Krishna Debnath

Heard on 31.03.2016, 10.05.2016, 12.05.2016,
19.05.2016, 26.05.2016, 12.06.2016, 27.07.2016,
04.08.2016 & 28.08.2016

Judgment on 13.04.2017

Obaidul Hassan, J.

The petitioner being a lawyer of this Court filed this writ petition under Article 102 of the Constitution of the People's Republic of Bangladesh as a Public Interest Litigation (PIL) in

public interest with a view to uphold the 'Supremacy of the Constitution' and 'Rule of Law' for ensuring independence of the judiciary from other organs of the State. As a practicing lawyer of this Court he has become concerned about the recruitment process of the learned Judges in the High Court Division of the Supreme Court of Bangladesh which has given rise to serious criticisms in the recent past resulting in erosion of dignity and prestige of and respect for this lofty institution in the estimation of the general public to the great loss of the entire nation. By filing this writ petition the petitioner prayed for a direction upon the respondents to frame guidelines in respect of the process of selection of persons for being appointed as Judges of the Supreme Court of Bangladesh and published the same in Bangladesh Gazette Extraordinary in order to bring transparency and competitiveness in such process under the Constitution by causing a wider pool of applicants to be considered through public notifications inviting applications as mandated by the settled principles of separation of independence of judiciary being the basic structure of the Constitution. On 06.06.2010 a Rule was issued on the following term:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why guidelines should not be framed in respect of the process of selection of persons for being

appointed as Judges of the Supreme Court of Bangladesh and publish the same in Bangladesh Gazette Extraordinary in order to bring transparency and competitiveness in such process under the Constitution by causing a wider pool of applicants to be considered through public notifications inviting applications as mandated by the settled principles of separation and independence of judiciary being the basic structure of the Constitution and/or such other or further order or orders passed as to this Court may seem fit and proper."

At the time of issuance of the Rule the respondent no.1 was directed to inform this Court as to the process or system which has been followed till date for selection of persons for being appointed as Judges of the Supreme Court of Bangladesh within a period of one month from date. But unfortunately no report has yet come from the office of the respondent no.1 in this regard. Subsequently, on 04.03.2014 when the matter came up in the cause list for hearing, this Court appointed senior counsels namely Dr. Kamal Hossain, Mr. Rafiq-Ul-Haque, Mr. Moudud Ahmed, Mr. Mahmudul Islam, Mr. Rokunuddin Mahmud and Mr. Ajmalul Hossain as amicus curiae in this case. Mr. Mahbubey Alam, the learned Attorney General was also requested to assist the Court with regard to the issue raised in this Rule. Subsequently, on 17.02.2016 this matter was sent to this Bench from the office of the Hon'ble Chief Justice to hear and dispose of the same. On 23.02.2016 this Bench appointed

Mr. Shafique Ahmed and Mr. A.F. Hasan Arif, the two learned senior advocates as amicus curiae in addition to the amicus curiaes appointed earlier. Mr. Moudud Ahmed, the learned senior advocate was appointed as amicus curiae but he expressed his inability to appear before this Bench in this matter for his personal difficulties. On the other hand Mr. Mahmudul Islam died before hearing of the Rule commenced. However, the learned senior advocates Dr. Kamal Hossain, Mr. Rokonuddin Mahmud, Mr. Shafique Ahmed, Mr. A.F. Hasan Arif and Mr. Mahbubey Alam, the learned Attorney General appearing before this Court gave their valuable opinion in this regard to come to a correct finding.

Mr. Hassan M.S. Azim, the learned advocate appearing on behalf of the petitioner submitted that one of the most important cardinal aspects of the independence of judiciary is that "the process of appointment of judges is not subject to control or influence by or of other organs of the State so that judgments can be delivered without fear or favour." He further submitted that the Constitution has clearly set down through the provisions of the Supreme Judicial Council (now defunct), the procedure for removal of the Judges of the Supreme Court, but the procedure for appointment has been dealt within broader terms and manner mentioned in Articles 94,95,97 and

98 of the Constitution. As per the Constitution the power of appointment of the Chief Justice and other Judges and both the Divisions of the Supreme Court is conferred by Articles 95 and 98 of the Constitution on the President i.e. the executive. In the matter of appointment of the Judges of both the Divisions of the Supreme Court the President is required to act on the advice of the Prime Minister under Article 48(3) of the Constitution. The Constitution as originally framed contained provision requiring the President to consult the Chief Justice in the matter of appointment of the Additional and Permanent Judges. Article 95 deals with the appointment of Regular/Permanent Judges to the High Court Division and the Appellate Division and Article 98 deals with the appointment of the Additional Judges to the High Court Division and Ad-hoc Judges to the Appellate Division of the Supreme Court. But this provision for consultation was omitted by the 4th Amendment of the Constitution. In other words the constitutional requirement of consultation by the President i.e. the executive with the Chief Justice was done away with by the 4th amendment of the Constitution. Nevertheless, over the years, the practice of consultation with the Chief Justice of Bangladesh by the President regarding appointment of Judges of the Supreme Court turned into a continuous and unbroken convention. In such view of the matter, the Appellate Division in the case of

Ministry of Justice vs. Md. Idrisur Rahman reported in 7 LG(2010) AD 17 held that “independence of judiciary being a basic structure of the Constitution, prior consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of judiciary and the same requirement of an effective consultation is as good as any other provisions of the Constitution and binding upon the executive.”

