

10 SCOB [2018] HCD

High Court Division (SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 525 of 2017

MD. Mahbubur Rahman.Petitioner
Vs.
Bangladesh and others.Respondents.

Mr. Nurul Islam Sujon with
Mr. Md. Mustaque Ahmed, Advocate
..... for the petitioner

Mr. Syed Apurba Islam with
Mr. Md. Abdur Rahman and
Mr. Faruk Ahmed, Advocates
.....For the respondent nos. 2 and 3

Heard on 04.03.2018, 05.03.2018,
09.05.2018 and 13.05.2018.
Judgment on 16.05.2018

Present:

Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Md. Ashraful Kamal.

The Constitution of the People's Republic of Bangladesh

Article 102:

Writ Court is also a Court of equity. It is a settled proposition of law that one who seeks equity must come with clean hands. In this case, the petitioner's hands being unclean and dirty can not invoke the writ jurisdiction of the High Court Division. ... (Para 42)

We are led to hold that for breach of any of the terms and conditions of the contract in the present case before us, say for example, clause 14 of Annexure-'C' to the Writ Petition, the remedy of the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act. So it necessarily follows that the writ jurisdiction of the High Court Division under Article 102 of the Constitution is not available to him. ... (Para 52)

The facts and circumstances of the case irresistibly lead us to uphold the contention of the contesting respondents that the petitioner was governed by the Rule of Master and Servant. As such the Board of Governors, that is to say, the master had the authority to terminate the petitioner (servant) at any time even before his attainment of 60 years of age as contemplated by clause 14. This is because no servant can be forced upon an unwilling master, for whatever reason it is. ... (Para 53)

It is a truism that no servant is entitled to any prior show cause notice in case of his dismissal, removal, termination etc. by his master. Had the Rule of Master and Servant not been applicable to the case of the petitioner, in that event, he would have been entitled to a prior show cause notice. As the relationship between the petitioner and the Board of Governors of the PDBF was regulated by the Master and Servant Rule, we opine that the Board of Governors did not commit any illegality in terminating the petitioner from the post of the MD without any prior show cause notice. ... (Para 53)

Judgement

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. 47.66.0000.033.06.060.16-452 dated 28.12.2016 issued under the signature of the respondent no. 3 terminating the service of the petitioner (Annexure-‘E’ to the Writ Petition) should not be declared to be without lawful authority and of no legal effect. Subsequently on another application filed by the petitioner, a further Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to reinstate the petitioner in the post of the Managing Director (MD) of Palli Daridra Bimochan Foundation (PDBF), House No. 05, Avenue-03, Hazi Road, Rupnagar, Mirpur-2, Dhaka-1216 with all arrear salaries and service benefits and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner obtained BSS (Hons.) and MSS degrees from the University of Dhaka in 1983 and 1984 respectively. In 1984, he joined the Foundation for International Training (FIT) as Program Officer and remained there till 30.06.1988. From 01.07.1988 to 31.08.1995, he worked as Program Manager of Canadian Resource Team (CRT). From 01.09.1995 to 13.01.2001, he acted as Coordinator of Mobilization, Training and Social DEU of Canadian Resource TESA CRT (CIDA). He joined the PDBF as Manager (Human Resources) on 14.01.2001 and worked in the same post till 03.06.2009. On 04.06.2009, he was appointed as officiating MD of the PDBF and remained in that post till 12.05.2013.

3. Anyway, in response to an advertisement published in various national dailies, 4(four) candidates including the petitioner submitted applications for appointment to the post of the MD of the PDBF by its Board of Governors. On 12.05.2013, a Selection Committee was constituted for appointing the MD of the PDBF. As per the decision of the Selection Committee, the intending candidates were called for an interview which was held on the same day (12.05.2013). According to the assessment of the Selection Committee, the petitioner stood first securing 89 marks out of 100 marks. As such the Selection Committee proposed his name to the Board of Governors of the PDBF for his appointment to the post of its MD. On 12.05.2013, the Board of Governors held its 61st Meeting and unanimously decided to appoint the petitioner as the MD of the PDBF under certain terms and conditions. One of the conditions (clause 14) was that the petitioner would be entitled to continue his service as the MD of the PDBF up to the age of 60 years. Accordingly an appointment letter was issued in his favour on 13.05.2013. On the self-same date (13.05.2013), he submitted his joining letter as the MD of the PDBF to the Chairman of the Board of Governors which was duly accepted on 13.05.2013. Having been appointed as the MD of the PDBF, the petitioner had been discharging his duties and responsibilities to the satisfaction of all concerned. In the 69th Meeting of the Board of Governors of the PDBF held on 28.12.2016, the respondent no. 3 disclosed that he had already received a report from the Inquiry Committee formed at the 68th Board Meeting to enquire into the irregularities occurred in the process of appointment of the MD of the PDBF. The respondent no. 3 did not unveil the inquiry report at the 69th Board Meeting. However, at the concluding stage of that Board Meeting, the respondent no. 3, without taking any consent from any of the Members of the Board of Governors, declared that the petitioner would be terminated from the service of the respondent no. 2. Pursuant to

