

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

**Writ Petition No. 6653 of 2012**

In the matter of :

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

-And-

In the matter of :

M. Asafuddowlah

..... Petitioner

-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Dhaka.

.....Respondent

Mr. Aneek R. Haque with  
Mr. Md. Monjur Nahid,  
Ms. Mahjerin Musharaf and  
Ms. Khaleda Chowdhury, Advocates

.... For the Petitioner

Mr. Mahbubey Alam, Attorney General with  
Ms. Israt Jahan, DAG with  
Mr. Amit Das Gupta, DAG  
Ms. Rokeya Akhter, AAG,  
Ms. Abantee Nurul, AAG,  
Ms. Annah Khanom, AAG and  
Mr. A.K.M. Nur Nabi, AAG

..... For Respondent No. 1

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Sashanka Shekhar Sarkar

Date of Hearing : 31.03.2019, 17.04.2019,  
07.05.2019 & 28.07.2019

Date of Judgment : 08.01.2020

**Zubayer Rahman Chowdhury, J :**

The petitioner, a retired bureaucrat of the country, has brought to the fore an issue of considerable public importance and significance by filing this application under Article 102(2) of the Constitution of the People's Republic of Bangladesh, consequent upon which the instant Rule was issued in the following terms :

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the current trend of making/posting the Civil Servants as Officers on Special Duty (OSD) without assigning any special duty, whatsoever, beyond the scope of Circular No. Sa.Ma/ (Bi:Pro:)-12-90-03(200) dated 03.10.1991 and keeping them as OSD for unlimited period longer than the periods prescribed in the said Circular dated 03.10.1991 and paying them monthly salary and benefits throughout the period without receiving any service from them thereby allowing them to enjoy unearned income causing huge wastage of taxpayers' money should not be declared to be illegal, ultra vires the Constitution and as such of no legal effect and why they should not be directed to frame a guide line in addition to the Circular No. Sa.Ma/(Bi:Pro:)-12-90-03(200) dated 03.10.1991 to regulate the practice of making/posting the officers as OSD in a meaningful manner, and/or pass such other or further order or orders as to this Court may seem fit and proper.”

This application is somewhat unique in that although a Public Interest litigation, commonly known as PIL, is instituted on behalf of the down-trodden, underprivileged and/or the helpless section of the society, in the instant case, it has been filed for espousing the cause of one of the most privileged section of the society, namely the Government officials. On one hand, this application seeks to enforce the Fundamental Right of the Government officials, numbering well over nine hundred, currently designated as ‘Officer on Special Duty’, to be treated in accordance with

law, as enshrined in Article 31 of the Constitution; on the other hand, it seeks to prevent the wastage of the tax-payers money by the Government.

The Rule is being opposed by respondent no. 1 by filing an affidavit-in-opposition as well as several supplementary affidavits. The petitioner, in his turn, has also filed several supplementary affidavits, to which we shall advert in due course. It is pertinent to observe, for the purpose of record, that shortly after the conclusion of hearing, this Bench was reconstituted, resulting in some delay in the delivery of judgment.

A brief narration of the facts leading to the issuance of the Rule is called for. The petitioner, son of late Khan Bahadur Mohammad Ismail, joined the erstwhile Civil Service of Pakistan (briefly, CSP) in 1961. Thereafter, he served in different posts in various capacities and finally he retired as a Secretary to the Government of Bangladesh, having served in the said capacity for more than 10 years. Being a regular taxpayer of the country, the petitioner has challenged the process of designating any Officer serving under the Government as an Officer on Special Duty beyond the stipulated period of one hundred and fifty days and thereby allowing such Officer to receive salary and other benefits without rendering any service, being in violation of the Constitution, apart from being detrimental to the interest of the taxpayers of the country.

It has been stated in the application that hundreds of Government officials, serving in the post of Assistant Secretary, Senior Assistant Secretary and Deputy Secretary, have been designated as “Officer on Special Duty” (hereinafter referred to as OSD) without assigning any

reason. It has been further stated that although any Officer serving under the Government can be designated as an OSD for a maximum period of 150 days, in each and every case, there has been a complete violation of the Rule.

