

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Bench:

Mr. Justice Mohammad Bazlur Rahman

and

Mr. Justice Md. Ruhul Quddus

Writ Petition No.114 of 2012

In the matter of :

An application under article 102 of the Constitution
of the People's Republic of Bangladesh;

And

In the matter of :

Md. Saiful Islam

...Petitioner

-Versus-

Government of the People's Republic of Bangladesh
and others

...Respondents

Mr. Md. Oziullah, Advocate

... for the petitioner

Mr. Md. Helal Uddin Mollah, Advocate

í for added respondent 10

Judgment on 16.05.2013

Md. Ruhul Quddus, J:

This *rule nisi* at the instance of a Nikah Registrar was issued to examine the legality of an order of the Ministry of Law, Justice and Parliamentary Affairs, Law and Justice Division as contained in Memo No.Bichar-7/2N-65/76 (Angsho)-1017 dated 12.12.2011 under the signature of its Senior Assistant Secretary (herein respondent 2) creating a new area comprising of ward Nos.1-5 of Shah Mahmudpur Union, Chandpur Sadar bifurcating the

existing area of the entire union covered by the petitioner's license (annex-C). By the same order, the Ministry also asked the District Registrar, Chandpur (herein respondent 7) to send a panel towards appointment of a Nikah Registrar for the newly created area and forwarded an application filed by one A H M Helal Uddin Siddiqui (added respondent 10) presumably to include his name therein.

Petitioner's case, in short, is that he obtained his *Kamel* degree in 2001 and became competent to be a Nikah Registrar. His father Moulana Mohammad Nurul Islam, since deceased was his predecessor. Thereafter, the District Registrar, Chandpur under memo No.260 dated 22.04.2002 (annex:A-1) appointed him as Nikah Registrar for entire Shah Mahmudpur Union against the vacancy caused by the death of his father with prior approval of the Ministry vide its Memo No.314-Bichar-7/2N-65/76 dated 11.04.2002 (annex-A). Since then he has been performing his duty on payment of all fees and charges to the Government and to the satisfaction of all concerned. The added respondent filed an application to the Honorable State Minister for Law, Justice and Parliamentary Affairs for creating a new area curtailing the existing area of the petitioner and appointing him as Nikah Registrar therein (annex-B). The Ministry acted on the said application and issued the impugned order, in which event the petitioner moved in this Court with the present writ petition.

The respondent-government does not appear to contest the Rule. However, the added respondent contests it by filing an affidavit-in-opposition denying the material allegations of the writ petition contending, *inter alia*, that the petitioner obtained his license on false statement. One A. B. M. Moudud

Ahmed was in fact appointed as Nikah Registrar of the union in question. Subsequently his appointment was cancelled and the added respondent was appointed there in accordance with law. According to section 4 of the Muslim Marriage and Divorce Registration Act, 1974 (LII of 1974) the Government can extend, curtail and alter the area or territorial jurisdiction of a Nikah Registrar at any point of time. Since the petitioner obtained his license on furnishing false statement regarding appointment in place of his deceased father, he cannot get any relief in writ jurisdiction.

During pendency of the Rule, the added respondent was appointed as Nikah Register for the newly created area, for which the petitioner filed a supplementary affidavit incorporating the development of facts, and two separate applications one for issuance of a supplementary Rule and another for an order of injunction. The said applications were kept in record to be considered and disposed of at the time of hearing of the Rule.

We have given our thought on the said applications. Since the basis of the appointment of the added respondent is under challenge, his fate may well be decided in the instant Rule without any prejudice to him and as such no supplementary Rule is necessary. The applications are accordingly disposed of.