the decision taken at the 69th Board Meeting dated 28.12.2016, the respondent no. 2 issued the impugned Memo terminating the service of the petitioner as the MD of the PDBF.

4. The impugned order of termination dated 28.12.2016 refers to the breach of Rule 7 of the Service Rules for the position of the Managing Director (MD) approved at the 2nd Meeting of the Board of Governors. But this Rule 7 was not applicable to the petitioner inasmuch as the terms and conditions of his appointment were laid down in the proceedings of the 61st Board Meeting. Clause 14 of the aforesaid terms and conditions specifically provides that the petitioner may hold the post of the MD of the PDBF till completion of 60 years of age. After the issuance of the impugned order, 6(six) Members out of 9(nine) Members of the Board of Governors, recorded notes of dissent to the effect that the decision of termination of the petitioner had been taken solely by the Chairman of the PDBF. So the impugned order of termination dated 28.12.2016 of the petitioner from the post of the MD of the PDBF is clearly without lawful authority and of no legal effect.

5. In the Supplementary Affidavit dated 18.09.2017 filed by the petitioner, it has been stated that in pursuance of Rule 10 of the Service Rules for the position of the MD of the PDBF, the MD can be terminated with the majority votes of the Board of Governors. But in view of the notes of dissent given by 6(six) Members out of 9(nine) Members of the Board of Governors, it is palpably clear that the petitioner was not terminated from the service of the PDBF with the majority votes of the Members of the Board of Governors. That being so, the resolution taken at the 69th Board Meeting terminating the petitioner from the service of the PDBF is *coram non iudice*.

6. In the Supplementary Affidavit dated 19.03.2018 filed by the petitioner,

It has been averred that the date of birth of the petitioner, as per his National Identification Card, is 19.12.1962 and accordingly he will reach the age of 60 years on 18.12.2022.

7. In the Supplementary Affidavit dated 13.05.2018 filed by the petitioner, it has been mentioned that on 07.03.2007, one Md. Shamsuzzaman was appointed as the MD of the PDBF on contractual basis for a period of 3(three) years; but the petitioner was appointed as the MD of the PDBF following a resolution at the 61st Board Meeting on 13.05.2013 on regular basis as a departmental candidate.

8. In the Supplementary Affidavit dated 15.05.2018 filed by the petitioner, it has been stated that as per the resolution taken at the 68th Board Meeting of the PDBF on 28.08.2016, a 3-Member Inquiry Committee headed by an Additional Secretary to the Government was constituted in order to inquire into the irregularities in the process of appointment of the petitioner as the MD of the PDBF and the Inquiry Committee submitted its inquiry report on 20.12.2016. This Inquiry Committee was constituted with a mala fide intention with a view to ousting him from the post of the MD of the PDBF. So the inquiry report dated 20.12.2016 can not be the basis for termination of the petitioner from the service of the PDBF.

9. The respondent nos. 2 and 3 have contested the Rule by filing a joint Affidavit-in-Opposition. Their case, as set out in the Affidavit-in-Opposition, in brief, is as under:

The instant Rule is not maintainable and tenable in law in that the petitioner was appointed on contractual basis and a contractual obligation can not be enforced through the writ jurisdiction of the High Court Division under Article 102 of the Constitution. The Service Rules for the position of the MD were framed by the Board