He further submitted that though it is now a settled law that prior effective consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the Constitution, yet the process of selecting persons for being appointed as Judges of the Supreme Court somewhat lacks in transparency. Though the High Court Division vide the analogous judgment and order dated 17.07.2008 passed in Writ Petitions No.3217, 2975 and 1543 of 2003 categorically held that the proposal and process for appointment of Judges to the Supreme Court in both the High Court Division and the Appellate Division should be initiated from the Chief Justice of Bangladesh and also that the President of the republic shall have no right to directly initiate the process for appointment of Judges to the Supreme Court by passing the Chief Justice of Bangladesh, but the President/Government shall have the right

of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court, but in appeal in the case of Ministry of Justice vs. Md. Idrisur Rahman, reported in 7 LG (2010)AD 17 the Appellate Division did not overrule this decision of the High Court Division, either impliedly or expressly. Hence, initiation of the process for appointment of Judges to the Supreme Court is to be done by the Chief Justice of Bangladesh. But there are no guidelines as to how the Chief Justice shall initiate the process or for that matter how the President/Government shall exercise the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court. Had there been some definite guidelines then the aspirant advocates could have pursued the different avenues following guidelines.

There cannot be any denial of the fact that a wider pool of strong candidates from all backgrounds can only lead to a healthier competition and the candidates who succeed will need to be even better resulting in appointment of truly qualified independent Judges. He further submits that due to such lack of definite guidelines, Judges are being appointed through a very weak system of selection. A culture of nepotism has also been developed in the system in respect of the

suggestions being made by the executive, undoubtedly favouring persons with similar political ideologies and political connection with the ruling party which has the consequence of a section of the Bar opposing such appointments on a regular basis, which is also for nothing but political differences. As a result, the experience in the recent past has not been very pleasant for the nation. Even events like boycotting of Court also took place in the highest judiciary of the country resulting endless misery of the litigant public.

He further submitted that appreciating such dearth in the system, the President during the ruling of Non-Party Caretaker Government promulgated Supreme Judicial Commission Ordinance, 2008 (hereinafter referred to as the Ordinance). The Ordinance was published in the Bangladesh Gazette Extraordinary on Sunday, March 16, 2008 providing matters for appointment of Judges in both the Appellate Division and the High Court Division of the Supreme Court of Bangladesh. It provided for constitution of a Supreme Judicial Commission for selection and recommendation of names to the President of the Republic for appointment as Additional Judges and Judges of the High Court Division and Judges of the Appellate Division of the Supreme Court. Subsequently, the said Ordinance was challenged by one Mr. Md. Idrisur Rahman, an Advocate of the

Supreme Court, as being *ultra vires* of Articles 7,22,94,111 and 112 of the Constitution by way of filing a writ petition being Writ Petitions No.3228 of 2008 before this Court. In the said writ petition the Rule Nisi was issued. Subsequently, the Hon'ble Chief Justice by his order dated 18.06.2008 constituted a larger Bench consisting of their Lordships Mr. Justice Mohammed Abdur Rashid, Madam Justice Nazmun Ara Sultana and Mr. Justice Md. Asfaqul Islam who heard and disposed of the Rule. On 30.06.2008, when the Rule came up for hearing, their Lordships issued a notice contemplated under Order XXVIA of the Code of Civil Procedure to the learned Attorney General to appear and assist the Court in the interpretation of relevant provisions of the Constitution regarding Judges of the Supreme Court of Bangladesh.

He also submitted that the respondents-government appeared and filed an affidavit in opposition sworn on 08.06.2008 and supplementary affidavit, it was asserted that the Ordinance was not inconsistent with the independence or separation of judiciary, but aimed at fair and sound appointment to the posts of the Supreme Court Judges from amongst the qualified persons on the basis of objective satisfaction and not depending on subjective satisfaction of the executive organ of the State. In order to prevent political

motivated choices, which happened in the recent past and in order to invite the actual qualified persons for appointment to the post of the Supreme Court Judges, the Ordinance was promulgated by the President to safeguard the public interest. After hearing both sides the High Court Division was pleased to make the Rule absolute in part by majority 2:1 by the judgment and order dated 07.08.2008 declaring subsection (4) of section 9 of the Supreme Judicial Commission Ordinance, 2008 (Ordinance No.VI of 2008) void.

Thereafter, against the said judgment and order dated 07.08.2008 passed by the High Court Division in Writ Petition No.3228 of 2008, the writ petitioner preferred Civil Appeal No.331 of 2008 before the Appellate Division under Article 103(2)(a) of the Constitution. The said appeal was, however disposed of by the Hon'ble Appellate Division vide judgment and order dated 22.04.2009 holding, inter alia, that since by the time the appeal came up for hearing the said Ordinance of 2008 had lapsed as it had not been approved by the Parliament and therefore the appeal had become infructuous. The said judgment and order dated 22.04.2009 passed by the Appellate Division in Civil Appeal No.331 of 2008 has been reported in 7ADC (2010) 174 (Md. Idrisur Rahman vs. Bangladesh and another).

He further submitted that the United Kingdom has already introduced a system of inviting applications by public advertisement, as was the case when judges were appointed to the UK Supreme Court recently. They have moved away from the traditional system for better results in public interest through establishment of a National Judicial Appointment Commission (JAC). He also submitted that the old tried and tested system though was not very transparent, yet there cannot be any denial to the fact that it had delivered many outstanding judges from the cream of a respected profession. There is, however, currently an overall consensus in Bangladesh that in today's political conditions, the power of appointment of Judges cannot be restored back to the government in any manner.