Having placed the application and the supplementary affidavits together with the documents annexed thereto, Mr. Aneek R. Haque, the learned Advocate appearing on behalf of the petitioner submits that although the Government has the authority to designate an officer as an OSD for a maximum period of 150 days only, in almost all the cases, they have continued to remain as OSD for much longer periods, varying between five to ten years and, in two particular cases, for over seventeen years. He submits that although such Officers are not rendering any service to the Republic, they are being allowed to receive their salaries and other benefits including festival bonuses, which is violative of Article 20(2) of the Constitution. He submits that if there is any complaint/allegation against any Officer who has been designated as an OSD, the Government should initiate appropriate proceedings against such Officer and conclude the same within the stipulated period of 150 days. However, if there is no adverse finding against them, they should be allowed to discharge their duties.

Referring to Article 88 of the Constitution, Mr. Haque submits that the salaries and other monetary benefits are paid from the Consolidated Fund, which is mainly derived from the taxpayer's money. He submits that it is the violation of Article 20(2) and Article 88 of the Constitution which has necessitated the filing of the instant writ petition.

On the issue of maintainability of the writ petition, Mr. Haque submits forcefully that as the issue involves interpretation of the Constitutional provisions affecting the rights of the tax-payers of the country, this writ petition is maintainable at the instance of the petitioner, who is a tax-payer of the country. In support of his contention, Mr. Haque has relied on the celebrated case of Dr. Mohiuddin Faruque vs. Bangladesh, reported in 49 DLR (1997) AD 1.

On the other hand, Mr. Mahbubey Alam, the learned Attorney General appearing in opposition to the Rule submits that the process of designating a Government Officer as an OSD is neither new nor uncommon. Elaborating his submission, the learned Attorney General submits that such a practice, which also prevails in our neighbouring countries, namely India and Pakistan, began in the early sixties at the behest of the then Government of Pakistan, which is still being continued for running the administration by the Government. Referring to the relevant Rules, the learned Attorney General submits that as the Government has been vested with the authority to designate any Officer as an OSD, the exercise of such power cannot be questioned by filing a writ petition. The learned Attorney General acknowledges that for lack of available posts, some Officers had to remain as OSD for long periods well in excess of the stipulated period of 150 days. He submits that steps are now being taken by the Government to address the situation.

With regard to the contention of Mr. Haque that the process of keeping an Officer as an OSD for an indefinite period is causing substantial financial loss to the National Exchequer, the learned Attorney

General submits that as the Officers have been designated as OSD by the Government due to various exigencies of the situation, they are entitled to receive their salaries and other benefits as per law and therefore, it cannot be construed as being violative of the Constitutional provisions. He lastly submits that the petitioner cannot be deemed to be a person aggrieved and on that count, the writ petition is not maintainable and therefore, the Rule is liable to be discharged.

At the very outset, let us address the issue of locus standi of the petitioner, so vigorously argued by the learned Attorney General.

Almost half a century ago, the issue of locus standi came up for consideration before the Supreme Court of Bangladesh in the case of Kazi Muklesur Rahman vs. Bangladesh, reported in 26 DLR (SC) (1974) 44. While delivering the landmark judgment, Abu Sadat Mohommad Sayem, the learned Chief Justice observed :

“It appears to us that the question of locus standi does not involve the Court’s jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstance of each case.”

Nearly a quarter of a century later, in the case of Dr. Mohiuddin Farooque vs. Bangladesh, reported in 49 DLR (AD) (1997) 1, the Apex Court expressly endorsed the aforesaid view. The landmark judgment of Sayem, CJ in Kazi Mukhlesur Rahman’s case was not only setting a trend, albiet well ahead of many other jurisdictions, it also had a profound effect on Dr. Mohiuddin Farooq’s case, as evident from the dictum of Afzal CJ and I quote:

“The liberalised view as expanded by my brother is an update, if I may say so, of liberalisation agenda which was undertaken in the case of Kazi Mukhlesur Rahman 26 DLR(SC) 44. It is a matter of some pride that quite early in our Constitutional journey the question of locus standi was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of “sufficient interest” for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian Jurisdiction. The springboard for the liberalisation move was the momentous statement made in that case.”

The learned Chief Justice then quoted the “momentous statement” of Sayem CJ verbatim and further observed :

“Any person other than an officious interveenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.”

In that very same case, Mustafa Kamal, J (as the learned Chief Justice then was) not only quoted the very same statement of Sayem CJ, but went on to observe as under :

“Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.

It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he

is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.”