of Governors of the PDBF at its 2nd Meeting held on 23.05.2000. As per Rule 7 of the aforementioned Service Rules, the MD will be hired on contract for a term of three years subject to satisfactory annual performance of service by the Board. This contract may be extended by the Board subject to the satisfaction of all other terms and conditions of employment. The appointment letter of the petitioner dated 13.05.2013 as the MD of the PDBF was issued in violation of Rule 7 of the Service Rules at his instance so as to suit his convenience. In this respect, he misused his position as the officiating MD of the PDBF. However, pursuant to Rule 7 of the Service Rules, the tenure of the petitioner as the MD of the PDBF expired on 12.05.2016 and thereafter his contractual service was never extended by the Board of Governors. After expiry of his tenure on 12.05.2016, he was holding the post of the MD of the PDBF without any legal basis. As the petitioner's contractual period came to an end on 12.05.2016, he made an attempt to extend his tenure by publishing a gazette notification dated 19.09.2016 in a fraudulent manner. When the fraud was detected by the Board of Governors of the PDBF, the gazette notification dated 19.09.2016 was cancelled by issuing another gazette notification dated 06.11.2016. Be that as it may, the Board of Governors took a very lenient view and terminated the petitioner from the post of the MD by a letter dated 28.12.2016 in compliance with the Service Rules for the position of the MD of the PDBF. Anyway, Regulation 61(2) of পল্লী দারিদ্র বিমোচন ফাউন্ডেশন কর্মচারী চাকুরী প্রবিধানমালা, ২০১১ (hereinafter referred to as the Regulations of 2011) was inadvertently referred to in the impugned Memo of termination. As the service of the petitioner came to an end automatically after expiry of 3(three) years on 12.05.2016, there remained virtually nothing for his termination and he was released from his post by the impugned Memo dated 28.12.2016.

10. At the 69th Board Meeting dated 28.12.2016 of the PDBF, the inquiry report dated 20.12.2016 and other materials on record were taken into account by the Board and thereafter the Board decided to release the petitioner from his service. So by no stretch of imagination, it can be said that the decision of termination/release of the petitioner from the post of the MD was solely taken by the Chairman (respondent no. 3) of the PDBF. That decision for termination/release of the petitioner was taken after long deliberations under the agenda item no. 7. The Service Rules for the position of the MD of the PDBF that were approved at the 2nd Meeting of the Board of Governors are still in force. However, the petitioner was appointed in accordance with the decision of the 61st Board Meeting of the PDBF wherein it was simply stated in clause 14 that he would be eligible to hold the post of the MD up to his 60th year; but it was never spelt out that pursuant to the appointment letter, he would continue as the MD of the PDBF in derogation of the Service Rules. The Service Rules were framed pursuant to section 11(6) of পল্লী দারিদ্র বিমোচন ফাউন্ডেশন আইন, ১৯৯৯ (১৯৯৯ সনের ২৩ নং আইন) (hereinafter adverted to as the Act No. 23 of 1999). Although the decision for termination/release of the petitioner from the post of the MD was taken unanimously; yet the petitioner misguided some of the Board Members and obtained the alleged notes of dissent. But subsequently 4(four) Board Members realized the real state of affairs and the fraudulent practice of the petitioner and withdrew their earlier notes of dissent. What is more, the decision taken at the 69th Board Meeting was afterwards confirmed by the 70th Board Meeting of the PDBF. So on this count, no exception can be taken to the impugned Memo dated 28.12.2016. Given this scenario, there is no illegality or irregularity in issuing the order of termination/release of the petitioner from the post of the MD of the PDBF.

11. However, as the service of the petitioner was contractual in nature and as it was not a statutory contract, the appropriate remedy, if any, of the petitioner lies in a properly

constituted suit for damages in the competent Civil Court under section 73 of the Contract Act, 1872 for alleged violation of any terms of the contract. In other words, the petitioner can not invoke the writ jurisdiction of the High Court Division under Article 102 of the Constitution for necessary redress arising out of his termination/release from the post of the MD of the PDBF. So the Rule is liable to be discharged with costs.

12. In the Supplementary Affidavit-in-Opposition dated 05.03.2018 filed on behalf of the respondent nos. 2 and 3, it has been stated that after the termination/release of the petitioner from the post of the MD of the PDBF, one Mr. Madan Mohan Saha was appointed as the acting MD of the PDBF and he has been performing the functions of the MD to date. So the letter of termination/release dated 28.12.2016 has already been acted upon.

13. In the Supplementary Affidavit-in-Opposition dated 11.04.2018 filed by the respondent nos. 2 and 3, it has been mentioned that as the officiating MD of the PDBF, the petitioner was well-acquainted with the Service Rules and he held that position till he was appointed as the MD on regular basis on 13.05.2013. As he was well aware of the Service Rules, he can not turn round and deny that he was appointed on contractual basis. With regard to the termination/release of the petitioner from the PDBF, the principle of natural justice has no manner of application as his service was governed by the terms and conditions of the contract. By that reason, the relationship between the petitioner and the PDBF was governed by the Master and Servant Rule. This being the situation, even if the termination/release of the petitioner from the PDBF is illegal, he can not invoke the writ jurisdiction of the High Court Division for necessary redress.