Mr. Azim, further submitted that independence of judiciary is a basic structure of the Constitution. An independent judiciary is absolutely indispensable for ensuring the rule of law. Wrong appointment of Judges have affected the image of the Court. He also submitted that in any system of dispensation of justice, much depends upon the personality of judges; the most well-drafted codes and laws would prove to be illusive if those concerned with construing and implementing those laws are lacking in right caliber. A person

appointed not on merit, but because of favoritism or other ulterior considerations can hardly command real and spontaneous respect of the Bar.

He also submitted that often the length of time taken in the hearing of a case depends upon the up-take of the judge, his capacity to quickly grasp the points of law and facts and his ability to wade through the maze of facts and legal propositions to the crucial point. He further submitted that the selection of a person on considerations other than of merit has far-reaching repercussions. Such a Judge would naturally not receive cooperation from members of the Bar, who would be no strangers to his capacity, the full measure of co-operation which is needed for the proper administration of justice; nor would a Judge so appointed generally have the amount of confidence in himself which alone can contribute to the efficient discharge of his duties. Thus, the effect of wrong or improper appointment is felt not only for the time being; its repercussions are felt long thereafter. It also quite often has the effect of dissuading other suitable persons from subsequently accepting offers for appointment. It, therefore, becomes essential to eliminate, as far as possible, the chances of favoritism and plug other loopholes with a view to ensure that in future person of the right caliber are appointed and that the consideration which might weigh

should be of merit alone. He also submitted that while deciding a case filed against the formation of a Supreme Judicial Commission by the Caretaker Government in 2007, a Larger Bench of this Court found in the case of Md. Idrisur Rahman vs. Bangladesh, reported in 60 DLR 714, that *“Appointment of judges of the Supreme Court is alleged to have been politicized in recent past, which has been severely questioned and criticizedThere are sufficient admitted evidence and circumstances, which satisfied the President who thought it expedient to take immediate action.....”*

Mr. Azim finally submits that for the greater interest of the judiciary and for upholding a free fair and biseless judicial system in the country there should be a guideline to recruit candidates having excellent background of education and legal competency.

No one appears on behalf of the respondents.

Mr. Mahbubey Alam, the learned Attorney General appeared in this case being asked by this Court to appear and he submits that the service rendered by the Judges of the apex Court is not a service of the republic. As per constitutional provision the Judges are appointed, thus no application is required to be invited to fill-up the vacancy of the Judges of the Supreme Court. As per provision of Article 98 of our Constitution if the President is satisfied the number of the

Judges of a Division of the Supreme Court should be for the time being increased the President may appoint one or more duly qualified persons to be additional Judges of that Division. There is no any fixed number of posts for the Supreme Court Judges. It is absolutely the prerogative of the President of the Republic to appoint Judges in the apex Court. Thus, Constitution itself says how President would be satisfied regarding competency of the persons who are eligible to be appointed as Judge of the Supreme Court. Like other services of the Republic no application should be sent to the President of the Republic or to the Chief Justice of the country. He further submits that the Constitution itself has described the qualification of the Judges. As per Article 95(2)(a) a person to be appointed a Judge if he has practice as an Advocate of the Supreme Court for at least 10 years and as per Article 95(2)(b) any person who has served as a Judicial Officer for not less than 10 years, held judicial office in the territory of Bangladesh; or has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

He also submits that the qualification of a candidate has been described in the aforementioned Article and if anyone is considered qualified by the President as per Article 95(2)(a) or 95(2)(b) the President can appoint him as a Judge of the highest Court. He further submits that the qualification as described in

the said Article are disjunctive, either of the qualification mentioned in Article 95(2)(a)(b)(c) is required for being appointed as a Judge of the Supreme Court, if the Hon'ble President of the Republic does not get any suitable candidate who fulfills the requirement of the Article 95(2)(a) or 95(2)(b) then he can go for next option described in Article 95(2)(c). Till this date no such situation arose. Furthermore, our legislature does not think it necessary to enact any law as per Article 95(2)(c) for appointment of the Judges of the Supreme Court. Since the parliament is the sole authority to enact law, it is better to leave it to them because as the house of people's representative the parliament is the competent authority to think what law should be enacted for the benefit of the country. This Court has no jurisdiction to direct the parliament to enact any law. However, he candidly submits that this Court can make observation how the present selection process can be improved, but no rule or guideline is necessary as Constitution itself has given the guideline.

He further submits that since after being appointed as an additional Judge of the Supreme Court under Article 98 of our Constitution the Judge is made confirmed as per provision of Article 95. As per Article 95 the President appoints someone as Judge of the Supreme Court after due consultation with the Chief Justice. It is absolutely clear that the Chief Justice has a

vital role finally in appointing the Judges of the Supreme Court. Since the Chief Justice has a pivotal role he can advise the President to appoint the competent persons in the apex Court as a Judge. The Chief Justice has the scope to see the qualities of the additional Judges who were appointed under Article 98 of the Constitution and if he does not give any recommendation to anyone the President shall not appoint him as a Judge of the Supreme Court because the Chief Justice is the only person who is competent to know whether the additional Judge appointed earlier could prove his competence to be confirmed as a permanent Judge of the Supreme Court. Thus the system as has been going on in our country cannot be said flawed. He candidly submits that it becomes flawed only when personal interest of the Chief Justice or the persons who are in the helm of the affairs, supersede the other legal qualification of the prospective candidates.