The issue of locus standi of a person to maintain a writ petition has had a significant shift from its earlier position of requiring a petitioner “to be a person aggrieved” to one requiring the petitioner “to have sufficient interest.” With the passage of time, the scope and extent of the writ jurisdiction has widened to such an extent that even an aggrieved person, who is not a citizen of this country, can maintain a writ petition when the functionaries of the Republic do not act in accordance with law (Northpole (BD) Ltd. vs. Bangladesh Export Processing Zones Authority, 57 DLR (2005) 631). In fact, the current position has been summed up by our Apex Court in the case of ETV vs Dr. Chowdhury Mahmood Hasan, reported in 54 DLR (AD) 2002, 132 in the following terms :

“The narrow confines within which the rule of standing was imprisoned for long years have been broken and new dimension is being given to the doctrine of locus standi.”

(per K.M. Hasan, J, as the learned Chief Justice then was)

In this context, we may refer to two other decisions from our neighbouring jurisdiction. To begin with, in the case of Mahmood Akhtar Nagvi v. Pakistan, reported in PLD 2013 Supreme Court 195, a petition was filed in the form of public interest litigation “seeking elaboration of constitutional and legal safeguards relating to the working of civil servants.” On the issue of maintainability of the petition, the Court held :



“The petition has been held maintainable because the situation portrayed does raise a question of public importance with reference to the enforcement of fundamental rights.”

(per Jawwad S. Khawaja, J, as the learned Chief Justice then was)

In the case of *Bandhua Mukti Morcha vs Union of India*, reported in AIR 1984 SC 802, Pathak, J (as the learned Chief Justice then was) observed :

“Fundamental rights guaranteed under the Constitution are indeed too sacred to be ignored or trifled with merely on the ground of technicality or any rule of procedure.”

In the United Kingdom, the issue has been answered well and truly by Lord Diplock through the following observation made in the case of *Inland Revenue vs. National Federation of Self-Employed and Small Businesses Ltd.*, reported in (1981) 2 All ER 93 :

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited tax-payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped.”

In ‘Legal Control of Government’, noted authors Professor H.W.R. Wade and Professor Schwartz observed :

“If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest.”

Commonly perceived, the term ‘locus standi’ refers to the standing or capacity of any person or group, having sufficient interest, to raise an issue involving public interest for adjudication before the Court.

However, the term ‘sufficient interest’ cannot be defined with any precision. Suffice to say that it is best left to the discretion of the Court to decide, in light of the factual and legal position prevailing in each particular case, as to what would constitute ‘sufficient interest’.

The petitioner is not only a retired bureaucrat, he is also a regular tax-payer of this country. As such, he has a legitimate expectation to be apprised of the manner in which the tax-payers money is being spent by the Government. In our considered view, the petitioner has the locus standi to file the instant application under Article 102(2) of the Constitution. Resultantly, the writ-petition is held to be maintainable.

In the instant case, the factual position is undisputed. The process of designating a Government Officer as an OSD is not novel. This is being practiced by successive Governments for a considerable period of time, right from the then Pakistan era upto the present day. For a better understanding of the issue, let us refer to the Notification No. সম/(বিঃপ্রঃ)-১২-৯০-০৩(২০০) dated 03.10.1991, issued by the then Ministry of Establishment (presently Ministry of Public Administration), which reads as under :

“সংস্থাপন মন্ত্রণালয়  
[নং- সম।(বিঃপ্রঃ)-১২-৯০-০৩(২০০)]

তারিখঃ ১৯-০৯-১৩৯৭ বাং  
০৩-১০-১৯৯১ ইং

ও এস ডি/সুপারনিউমাররী পদ সংক্রান্ত  
(Officer on Special Duty / Supplementary Post)

১। সাংগঠনিক কাঠামো পুনর্বিন্যাসের (restructuring) ফলে কোন স্থায়ী/নিয়মিত কর্মর্তা/কর্মচারী উদ্বৃত্ত ঘোষিত হলে কোন সংস্থায় তার আত্মীকরণের অথবা যে সমস্ত কর্মতকর্তা/কর্মচারী অবসর গ্রহণের প্রাপ্তে তাদের অবসর গ্রহণের পূর্ব পর্যন্ত সুপার নিউমাররী পদের বিপরীতে বেতন ও ভাতাদি পেতে থাকবে, প্রশাসনিক মন্ত্রণালয়/বিভাগ এ সমস্ত উদ্বৃত্ত কর্মচারীদের জীবন বৃত্তান্ত ও চাকুরি সংক্রান্ত প্রয়োজনীয় তথ্যাদিসহ তাদের নামের তালিকা আত্মীকরণের জন্য সংস্থাপন মন্ত্রণালয়ে