Mr. Md. Oziullah, learned Advocate for the petitioner submits that under the newly framed Muslim Marriage and Divorce Registration Rules, 2009 (in short -the Rules, 2009) the scope of curtailment of an area has been limited. Under rule 13 of the Rules, 2009 the minimum limit has been fixed at one union in case of the area of Union Parishad. Now a Nikah Registrar of a union is entitled to hold the entire union under his licence. In the present case, the

licensing authority in arbitrary exercise of power curtailed the territorial limit of the petitioner without serving any notice on him even without assigning any reason and appointed the added respondent without following the rules, which were beyond the scope of law and as such without lawful authority.

Mr. Oziullah further submits that the petitioner obtained the licence on payment of certain amount of money to the Government and maintains his livelihood with the statutory fees he receives for marriage and divorce registration. The impugned action of reducing his area will adversely affect his livelihood and as such his right to life and right to profession guaranteed under the Constitution have also been infringed by the impugned order for no fault of his own.

Mr. Oziullah draws our attention to the top of the application filed by the added respondent (annex-B), where the Honøble Minister for Foreign Affairs and the Member of Parliament of the area in question made a recommendation using his official seal. He then submits that the impugned order of curtailment of the petitioner's territorial jurisdiction at the instance of a Cabinet Minister without assigning any reason is an example of unauthorized and arbitrary exercise of power by the licensing authority. The law has given the power of curtailment of area/territorial jurisdiction of a particular Nikah Registrar, does not mean that the authority will curtail it violating the minimum limit fixed by law and without showing any reason. In support of his contention, Mr. Oziullah refers to an unreported decision of the High Court Division passed on 12.12.2012 in Writ Petition No. 9833 of 2011 (Md. Mobarak Hossen Farazi vs. Govt. of Bangladesh and others).

Mr. Md. Helal Uddin Mollah, learned Advocate appearing for the added respondent submits that under section 4 of the Act LII of 1974 the Government has ample power to extend, curtail or alter the area of a Nikah Registrar at any point of time. This principle has already been decided by the Appellate Division in so many cases including that of Raisuddin vs. Bangladesh and others, 51 DLR (AD) 152 and Kazi Imamuddin Bhuiya vs. Government of Bangladesh and others, 10 BLC (AD) 134. He further submits that even if there is any inconsistency or contradiction between section 4 of the Act LII of 1974 and rule 13 of the Rules, 2009 it is needless to say that the Act will prevail. Mr. Mollah lastly submits that the word "minimum" should not be added to interpret a union to be an area of a Nikah Registrar. The preferential rule of appointment in place of father having not been incorporated in the present Rules, the petitioner cannot claim to continue with his licence under the previous Rules. The licence given to any Nikah Registrar does not create any vested right in his favour and as such no compliance of natural justice is required to curtail the area under such licence.

It appears that the District Registrar, Chandpur with prior approval of the Ministry appointed the petitioner as Nikah Registrar for entire Shah Mahmudpur Union against the vacancy caused by the death of his father under rule 5 (1) and 5 (3Ka) of the Muslim Marriage and Divorce Registration Rules, 1975 (vide annexes A and A-1 to the writ petition). Authenticity of the said documents is not denied by the respondents. It further appears that the added respondent had filed a complaint against the petitioner to the Ministry bringing allegations that his (petitioner's) father was not the Nikah Registrar of Shah

Mahmudpur Union and that he obtained the licence on false statement about his father's appointment as Nikah Registrar thereof (annex-E). The District Registrar, Chandpur under instruction of the Ministry inquired into the matter and submitted a report on 14.08.2003 [annex-E(1)] to the Ministry with observation and findings as follows:

“AÎ Kihfj x i WZ vKWcT chPvPbv Kivi qv vlv hvq vvvj v vRóvi Awdm Kigj v nBZ cŃB vbKvn vRóvi Mxi Zvuj Kvq Rbve G, v Gg, bj j Bmj vg mve 4 bs kvngvngj cji BDvbq I 2 bs ivRvi Mvl (^t) BDvbqxi vbKvn vRóvi inmv DKL inqv | AÎ Kihfj q nBZ vWZ cT`x Rbve G, x, Gg, bj j Bmj vxi gnvgvqv evRvi Awdxi vKvbq vY Kiv nBqv Ges vbKvn vRóvi xi big I Z_” mshj Z weibx Rbve G, x, Gg, bj j Bmj vg 4 bs kvngvngj cji BDvbq I 2 bs ivRvi Mvl BDvbqxi vbKvn vRóvi inmv DKL Kiv nBqv | g% x vWZ Zvni gZj mshj% cŃZ` xI Zvni 4 bs kvngvngj cji BDvbq I 2 bs ivRvi Mvl BDvbqxi vbKvn vRóvi inmv DKL Kiv nBqv (Kuc mshj) |

....

“Awf vMvix Rbve vjvj Dvib, Awfhj vbKvn vRóvi Rbve mvdj Bmj vg Gi Revbe Š I AÎ Kihfj x vKWcT chPvPbv vlv hvq v 4 bs kvngvngj cji BDvbqxi eZvb vbKvn vRóvi Rbve mvdj Bmj vxi vZv Rbve G, x, Gg, bj j Bmj vg mve D³ BDvbqxi vbKvn vRóvi inmv vbM cŃB vQxb Ges KgPZ vQxb | vZvb D³ BDvbqxi vbKvn vRóvi vQxb bv gRbve G, GBP, Gg, vjvj Dvib Gi AvbxZ Awf vM mZ” b | 0

From the passages of the report quoted above it appears that the allegations made by the added respondent were not correct. We are, therefore, unable to accept his contention that the petitioner obtained the Rule on false

statement regarding his appointment in place of his deceased father. Since the petitioner is fully qualified to be a Nikah Registrar and his appointment was made long before framing of the Rules, 2009, the subsequent omission of the preferential rule in the newly formed Rules will not adversely affect his right or invalidate the licence issued in his favour.

The area of the union in question was bifurcated but no reason whatsoever for such bifurcation was assigned. The added respondent filed an application (annex-B) directly to the Honøble State Minister, Ministry of Law, Justice and Parliamentary Affairs for his appointment as Marriage Registrar by creating a new area curtailing the area licensed to the petitioner. The Honøble Minister, Ministry of Foreign Affairs made recommendation on the said application on 6.10.2011, upon which the Ministry of Law acted and passed the impugned order on 12.12.2011. It clearly indicates that the existing area was bifurcated and the new area was created for the purpose of accommodating the added respondent, not for any valid reasons like increase of population, incapacity of the sitting Nikah Registrar to render the service needed etc. For better understanding about the area/territorial jurisdiction of a Marriage Registrar section 4 of the Act LII of 1974; rule 10 of the Rules, 1975 and rule 13 of the Rules, 2009 are quoted in seriatim below:

Section 4 of the Act LII of 1974:

õ4. For the purpose of registration of marriages under this Act, the Government shall grant licenses to such number of persons, to be called Nikah Registrars, as it may deem necessary for such areas as it may specify:

Provided that not more than one Nikah Registrar shall be licensed for any one area (emphasis supplied)

Provided further that the Government may, whenever it deems fit so to do, extend, curtail or otherwise alter the limits of any area for which a Nikah Registrar has been license.”

Rule 10 of the Rules, 1975:

“10. Jurisdiction.-Notwithstanding anything contained in these Rules or in any licence granted under these Rules, an area for which a Nikah Registrar may be licensed shall be-

(a) in the case of a City Corporation, not more than one ward;

[(b) in the case of a municipality of-

(i) category ‘A’, not more than two wards;

(ii) category ‘B’, not more than three wards; and

(iii) category ‘C’, whole municipality:

provided that this provision shall not affect a licence already issued for any ward; and]

(c) in other cases, not more than one union. (emphasis supplied)

Rule 13 of the Rules, 2009:

*“13| Awa xjT | -GB neliagvj vi Aaxb cŃ Ę nbKvn vvr ÷ vxi j vBxxš hinv nKQB _vKK
bv vwb, GKRB nbKvn vvr ÷ vi x nbgewYZ Gj vKvi Rb” j vBxxš cŃ vb Ki v hvBx, h_vt-*