Mr. A.F. Hasan Ariff, the learned senior advocate appearing in this case as *Amicus Curiae*, he submits that the provision of Article 95(1)(2)(a)(b)(c) should be read conjunctively. Article 95(2)(c) is a complementary provision, it is to be read along with Article 95(2)(a) and (b). He candidly submits that direction to enact law to the parliament cannot be given but a direction to the Government can be given to take immediate steps to frame a Rule or a guideline to appoint the

Judges of the Supreme Court in the light of observation. This Court is competent enough to make an observation how a guideline should be prepared by the government and in that observation it can be said that if government makes any Rule for appointment of the Judges of the apex Court it must be consulted with the Chief Justice before framing it finally. He also submits that during Caretaker Government a Supreme Judicial Council was formed to appoint the competent persons as a Judge in the apex Court. The Supreme Judicial Council was formed by an Ordinance, same was challenged before this Court. The provision of section 9(4) of the said Ordinance was declared void by majority view in a judgment reported in **60 DLR (HCD) 714** saying that:

“the provision of the Ordinance as laid down in section 9(4) which empowers the President to reject the recommendation of the Commission for reasons to be recorded, which would be final, is indeed, unconstitutional. Definitely this particular provision is inconsistent with the Constitutional provision and Convention for the appointment of the Judges of the Supreme Court. It flouts the main object of securing primacy of the Commission’s decision. To make the Ordinance effective this section is a bar for the reasons stated above. I declare this section 9(4) of the Ordinance void.”

Since the Ordinance was not placed before the parliament ultimately it died its natural death. He further submits that it is the desire of the people of the country to make a guideline to

appoint the competent persons in the highest judiciary. The Ministry of Law, Justice and Parliamentary Affairs has failed to perform their duties. Qualification, selection and appointment must be guided by a legal instrument of the Constitution. Thus the Rule or guideline to appoint the Judges of the apex Court is necessary.

He submits that since the government is mandated to form a Rule vide Article 95(2)(c) and for the last 45 years they have not done so, this Court may give a direction to the government to frame a Rule for this purpose. In Masder Hossain case reported in *52 DLR (AD) Page-82, Para-73* it has been mentioned that observation if given by this Court expressing its wish to frame a guideline or Rule the government should follow it. As per Masder Hossain case this Court is competent to give a direction upon the government to frame a guideline or Rule.

Mr. Shafique Ahmed, the learned senior advocate appearing in this case as another Amicus Curiae submits that since there is no any provision in our Constitution for inviting any application from the competent persons to recruit them as a Judge of the Supreme Court as per the petitioner's demand the Chief Justice or the persons who are in the helm of the affairs should ask for application is not at all permissible. The Supreme Court Judge is not a person employed in the service of

the republic, so like other services of the republic no application should be called for.

He further submits that the qualification, experience and other qualities regarding legal acumen of a candidate should be seen by the Chief Justice. Unless he recommends anyone for the post, the President/Government cannot give appointment. As per judgment pronounced in 10 Judges' case the legal acumen is to be seen by the Chief Justice and the other antecedent would be seen by the government. Thus the competency of a person can only be seen by the Chief Justice. How the Chief Justice will know about the legal acumen it depends absolutely upon him. He is to find out the way. He may take opinion from his fellow brothers or from the senior advocates from the Bar or directly he can ask any person who according to him is competent to be a Judge of the Supreme Court to appear before him for interview. Thereafter, he can give consultation to the President/Government to appoint the said person as a Judge of the Supreme Court.

He also submits that since there is no any appointment guideline for the recruitment of the Judges of the highest judiciary other than the provision of Article 95(2)(a)(b). This Court can direct the government to fulfill the Constitutional mandate as per Article 95(2)(c). Finally, he submits that practically no one submits any application to the Chief Justice

or to the government expressing his intention to be elevated to the Bench.

He further submits that since for such high position no application should be invited like other jobs, but the intending candidate may give their CV in the website of the Supreme Court so that it comes to the notice of the Hon'ble Chief Justice.

He further submits that now a days it has become very difficult to appoint competent person as a judge of the Supreme Court as the salary structure of the judges of the apex Court is very low in comparison to judges of the higher judiciary of the neighbouring countries. Thus, for attracting the brilliant candidates in judgeship of the higher judiciary government should think to increase the salary of the judges. A lawyer who becomes eligible to be elevated earns a lofty amount of money during his practice as a lawyer. If the government or the Chief Justice thinks to get his service in the judiciary as a Judge he should be given a good salary though which may not be equal to the earning of a lawyer of his stature. He also submits that still it is possible to bring the good lawyer having good academic background and competency as a lawyer to serve the higher judiciary if their salary structure can be made attractive.

Dr. Kamal Hossain, the learned senior advocate another Amicus Curiae submits that the process that has been followed

in the appointment of Judges in South Asia for over one hundred years is that the appointment is made after consultation with the Hon'ble Chief Justice. He also submits that consultation with the Hon'ble Chief Justice before appointment of a judge absolutely necessary for the independence of the judiciary, which is one of the basic features of the Constitution. The consistent practice of consultation with the Hon'ble Chief Justice has been established for over a century in the subcontinent, in particular. Since the fourth amendment of 1975 till February, 1994 and thereafter the Constitution process can be said to have established as a constitutional convention, which has become integral part of the Constitution.