এবং অবগতির জন্য অর্থ বিভাগে প্রেরণ করবে সংস্থাপন মন্ত্রণালয় উদ্বৃত্ত ঘোষিত কর্মকর্তা। কর্মচারীগণকে সরকারের উদ্বৃত্ত কর্মকর্তা/কর্মচারীদের আত্মীকরণ সংক্রান্ত আদেশ/নির্দেশ/নীতিমালা অনুসারে শূন্য পদের বিপরীতে আত্মীকরণের ব্যবস্থা গহন করবে।

২। সাময়িক অথচ অত্যাৱশ্যকীয় কাজের চাপ মোকাবেলার জন্য অস্থায়ী ভিত্তিতে পদ সৃষ্টির প্রয়োজন দেখা দিলে কর্মকর্তার প্রয়োজন সংশ্লিষ্ট ক্যাডার, সাব-ক্যাডার বা এক্স-ক্যাডার থেকে সংযুক্তির (attachment) মাধ্যমে পূরণ করতে হবে এবং এর জন্য কর্মকর্তার কোন অস্থায়ী পদ সৃষ্টি করা যাবে না। তবে এ ধরনের অতিরিক্ত কার্য সম্পাদনের জন্য সহায়ক কর্মচারীর (Supporting Staff) অস্থায়ী পদ সৃষ্টি করতে হলে সংস্থাপন মন্ত্রণালয় (সংগঠন ও বাবস্থাপনা উপ-বিভাগ) ও অর্থ বিভাগের সম্মতিএরমে মহামান্য রাষ্ট্রপতির অনুমোদন গ্রহন করতঃ সৃষ্টি করা যেতে পারে।

৩। বিভিন্ন প্রশাসনিক কারণে ইতিপূর্বে ক্যাডারভুক্ত/ক্যাডার বহির্ভূত কর্মকর্তাদের মন্ত্রণালয়ের সাথে সাথে বিশেষ ভারপ্রাপ্ত কর্মকর্তা (ও এস ডি) হিসাবে সংযুক্ত করা হত। সরকার কর্তৃক প্রদত্ত ক্ষমতাবলে ইতিপূর্বে অস্থায়ী পদ সৃষ্টি করে এ সমস্ত কর্মকর্তাদেরকে সংযুক্তকালের বেতন ভাতা প্রদানের ব্যবস্থা করা হত। প্রকৃতপক্ষে এ ধরনের বিশেষ ভারপ্রাপ্ত কর্মকর্তার পদ সৃষ্টির ফলে অনুমোদিত সাংগঠনিক কাঠামোর কোন পরিবর্তন ঘটত না। কিন্তু সম্প্রতি এক সরকারি নির্দেশ বলে মন্ত্রণালয়/বিভাগ কর্তৃক এ ধরনের বিশেষ ভারপ্রাপ্ত কর্মকর্তার পদ সৃষ্টির ক্ষমতা রহিত করা হয়। এখন থেকে বিশেষ ভারপ্রাপ্ত কর্মকর্তার পদ (ও এস ডি) শুধুমাত্র নিম্নলিখিত ক্ষেত্রে সৃষ্টি করা হবেঃ

ক) দু মাসের বেশী ছুটি ভোগকারী।প্রশিক্ষণরত কর্মকর্তা।

খ) পুরাতন পদ/বৈদেশিক চাকুরি থেকে অব্যাহতি প্রাপ্ত/বৈদেশিক প্রশিক্ষণ থেকে প্রত্যাগত এবং নতুন পদে যোগদানের জন্য অপেক্ষমান কর্মকর্তা (অনূর্ধ্ব ১ মাস ১৫ দিন)।

গ) বৈদেশিক চাকুরিতে যোগদানের জন্য/বৈদেশিক প্রশিক্ষণে যোগদানের উদ্দেশ্যে প্রয়োজনীয় বৈদেশিক ভাষা শিক্ষা (Foreign Language Course) লাভের জন্য অপেক্ষমান কর্মকর্তা (অনূর্ধ্ব ৩ মাস)।

ঘ) দুর্নীতি, শৃংখলাজনিত কারন, অসদাচরণ ও অযোগ্যতার জন্য প্রত্যাহিত (Withdrawn) কর্মকর্তা (অনূর্ধ্ব একশত পঞ্চাশ দিন)