14. In the Supplementary Affidavit-in-Opposition dated 13.05.2018 filed by the respondent nos. 2 and 3, it has been averred that in pursuance of the resolution of the 2nd Board Meeting dated 23.05.2000 of the PDBF, all the previous 3(three) Managing Directors, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman were appointed on contractual basis according to the stipulated terms and conditions as incorporated in their appointment letters. Accordingly, they served as the MDs of the PDBF and completed their respective tenures of service.

15. In the Affidavit-in-Reply dated 05.03.2018 filed on behalf of the petitioner, it has been stated that the contesting respondents have admitted that Regulation 61(2) of the Regulations of 2011 is not applicable to the petitioner and hence the impugned termination letter is without lawful authority and of no legal effect. As the petitioner was appointed under certain terms and conditions pursuant to the decision of the 61st Board Meeting, the question of applicability of Rule 7 of the Service Rules is out of the question. In any view of the matter, the authority can not go beyond the terms and conditions as stipulated in the letter of appointment of the petitioner as the MD of the PDBF. He was appointed as the MD on full-time basis and as per his appointment letter, the tenure of his service is up to 60 years of age. The termination/release of the petitioner from the post of the MD is a feat of high-handedness of the Chairman of the PDBF. The petitioner was not afforded any opportunity of being heard prior to the issuance of the termination letter. In this perspective, the termination letter is unsustainable in law.

16. At the outset, Mr. Nurul Islam Sujon, learned Advocate appearing on behalf of the petitioner, submits that indisputably the petitioner was the officiating MD of the PDBF and having secured the highest marks in the interview, he was finally selected by the Board of Governors of the PDBF and as such the Board issued a letter dated 13.05.2013 appointing

him to the post of the MD under certain terms and conditions as evidenced by Annexure-‘C’ to the Writ Petition; but he did not contravene any of the terms and conditions as stipulated in Annexure-‘C’ to the Writ Petition; yet curiously enough, he was terminated/released from the post of the MD whimsically and illegally pursuant to the decision taken at the 69th Meeting of the Board of Governors on 28.12.2016 and on this score, the impugned order of termination dated 28.12.2016 has no legs to stand upon.

17. Mr. Nurul Islam Sujan also submits that admittedly the principle of “Audi Alteram Partem” was not adhered to prior to termination of the petitioner from the post of the MD of the PDBF and in that view of the matter, the impugned order of termination dated 28.12.2016 is liable to be knocked down as being without lawful authority.

18. Mr. Nurul Islam Sujan further submits that the record does not show that the petitioner was formally charged with the commission of any illegalities/irregularities in his appointment process as the MD of the PDBF; but funnily enough, a 3-Member Inquiry Committee headed by an Additional Secretary to the Government was formed at the 68th Board Meeting and at the 69th Board Meeting dated 28.12.2016, the report submitted by the Inquiry Committee was taken into consideration unfairly and the Chairman of the PDBF took a decision to terminate the petitioner from the post of the MD which can not be tenable in law. By way of elaboration of this submission, Mr. Nurul Islam Sujan draws our attention to the fact that out of 9(nine) Members of the Board of Governors, 6(six) Members recorded their notes of dissent and thereby they did not support or approve the decision allegedly taken by the Board at its 69th Meeting in the matter of termination of the petitioner from the post of the MD of the PDBF and this being position, it leaves no room for doubt that the termination of the petitioner was carried out in a hush-hush manner.

19. Mr. Nurul Islam Sujan next submits that the petitioner was never appointed on contractual basis; rather as per Annexure-‘C’ dated 13.05.2013 to the Writ Petition, he was appointed as the MD of the PDBF as a full-timer and until he reaches the age of 60 years, he can not be terminated from service unless he has committed any gross misconduct to the detriment of the interest of the PDBF.

20. Mr. Nurul Islam Sujan also submits that the petitioner was appointed to the post of the MD of the PDBF under certain terms and conditions pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999 and those terms and conditions were specifically laid down in his appointment letter dated 13.05.2013 and as the petitioner did not offend against any of the terms and conditions of his appointment letter, he can not be shown the door by issuance of Annexure-‘E’ dated 28.12.2016.