He further submits that reason behind the constitutional convention of consultation with the Hon'ble Chief Justice is no less than the preservation of the independence of the judiciary, because a Judge should be appointed or confirmed on the basis of the performance, and his performance should be seen from his judgments which can be seen by the Hon'ble Chief Justice. Dr. Kamal citing a decision in the case of *Md. Shamsul Huda & others Vs. Bangladesh and others* reported in *17 BLT (HCD) 2009 page-109* submits that the process of consultation in the appointment of Judges is needed in order to uphold the

independence of judiciary for, it was realized that the independence of judiciary is not possible by only safeguarding merely by providing security tenure and other conditions of preventing influence of political pressure in making appointments. To avoid this eventuality it is necessary that the process of appointment should be initiated by the Hon'ble Chief Justice of Bangladesh and not by the Executive. But still the appointment is being initiated by the executive and the Hon'ble Chief Justice is consulted on the basis of list of candidates provided by the executive.

Dr. Kamal submits that in the present writ petition the petitioner has prayed for framing of guidelines for process of selection which would be fair and impartial by enabling selection by public notification and appointment through a process which is transparent and impartial and competitive. He further submits that in this regard such process of selection would to safeguarding the independence of judiciary. He further submits that the issue of framing guidelines has merit considering by the Court taken into account the developments already made in this regard in this country and other neighbouring countries and the view expressed in the judicial decisions pronounced by our apex Court.

Mr. Rokonuddin Mahmood, the learned senior advocate appearing in this case as another Amicus Curiae submits that as per the provision of Constitution there is no any provision to frame any guideline for appointment of the Judges of the apex Court. He questioned when constitution has not given any scope to frame any guideline, under what authority guideline, can be framed. He further submits that if any guideline at all necessary it is the parliament who can decide. This Court is not in a position to make any rule. As per Article 95(2) it has been mentioned that who are the persons qualified to be appointed as the Judge of the Supreme Court and Article 95(1)(2) clearly said that what is the qualification of the person to be appointed as a Judge of the apex Court. As per Article 95(1) the Chief Justice shall be appointed by the President and the other Judges shall be appointed by the President after consultation of the Chief Justice. So whether consultation is at all given by the Chief Justice to the President or what consultation took place before the President and the Chief Justice can never be questioned to any Court or authority. Thus, the Constitution has given mandate to the President and the Chief Justice to make appointment of the Judges in the apex Court.

Mr. Rokonuddin Mahmood further submitted that now it is the responsibility of the Chief Justice to give consultation to

the President regarding the suitable candidates. Because, he is the person who has opportunity to know about the competency of the lawyers and other Judges working in the lower judiciary. It is up to the Chief Justice how he will take information regarding the particular person. In what mechanism the candidates should be selected absolutely depends upon the Chief Justice. He may consult with his fellow brothers, or he may ask the person who at his estimation eligible to be elevated to the Bench to appear before him for interview. He also submits that in this writ petition Secretary, Ministry of Law, Justice and Parliamentary Affairs, Registrar General, Supreme Court of Bangladesh have been made respondents. But neither of these respondents has the authority to make any Rule or to frame any law or guideline to appoint the Judges of the apex Court of the country. Thus, the writ petition is not maintainable, it is absolutely misconceived application.

He further submits that the Constitution rules out the advertisement for the post of judges of the higher judiciary. The petitioner by filing this writ petition sought to limit the power of the President and Chief Justice and they wanted to bind the President and Chief Justice to work under a frame work. Their prayer is absolutely contrary to the constitutional provision as mentioned in Article 95(2)(a)(b). The Court cannot enlarge the

scope of Article 95 nor can limit the scope of the same, only the parliament has the authority to bring any change in the Constitution or to make any law in conformity with the provision of the Constitution.

He further submits that as per Article 95(2)(c) it has been mentioned that a person should have "such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court." If any law is to be enacted it is the parliament's prerogative to do so, the Supreme Court cannot direct the parliament to make any law. Making a law is the exclusive jurisdiction of the parliament. As per Article 65 (1) the authority of legislative powers has been vested to the parliament only. Thus, if this Court makes any rule or guidelines it will be contrary to the provision of Article 65(1) of the Constitution.

He also submits that even as per Article 142 of the Constitution any provision of the Constitution may be amended by way of addition, alteration, substitution or repeal by Act of Parliament. Thus, it is very clear from the constitutional provisions that this Court has no power to make any guideline or rule for appointing the apex Court Judges extending the provision mentioned in the Article 95(2)(a)(b)&(c). He also submits that as per Article 119 the

election commission, another constitutional body has been given power to conduct elections of Members of Parliament, elections to the office of the President and some other jobs. In 119(2) the Election Commission has been given power to do such functions in addition to those mentioned in Article 109(1)(a)(b) as may be prescribed by this Constitution or by any other law. The more elections other than parliament and the President election are being held in our country as per law which has been enacted by the parliament. Thus, the absolute power to make any guideline or law or rule vests upon the parliament only. He further submits that as per Article 66(2)(g) it has been mentioned that a person is disqualified for such election (parliament) by or under any law. In this Article from (a)-(f) it has been mentioned about the criterions of disqualifications of a person to contest the parliament election. As per Article 66(2)(g) it has been further mentioned that any person may be declared disqualified for such election by or under any law. Thus a law must be enacted to make any person disqualified by the authority of the parliament not by the Election Commission.

He further submits that Article 95 is the basic structure of the Constitution. Only as per Article 48 (3) at the time of appointing Chief Justice, the President does not need to consult

with the Prime Minister, but other than the appointment of the Chief Justice and the Prime Minister, the President is under obligation in exercising his all functions to take advice of the Prime Minister. Thus, when the apex Court Judges are being appointed after due consultation with the Chief Justice it goes to the Prime Minister and the Prime Minister has a role to give advice to the President and after being advised the President appoints a Judge of the Supreme Court. So as per our Constitution a Judge is being appointed by the President after being consulted by the Chief Justice and also by the Prime Minister. As per proviso of Article 48(3) it is provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into any Court.