ঙ) প্রশাসনিক/অনিবার্য কারণে সংস্থাপন মন্ত্রণালয়ের নিয়ন্ত্রণাধীন বিভিন্ন মন্ত্রণালয়/বিভাগের কর্মকর্তাগণকে (আইন ও বিচার মন্ত্রণালয় ছাড়া) সংস্থাপন মন্ত্রণালয়ের সংযুক্ত করা যাবে। তবে এ ধরনের কর্মকর্তাদের তালিকা মাসিক প্রতিবেদন হিসাবে রাষ্ট্রপতির সচিবালয়ে প্রেরণ করতে হবে।

৪। উপরোক্ত ক্ষেত্রে কর্মকর্তাগণকে কেবল মাত্র বেতন/ভাতা প্রদানের জন্যই বিশেষ ভারপ্রাপ্ত কর্মকর্তা ঘোষণার বিজ্ঞপ্তিকে বিশেষ ভারপ্রাপ্ত কর্মকর্তাদের পদ সৃষ্টি/বেতন ভাতা প্রদানের নির্দেশ/ভিত্তি হিসেবে গন্য হবে। বিশেষ ভারপ্রাপ্ত কর্মকর্তা (ও এস ডি) হিসেবে সংযুক্তকালে তার স্থলে অতিরিক্ত নতুন পদ সৃষ্টি করা যাবে না।”

A perusal of the Notification indicates that an Officer serving under the Government can be posted as an Officer on Special Duty. However, this power or authority of the Government is circumscribed by certain conditions, which, amongst other, stipulate that the maximum period for which a person can be designated as an OSD shall not exceed 150 days. It also provides that an Officer is to be paid his salaries and other benefits for the period during which he remains an OSD.

However, from Annexure A (2) (1) of the affidavit of compliance dated 16.05.2013, filed by respondent no. 1, it appears that some Officers have continued to remain as OSD for a considerable length of time, far beyond the stipulated period of 150 days. This is corroborated by the contesting respondent through Annexure 7 of the affidavit of compliance dated 28.04.2019, wherefrom it appears that some Officers serving in the post of Assistant Secretary, Senior Assistant Secretary, Deputy Secretary and Joint Secretary, who were designated as OSD way back in 2000 and 2001, have continued to remain so till date. Respondent no. 1 has attempted to justify the position in the affidavit-in-opposition dated 30.05.2013 through the following statement :

“In 2005, 40 officers were promoted to the post of Secretary, 50 officers were promoted to the post of Secretary, 50 officers promoted to the post of Additional Secretary, 62 were promoted to the post of Joint Secretary and 327 were promoted to the post of Deputy Secretary. In the similar way in 2006 total 1259 officers were promoted to different position. In practice all these promotees had been made OSD for time being and thereafter they were posted in regular position gradually. And for this the figures of OSD have been shown enormous. In true sense they were not made OSD.”

The petitioner has filed a supplementary affidavit dated 13.05.2019 enclosing a list, which is reproduced hereinbelow :

Sl. No.	Name	ID No.	PRL Date	Position	Duration (YY-MM-DD)
01.	M. Mosaddeque Hossain	1891	27.06.2019	Senior Assistant Secretary	16-10-06
02.	Mohammad Nur Hossain	3505	29.09.2019	Senior Assistant Secretary	14-00-01
03.	Abdullah-Al-Baqui	4529	09.07.2022	Deputy Secretary	10-02-02
04.	Md. Quamruzzaman Chowdhury	4572	29.12.2019	Deputy Secretary	11-04-29
05.	Khondoker Md. Moklesur Rahman	4962	09.11.2019	Deputy Secretary	09-07-19
06.	Mahsia Akter	5854	29.06.2020	Assistant Secretary	18-11-15
07.	Aysha Afsari (Aysha)	6087	02.09.2025	Assistant Secretary	17-06-25
08.	Dr. Md. Nur Islam	6089	16.09.2022	Assistant Secretary	10-03-07
09.	Sheikh Muhammad Akhlaque Ahmed	6355	30.12.2028	Senior Assistant Secretary	09-07-25
10.	Tabassum Azfar	15098	24.10.2030	Assistant Secretary	14-06-15
11.	Khadija Anwar	15501	23.10.2019	Assistant Secretary	12-10-17
12.	Mohammad Abdul Kader	4598	01.10.2020	Senior Assistant Secretary	15-2-24

It is to be noted that the contesting respondent has neither disputed nor challenged the veracity of the aforesaid list.