(K) nmU Kxxkxi vlx, GKU I qvW,

(L) ŃKŃ vxi vqmfvi vlx, `Biu I qvW,

(M) ŃLŃ vxi vqmfvi vlx, nZbu I qvW,

(N) ŃMŃ vxi vqmfvi vlx mgMŃGj vKv:

(O) BDnbqb cii I ` Gj vKvi vlx GKU BDnbqb/”(emphasis supplied)

From a careful reading of the above quoted provisions of law it appears that in the newly framed Rules the words "not more than" are omitted. This omission has got a definite meaning. It does mean that earlier in the Rules, 1975 the area of a Nikah Registrar was "not more than one union", but in the newly framed Rules, 2009 it has been fixed at only "one union".

In the two cases of the Appellate Division cited by the learned Advocate for the added respondent, power of the Government to curtail, extend and alter an area of a Nikah Registrar as conferred by the second proviso to section 4 of the Act LII of 1974 was interpreted in the light of rule 10 of the Rules, 1975. But in the light of rule 13 of the newly framed Rules, 2009, the interpretation may be otherwise because of omission of the words "not more than".

More so, in the case of Raisuddin vs. Bangladesh and others, 51 DLR (AD) 152 the Nikah Registrar was appointed in 1971 for an area of Dhaka City which was subsequently curtailed in 1998. It is presumed that in between the periods, population of the area was increased many times. In the case of Kazi Imamuddin Bhuiya vs. Government of Bangladesh and others, 10 BLC (AD) 134 the petitioner was appointed as Nikah Registrar for four unions under Chittagong District, namely, Syedpur Union, Baroairudhala Union, Sitakundu Union and Muradpur Union, which was subsequently amalgamated with Wahedpur union. This huge territory was beyond the maximum limit prescribed by the Rules, 1975. However, subsequently Wahedpur Union was shown vacant and approval for issuance of licence to another person was given, which was challenged. In the present case the petitioner's licence was issued for one union of Chandpur in 2002, which fell well within the definition of

one area provided in rule 13 of the Rules, 2009. This area was curtailed in 2011 without assigning any reason. So, the facts of the cases cited by the added respondent are distinguishable.

Section 14 of the Act LII of 1974 confers authority on the Government to make Rules to carry into effect the purposes of the Act. After framing and notification of such Rules with clear description of an area as provided in rule 13 of the Rules, 2009, if the functionaries of the Government are allowed to curtail the minimum area by an executive order, the very purpose of the law stands defeated. Where the minimum territorial limit/area of a license for marriage registration has been fixed by a legislation, may be subordinate or delegated, the Government's authority to curtail, extend and alter the limit of an area should not be exercised beyond that limit.

In the unreported decision passed in Writ Petition No. 9833 of 2011, bifurcation of one union and thereby creation of two areas in that union, and subsequent appointment of a new Nikah Registrar on a demi official letter issued by the Honorable Minister for Home Affairs was challenged by the existing Nikah Registrar. A Division Bench of this Court declared the said actions illegal taking the view that the process of bifurcation having been initiated at the instance of the concerned Member of Parliament and Minister of a particular Ministry, was *malafide*. Facts of the case are identical to that of the present one.

There are some other aspects to be considered. Section 11 of the Act LII of 1974 says that any license of a Nikah Registrar cannot be revoked unless he is found guilty of misconduct in the discharge of his duties or has become unfit

or physically incapable. In that case also the Nikah Registrar is to be given a reasonable opportunity to show cause why that order should not be passed. Rule 12 of the Rules, 2009 provides that a licence shall stand annulled on the date, on which the licensee attains the age of sixty-five years. The licence granted under the Act LII of 1974 is thus exclusive and perpetual in nature subject to attainment of sixty-five years age by the incumbent Nikah Registrar. Curtailment of an area is also a sort of revocation of license for the area curtailed and if it is done without assigning any valid reason and without any intimation or option to the licensee, it will be violative of law and will also open an avenue of arbitrary exercise of power on the part of the licensing authority.