Thus, it is clear that the apex Court Judges are being appointed by the President after consultation with the Chief Justice and the Prime Minister. This Court cannot give them any guideline to follow. The Supreme Court cannot limit the power of the President, Chief Justice or Parliament to do the work within a frame work given by it. This kind of the action of the Supreme Court would be termed as unconstitutional.

We have gone through the application and considered the submissions of the learned advocate for the petitioner and the

Amicus Curiaes. In the writ petition, the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Registrar (now Registrar General), Supreme Court of Bangladesh, Principal Secretary of the Prime Minister Office and the Cabinet Secretary had been made respondents. None of the respondents turned to the Court to contest the Rule. However, we are to decide whether this Court can direct the respondents to frame guidelines in respect of process of selection of persons for being appointed as Judges of the Supreme Court of Bangladesh.

As per Article 95 of our Constitution the Judges shall be appointed by the President after consultation with the Chief Justice. In the original Constitution of 1972 the said provision was there. But after amending the Constitution by the 4th amendment the provision of consultation with the Chief Justice by the President was taken away. Thereafter the said provision has again come into force by the Constitution 15th Amended Act, 2011. Article 95(2) has described the qualification for appointment of judges. In the said Article it has been said that “a person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and – (a) has, for not less than ten years, been an advocate of the Supreme Court; or (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or (c) has such qualifications as may be

prescribed by law for appointment as a Judge of the Supreme Court. There is a provision of appointment of an Additional Judges of the Supreme Court which has been envisaged in the Article 98 of the Constitution which runs as follows:

“Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period:

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.”

The words “duly qualified persons” are not defined in the said Article. But in article 95(2) the disqualification of a person for being appointed as a judge has been articulated. If we go through the articles 95 and 98 together we can easily find what is the requisite qualification of a person to be elevated as a judge of the Supreme Court of Bangladesh. By Article 65 of the Constitution the parliament has been vested with the legislative power of the Republic. The parliament can delegate its power to any person or authority by an Act of parliament, to make orders, rules, regulations, bye-laws or other instruments having

legislative effect. From a plain reading of this article it reveals that unless and until the parliament delegates its power to any authority or any department within the limit of the country they cannot make any Rule. Thus, from the aforesaid article it is clear that the parliament is the sole authority to enact a rule or law and the parliament and only the parliament can delegate its powers to any authority to formulate, regulations, or any guidelines.

The question is whether Supreme Court can direct the Government (the respondents) to frame any guideline. The respondents no.1, Secretary, Ministry of Law, Justice and Parliamentary Affairs has no any power to formulate the guideline for recruitment of the judges of the higher judiciary neither the Registrar General, Principal Secretary of the Prime Minister or the Cabinet Secretary has such power to frame any guideline or rules for appointment the judges of the higher judiciary.

The Supreme Court is established under the provision of article 94 of the Constitution. The provision of article 94 of the Constitution runs as follows:

“(1) There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.

(2) The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other judges as the president may deem it necessary to appoint to each division.

(3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division, and the other Judges shall sit only in the High Court Division.

(4) Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions."

Now question is what is judicial function? The High Court Division of the Supreme Court works under the provision of the High Court Rules and the Appellate Division works under the provision of Appellate Division Rules. The High Court Division has the power to issue certain order and directions etc. under the provision of Article 102 of the Constitution. As per the provision of Article 102 (1) "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution." But the petitioner has not come up before us to enforce any of the fundamental rights guaranteed under part III of the Constitution.

As per article 65, it is the absolute power of the parliament to enact law which is completely an independent organ of the State, which consists of the elected representatives of the country. It is well settled that this Court cannot direct the parliament to enact any law. But nevertheless the Supreme Court has been vested with the power by the Constitution to review any act of the legislature or executive to see whether the act done is consistent with spirit of the Constitution or not. If it is found that the action of the parliament or executive is in contrary to the Constitution the Supreme Court's High Court Division has the power to declare the said action unconstitutional. In fact this power is the power of the people of the country. The Supreme Court always exercises such judicial power on behalf of the people. The people will always remain the focal point of concern.

The respondents in this petition are neither the part and parcel of the parliament, they are executives working under the government. The government executives are not at all vested with any power by the parliament to make any guidelines or regulation or Rule what so ever. So this Court cannot direct the respondents to make any rule or guidelines for appointing the persons in the higher judiciary. The petitioner during his submission submitted that if this Court is reluctant to give any

such direction upon the respondents to frame a guideline, it can give some observations to be followed by the concerned authorities in appointing the person as a Judge of the higher judiciary. In this regard the petitioner referred decisions in the cases of Vishaka vs. State of Rajasthan, AIR 1997 SC 3011, Destruction of Public and Private Properties vs. State of AP AIR 2009 SC 2266, Delhi Jal Board vs. National Campaign for Dignity and Rights of Sewerage & Allied Workers (2011) 8 Supreme Court Cases 568 and BLAST vs. Bangladesh, 55 DLR 363 where it has been observed that in absence of any particular law the Court can give direction to the government to take some measures in the light of directions.

In the above cases their Lordships considering the inadequacy of law and inadequacy of sufficient protection for the sewerage workers and others gave directions upon the concerned authority to take measure. But in the case in hand the petitioner prayed for a direction upon the respondents to formulate a guideline for appointing the judges of the apex Court. Since as per Constitution there is a provision of consultation with the Chief Justice before making any appointment in the higher judiciary, there is ample scope for the Chief Justice to select the competent persons for the higher judiciary.