We do not disagree with the submission advanced by the learned Attorney General that the Government has the authority to designate any

Officer working under the Government as an OSD. However, what we are concerned about is not the authority of the Government to do so, but the manner in which the process is being implemented and continued. As Lord Brightman stated in *Chief Constable of the North Wales Police vs. Evans*, reported in (1982) 1 W.L.R. 1155 :

“Judicial review is concerned, not with the decision, but with the decision-making process.”

We have also taken note from the affidavit of compliance dated 10.01.2013 that the contesting respondent has acknowledged that an amount of Tk. 103,25,64,537/- has been disbursed on account of salary and other benefits in respect of 962 officers serving as OSD covering the period from 2008-2012. Needless to observe that the said figure has increased manifold with the passage of another eight years, as the above-mentioned figure reflects the position only upto 2012. This, no doubt, goes to substantiate the argument advanced by Mr. Haque that the ordinary taxpayers of the country are being made to pay a staggering amount of money on account of the salaries of the Officers who are not discharging any duties.

In reality, the vast number of Officers, who are presently posted as OSD, are merely attending office and going back home every day without rendering any service. However, at the end of the month, they are being paid their salaries and other benefits. This is manifestly in contravention of Article 20 (2) of the Constitution, which prohibits enjoyment of unearned income. In other words, the Government itself is violating the provisions of Article 20 (2) of the Constitution by allowing the officials to

enjoy 'unearned income'. Obviously, this could not have been the intendment of the Legislature.

Furthermore, as per Article 88 of the Constitution, the payment of salaries and other benefits to Government officials are charged from the Consolidated Fund, which is made up of the revenue collected by the Government from the citizens of the country in the form of income tax, VAT and other duties. It is therefore undeniable that it is the tax payer's money which forms the Consolidated Fund. Hence, every citizen of the country, more particularly a tax payer, has a right to be apprised of the manner in which the disbursement of the Consolidated Fund is being made by the Government.

Despite a direction from this Court, the contesting respondent has failed to produce the relevant papers and documents regarding the process of designating an Officer as an OSD. In the affidavit-in-opposition, the contesting respondent has simply mentioned the date of the order along with a comment as to their present place of posting. Such a reply is not only incomplete, but is totally unacceptable. The power of the Government to designate any Officer as an OSD must be exercised only for some specific reason, as enumerated in the Circular dated 03.10.1991, albeit upon an objective assessment of each individual case. Regrettably, we have found that in each and every case, there was no objective assessment nor was any document produced before this Court to show the ground or reason for which the concerned Officers were designated as OSD. In the absence of any such ground, it is to be deemed that the act

was arbitrary and, therefore, without lawful authority. As Professor A.W. Bradley and Professor K.D. Ewing have so aptly commented :

“When a power vested in a public authority is exceeded, acts done in excess of the power are invalid as being ultra vires”

(Constitutional and Administrative Law, 14<sup>th</sup> Ed, page 727)

A similar view has also been expressed by Professor H.W.R. Wade in the following words :

“Every act of governmental power, ie., every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree.”

(Administrative Law 11<sup>th</sup> Ed, Wade & Forsyth, at page 15)

There is another important and pertinent feature in this case, which requires deliberation. In the context of our country, the social standing of the parent(s) is very important and relevant for the upbringing of the children. Therefore, when a person is made to remain as an OSD for an indefinite period, it has a negative impact and effect on the immediate family members and relatives. In two particular cases, two lady Officers, who were designated as OSD way back in 2001, have continued to remain so till date and by now, a period of over 18 years has elapsed. Unlike western countries, where the identity of the parent(s) is either immaterial or even irrelevant for the purpose of marriage, it is far from that in this country; in fact, the status of the parent(s) is not only important, it is also relevant when a marriage is arranged. Needless to observe that the process of keeping an Officer as an OSD for an indefinite period would certainly hinder the matrimonial prospect of the children, who are also citizens of this country. In our view, this is grossly unfair, unjust and an infraction of



a person's Fundamental Right, as guaranteed under Article 31 of the Constitution.

Article 31 of the Constitution, which is embodied in Part III of the Constitution relating to Fundamental Rights, stipulates as under :

“To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.”