Rule 8 of the Rules, 2009 speaks of the age limit, residential status and educational qualification of a Nikah Registrar. An aspiring Nikah Registrar is to go through a process of selection by an Advisory Committee constituted under rules 3 and 4, while rules 5 and 6 prescribe the procedure of granting licence to a Nikah Registrar. According to sub-rules (7) and (8) of rule 6 the selected person has to pay licence fee before obtaining the licence, and he has to pay yearly fee and a fixed portion of marriage and divorce registration fee according to rules 7 and 21 after obtaining the licence. Rules 15 and 16 speak of the procedure of resignation and handing over the charge of office by a Nikah Registrar, while rule 17 speaks of his leave. Rule 20 imposes restriction on a Nikah Registrar from pursuing any profession except in any mosque, school or madrasha only in his area.

So, the Act LII of 1974 and the Rules made thereunder stipulate some terms and conditions regarding the eligibility, procedure of selection and function of a Nikah Registrar, and impose some restriction on him and also bind him with some liabilities. When a licence is granted under a statute, and is obtained and maintained on payment of fees, and the guiding rules restrict some fundamental rights of the licensee and fix some responsibilities and liabilities on him, it gives him some rights too. Such a licence cannot be termed as a grace and the area covered by it or a part thereof cannot be curtailed to the detriment of his interest without assigning any valid reason, intimating him to that effect and giving him option to choose the area he wants to keep under his licence.

It has already been mentioned that in issuing the impugned order, the licensing authority acted at the behest of a Minister having no business with marriage registration. There was no other consideration. This is true that section 4 of the Act LII of 1974 gives the Government discretionary power to extend, curtail or otherwise to alter the limits of an area for which a Nikah Registrar has been licensed. But such power has legal limitation by restrictive principles of reasonableness and fair play, and in some cases by that of natural justice. The power is, therefore, not absolute.

In support of the view we are tempted to quote a passage from Wade's Administrative Law (Seventh Edition) p. 379:

“The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and

legal protection of the citizen. Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act. They have also, as explained elsewhere, imposed stringent procedural requirements. Here we are concerned with the substance of administrative discretion.”

Generally a Nikah Registrar is known as a *Kazi* by profession, he commands respect and enjoys social status in his locality because of holding the licence. Presumably he maintains his livelihood from the earning of marriage and divorce registration fees left with him after payment of a fixed amount therefrom to the Government. This aspect should also be considered in curtailment of an area, for which a Nikah Registrar has already been licensed.

For all the reasons, we hold that the area mentioned in rule 13 of the newly framed Rules, 2009 cannot be curtailed every now and then at the sweet will of the licensing authority. There must be some valid reasons for such curtailment, and in that case the incumbent Nikah Registrar should be given prior intimation and option as to which area he would choose to keep under his license subject to fulfillment of the other conditions provided in the Rules. Any decision of the Government regarding curtailment, extension or change of territorial jurisdiction of a Nikah Registrar must be justified with the test of reasonableness and fair play.

In view of the above we find substance in the submissions of the learned Advocate for the petitioner. Accordingly, the Rule is made absolute. The impugned order of the Ministry of Law, Justice and Parliamentary Affairs as contained in Memo No. Bichar-7/2N-65/76 (Angsho)-1017 dated 12.12.2011 issued by its Senior Assistant Secretary (herein respondent 2) as well as the appointment of the added respondent A. H. M. Helaluddin Siddiqui as contained in Memo No. Bichar-7/ 2N-65/76 (Angsho)-244 dated 22.03.2012 signed by its Senior Assistant Secretary, Bichar Shakha are declared to have been made without lawful authority and are of no legal effect.

Mohammad Bazlur Rahman, J:

I agree.