In Article 95(2)(a)&(b) the requisite qualification for being recruited in the higher judiciary as a Judge has been mentioned. Now it is the responsibility of the Chief Justice to select the candidate and to suggest the President in the form of recommendation to appoint them in the higher judiciary. There is ample opportunity for the Chief Justice to select the proper persons having sufficient legal acumen and competence for the higher judiciary. In ten judges case their Lordships held that:

“Consultation with the Chief Justice with primacy of his opinion in the matter of appointment of judges and the addition of judiciary is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is not conflict with Article 48(3) of the Constitution.”

By Article 48(3) the President takes advice from the Prime Minister. Since it has been held in the case of *Bangladesh & ors vs. Md. Idrisur Rahman, Advocae & ors* reported in 29 BLAD (AD) 29 that the opinion of the Chief Justice will get primacy, it absolutely depends upon the Chief Justice to select the proper persons for the higher judiciary. In the said case it has also been held that:

“the convention of consultation with the Chief Justice in the matter of appointment of Judges under Articles 95 and 98 of the Constitution has hardened and matured

into a rule of law having been recognized and acted upon by all the 'actors' in the matter and therefore is binding upon the executive."

The eligibility of the Judges has been mentioned in the Article 95(2). In spite of that the petitioner by filing this writ petition wanted to give a guideline how the persons who are in the helm of affairs should act and what should be a criterion for the persons to be recruited in the higher judiciary. Since the opinion of the Chief Justice has been made mandatory for the executive, presumably it can be said that the Chief Justice being the head of the judiciary, one of organs of the State will recruit the proper persons in the higher judiciary having proper legal background i.e. sufficient knowledge of law, man of dignity and integrity. The petitioner's submission is that for the sake of independence of judiciary the recruitment process of the Judges of the higher judiciary must be free from all political influences. It is his apprehension that since vide Article 48(3) of the Constitution there is a provision to take advice from the Prime Minister, the President is bound to listen his/her advice, thus there might be political influence in the process of recruitment of the Judges in the higher judiciary. In this regard Mr. Justice Abdul Matin in the case of *Bangladesh & ors vs. Md. Idrisur Rahman, Advocate & ors* reported in 29 BLAD (AD) 29 has said that "therefore the expression "*independence of judiciary*" is also

no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner except by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore, the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98, 116 of the Constitution.

The independence of judiciary has also been held to be a basic structure of our Constitution, in the case of *Anwar Hossain Chowdhury and other vs. Bangladesh* reported in **41 DLR(AD) 165** wherein it was held as under:

“This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J: said “if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task

of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective." He said that the Judges must uphold the core principle of the rule of law which says-"Be you ever so, the law is above you."

"The above is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and other vs. President of India and others AIR 1982 SC at Page 152)."

"Independence of the judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixe age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matter of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt, such a person can hardly be an independent Judge."

"The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of government. The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole

scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive."

But in the concluding part of the judgment in the aforesaid case it has been held too that the opinion of the Chief Justice shall have the primacy over the executive. Therefore, it may be reiterated that the Chief Justice is the key person in forming opinion as to eligibility of persons for appointment in the higher judiciary of our country. Expressing opinion by the Chief Justice thus inevitably forms part of the appointment process of Judges in the higher judiciary. In different countries including India and Pakistan Judges of the higher judiciary are appointed by the President in 'consultation' with the Chief Justice.

Recently the government of India introduced a Commission meant to select persons for appointment in the higher judiciary. But the same was challenged and eventually Indian Supreme Court scarped the idea of forming 'Commission' contemplating different mechanism and provisions for appointing judges in the higher judiciary and thus in India still the primary task of recommending persons for appointment in the higher judiciary remains in the dominion of the Chief Justice and other Judges. Also in the advanced countries like Australia, Canada etc the appointment

process in the higher judiciary is almost alike, having some differences.

Nobody will disagree that 'merit' and 'integrity' must be considered as 'prime criteria' for appointment of judges to the higher judiciary indeed. According to **Justice Kuldip Singh** of the Supreme Court of India "*...the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility.*"

The task of recommendation on part of the Chief Justice by selecting potential persons for appointment through assessing the above criteria thus plays a significant responsibility. Since the convention of consultation with the Chief Justice in appointing Judges in our higher judiciary under Articles 95 and 98 of the Constitution has been matured into a rule of law and since the 'actors' move on to act principally upon it the 'recommendation' initiated by the Chief Justice should be based on due, effective and transparent assessment. It has been envisaged in Article 95 of our Constitution that the President is required to consult the Chief Justice in respect of appointing judges in the Supreme Court. But however, the term

'consultation' would not diminish the 'primary role' of the Chief Justice in judicial appointments in the higher judiciary.

By the judgment in 'ten judges case' our Supreme Court has already rendered its considered view regarding the binding effect of 'consultation' with the Chief Justice by the President in appointing judges in the higher judiciary. Thus, we concede that there is no scope to direct the respondents to formulate guidelines to regulate appointments of judges in the High Court Division of the Supreme Court. This kind of direction to formulate guidelines for appointing the Judges in the higher judiciary shall only undermine the power of the Chief Justice which has been vested upon him by the Constitution itself and by pronouncement of judgment in the ten Judges case as well as Masder Hossain case. People of the country always expects that the man of integrity, having capability to express and man of personality should be appointed in the higher judiciary. In this regard his Lordship *J.S. Verma, J.* in the case of *Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441* has observed that:

"....only those persons should be considered fit for appointment as judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper

personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior judge. The collective wisdom of the constitutional functionaries involved in the process of appointing superior judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry. It is not unlikely that the care and attention expected from them in the discharge of his obligation has not been bestowed in all cases. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior judges should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made. This is not difficult to achieve."