Article 31 contains two directives; the first being a positive one and the second being a prohibitive one. In the first part, the Constitution is categorical in stating that every citizen is to be treated “in accordance with law”, while the second part prohibits the taking of any action, save and except in accordance with law, which is detrimental to, amongst others, the “reputation of any person”. It is undeniable that when a Government Officer is designated as an OSD, it is detrimental to his/her reputation vis-a-vis the society. In reality, such Officers face humiliation and degradation not only in the estimation of their colleagues and family members, but also before the society at large. No authority, not even the Government, has the right to degrade or malign a person and his family members in the society without observing the due process of law. Such conduct is undoubtedly arbitrary and malafide. As has been held by the Supreme Court of India in the case of H. L. Trehan vs Union of India, reported in AIR 1989 SC 568 :

“Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provisions of Article 14 of the Constitution.”

(per M. Mohon Dutt, J)

It is pertinent to note that Article 14 of the Constitution of India corresponds to Article 27 of our Constitution, which stipulates that ‘all citizens are equal before law and are entitled to equal protection of law’.

Let it be made very clear once again that we do not, for a moment, question the authority of the Government to designate an Officer as an OSD. However, this power must be exercised in accordance with law and only in accordance with law. Let us not forget that Government Officers too are citizens of this country and therefore, Article 31 is squarely applicable to their case as well. Merely because a person is serving as a Government Officer that, ipso facto, does not take away the protection envisaged by Article 31 of the Constitution.

More than a century ago, in the celebrated case of Board of Education vs. Rice (1911) AC 179, it was observed that ‘administrative power’ must be exercised in strict accordance with terms of the Statute. Almost a century later, in the case of Corruption in Hajj Arrangements in 2010, which was initiated on the basis of a Suo Moto Rule, the Supreme Court of Pakistan held :

“Every executive as administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution.”

(per Iftikhar Muhammad Chawdhury, CJ)

The concept of “due process” is so fundamental that it is engrained and embedded in the social matrix of any democratic system and its application can never be excluded or restricted through any Act of Parliament, far less any Executive order. This view of ours is fortified by the language of Article 55(2) of the Constitution which requires the executive power of the Republic to be exercised “in accordance with the Constitution.” To quote Lord Watson :

“It is an important condition of statutory powers that where exercised at all, they shall be executed with due care.”

(Sanitary Commissioner Gibraltar vs. Orfila, (1890) 15AC, 400)

In the event of any Officer being designated as an OSD, the Government must, without undue delay, form a Committee and undertake an inquiry so as to ascertain the veracity of such allegation/complaint. If the allegation/complaint is found to have substance, the Government should take appropriate action against the concerned Officer, in accordance with law. However, the process of enquiry must be completed within the stipulated period of 150 days.

In view of the foregoing discussion and being mindful of the mandate, as contained in Article 20(2) and Article 88 of the Constitution, we are inclined to hold that the continuation of the process of keeping an Officer as an OSD beyond the stipulated period of 150 days is ultra vires and, therefore, without lawful authority. Consequently, we have no

hesitation in coming to the conclusion that the instant Rule merits positive consideration.

Accordingly, the Rule is made absolute.

The continuation of the process of designating an Officer of Government as an 'Officer on Special Duty' beyond the stipulated period of 150 days, is declared to be without any lawful authority.

Each and every Government officer, presently designated as an OSD and in whose case the period of 150 days has elapsed, shall stand released forthwith from the order designating such Officer as an OSD and shall revert back to the previous place of posting.

Let a copy of this judgment be sent to the Senior Secretary, Cabinet Division, the Senior Secretary, Ministry of Public Administration and the Rector, PATC for their information and guidance.

The learned Deputy Attorney General is direct to ensure the communication of this order to the concerned officials.

Before parting with the matter, we wish to put on record our appreciation to Mr. Aneek R. Haque, the learned Advocate appearing for the petitioner and Mr. Amit Das Gupta, the learned Deputy Attorney General appearing with Ms. Rokeya Akhter, AAG, Ms. Abantee Nurul, AAG, Ms. Annah Khanom, AAG and Mr. A.K.M. Nur Nabi, AAG for their valuable assistance. Last but not least, this Court also wishes to put on record its appreciation for the petitioner for espousing a very pertinent

and important cause. In our view, this issue ought to have been raised before this Court long before. I reminded of the old adage – “Better late than never”.

There will be no order as to cost.

**Sashanka Shekhar Sarkar, J :**

I agree.