However, the matter in hand prompts us to express view of our own that undeniably the judiciary in true sense meets public expectations on both counts—selection of judges and performance of judges. To achieve the objective of an independent judiciary the selection process of judicial appointment in the higher judiciary needs to be designed in such a manner as to guarantee the selection of highly qualified, honest and eligible person. This Court wants to believe that if the existing system fails to work properly, our legislatures will come forward to enact a charter into the Constitution or make proper law as hinted by Article 95(2)(c) which shall elevate the higher judiciary to a rare dignity which will command the

respectful obedience of the people of Bangladesh. Undoubtedly it can be said that the existing process of recommending the persons to be appointed as High Court Judge by the Chief Justice reflects due fairness and transparency. According to **Justice V.R. Krishna Iyer** *“Not one bad robe should be allowed to tarnish a great institution.”*

In view of deliberation made herein above and to respond to the public aspiration the existing selection process could be made more effective, improved, transparent and realistic by taking the following matters into account as ‘eligibility criteria’, if considered appropriate and rational by the Honourable Chief Justice before he moves on to recommend a person or the pool of persons for appointment as Judge or Judges of the High Court Division, having regard to the provisions envisaged in Article 95(2) of our Constitution:

- (a) a person, a citizen of Bangladesh having sincere allegiance to the fundamental principles of the State Policy, i.e., nationalism, socialism, democracy and secularism as mentioned in Article 8 of the Constitution and also the spirit of the war of liberation through which the nation achieved its independence in 1971. A person should not be recommended for appointment if his antecedent does not appear balanced with the above principles and the spirit;

- (b) a person to be recommended must have brilliant academic profile, towering level of professional skill, legal acumen and integrity;
- (c) Mechanism of providing Curriculum Vitae of intending persons in the website of the Supreme Court may be installed so that the Chief Justice, on initial consideration of the same, if wishes may ask a person or persons to appear before him for an interview along with his assets and liability statement—which may substantially facilitate the process of appropriate recommendation through effective, transparent and impartial impression;
- (d) A person achieves professional skill and efficiency with the passage of time he spends in his professional arena and thus naturally age of the intending person should be one of key considerations of recommendation. In the 80th report of the Law Commission of India regarding the matter of appointment of Judges observed—for a Judges' maturity is an essential element. Professional maturity comes with years' brilliant uptake being no substitute. Conceding with this observation we are of the view that minimum age of a person intending to be selected for appointment as a Judge of the Supreme Court should be 45 years;
- (e) To ensure high level of quality selection the Advocates enrolled in the Appellate Division should be prioritized for recommendation by the Chief Justice. However, in a very exceptional case the Advocates enrolled in the High Court Division having wide range practicing experience with honesty and sincerity may

be considered in recommending their elevation to the High Court Division;

(f) The judges working in the sub-ordinate judiciary having judicial working experience of less than three(03) years in the capacity of District & Sessions Judge should not be considered for recommendation for appointing in the higher judiciary; and

(g) Also the merit and integrity must be the prime criteria while recommending the persons working in the sub-ordinate judiciary. It should be borne in mind that a person of high brilliance having no integrity is rather treacherous for any institution.

In addition to the above thoughts as we consider more supportive for recommending a person for appointment in the higher judiciary we also opt to add further view of our own that to attract the brilliant lawyers for appointing in the higher judiciary the remuneration of Judges of the Supreme Court should be made as smart as possible. The monthly remuneration of a Judge of the High Court Division and the Appellate Division of our Supreme Court should be parallel to that being received by the Judges of other jurisdiction of the Sub-Continent. Robust remuneration must make the eligible lawyers enthused to place him under consideration for recommendation.

Before we depart, we are forced to note that it is regrettable that the respondents did not come to this Court to

extend assistance in resolving the issues of controversy. Their assistance would have profitably focused more light on the issues. However, the writ petitioner's prayer to direct the respondents to formulate guidelines for the purpose of regulating the process of appointing judges in the higher judiciary is misconceived. Despite this final decision we think that the existing system of appointment can be made more improved by the Chief Justice of the country as he is the best and prime person to evaluate as to which lawyers and the judicial officers working in the sub-ordinate judiciary are truly eligible to be elevated to the Bench—and we mean it.

In the process of selecting the persons for elevation to the High Court Division the Chief Justice may, if feels indispensably necessary consult or share his view with at least two of his senior most brother Judges in the Appellate Division and two of the senior most Judges of the High Court Division as well in forming 'opinion' and also to ensure the recommendation appropriate, effective and transparent. After advancing the recommendation expressing opinion by the Chief Justice there should not be any room to disapprove or censure it unless the persons recommended is found by the executive to have an antecedent involving anti-state or anti-social subversive activities. The fate of the recommendation of

the Chief Justice expressing opinion should not be sealed and scrapped for no justified reason, in view of observation made in the 'ten judges case' by the Appellate Division of our Supreme Court.

With the above observations, the Rule is **disposed of**.

Let a copy of this judgment be communicated to all concerned including all respondents at once.

Krishna Debnath, J.

I agree.

Ismial H. Pradhan
BO