21. Mr. Nurul Islam Sujan next submits that the Regulations of 2011 are not applicable to the post of the MD of the PDBF and the petitioner was never appointed thereunder; rather he was appointed maintaining the continuity of his earlier service in the PDBF and because of this distinguishing feature, he can not be put on a par with the 3(three) previous MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman and this distinguishing feature was absolutely disregarded while terminating the petitioner from the post of the MD of the PDBF by issuance of Annexure-‘E’ dated 28.12.2016.

22. Mr. Nurul Islam Sujan further submits that as the petitioner was not a contractual appointee, he has invoked the writ jurisdiction of the High Court Division under Article 102 of the Constitution and as such the Writ Petition is maintainable.

23. Mr. Nurul Islam Sujan also submits that in the facts and circumstances of the present case, section 16 of the General Clauses Act, 1897 and the Rule of Master and Servant will not come into play and this is why, the petitioner is entitled to get the reliefs sought for in this Writ Petition.

24. Per contra, Mr. Syed Apurba Islam, learned Advocate appearing on behalf of the respondent nos. 2 and 3, submits that it is true that the petitioner was appointed to the post of the MD of the PDBF by Annexure-‘C’ dated 13.05.2013 under certain terms and conditions which were approved at the 61st Meeting of the Board of Governors; but in effect and for all practical purposes, he was a contractual appointee as the MD of the PDBF and as he was a contractual appointee, the Board of Governors terminated his contract by dint of Rule 7 of the Service Rules, albeit it is in his appointment letter dated 13.05.2013 that he would continue to function as the MD till his attainment of 60 years.

25. Mr. Syed Apurba Islam also submits that the authority, that is to say, the Board of Governors terminated the contract of the petitioner because of commission of some irregularities in his appointment process as the MD of the PDBF and his unauthorized publication of the gazette notification dated 19.09.2016 as evidenced by Annexure-‘1’ to the Affidavit-in-Opposition and this termination of the petitioner as a contractual appointee can not be agitated in the writ jurisdiction of the High Court Division under Article 102 of the Constitution inasmuch as it was an ordinary contract and not a statutory one.

26. Mr. Syed Apurba Islam further submits that as the contract was not a statutory contract, the remedy, if any, for the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act and on that count alone, the instant Writ Petition is not maintainable.

27. Mr. Syed Apurba Islam next submits that although Annexure-‘C’ dated 13.05.2013 is conspicuously silent about the termination of the petitioner, yet the Board of Governors had the authority to terminate him as its servant for the commission of any acts of malfeasance and misfeasance and accordingly the Board of Governors terminated its servant (petitioner) under the Master and Servant Rule and by that reason, this Writ Petition is also incompetent.

28. Mr. Syed Apurba Islam further submits that as a servant, the petitioner can not be thrust upon the master at any rate and if the master is unwilling and reluctant to retain the service of the petitioner, the master is always at liberty to terminate him at any point of time and considered from this standpoint, his appointment letter (Annexure-‘C’ dated 13.05.2013) can not be a stumbling-block in this regard and as such the Board of Governors lawfully terminated him from the post of the MD of the PDBF.

29. Mr. Syed Apurba Islam also submits that it is undisputed that prior to issuance of the impugned letter of termination, the petitioner was not afforded any opportunity of being heard; but the fact remains that he was examined by the 3-Member Inquiry Committee and he submitted his written statement before that Committee and the Committee examined the pros and cons of the matter under inquiry and recommended punitive measures against him and it was decided at the 69th Meeting of the Board of Governors that he would be terminated from service and accordingly he was terminated by the impugned Annexure-‘E’ dated 28.12.2016.

30. Mr. Syed Apurba Islam next submits that the record shows that after the 69th Board Meeting, 6(six) Members recorded their notes of dissent out of 9(nine) Members; but soon afterwards, 4(four) dissenting Members realized their mistakes resulting from the machinations adopted by the petitioner and ultimately withdrew their notes of dissent and as a result the minutes of the 69th Board Meeting were approved at the 70th Board Meeting and taking the entire scenario into consideration, it can safely be concluded that the Board of Governors terminated the petitioner from service at the 69th Board Meeting by majority view and on this account, no objection can be raised to the impugned letter of termination.

31. Mr. Syed Apurba Islam further submits that assuming for the sake of argument that the letter of termination of the petitioner as evidenced by Annexure-‘E’ to the Writ Petition is without lawful authority and of no legal effect, even then his remedy lies in a suit for damages in the competent Civil Court and not in the writ jurisdiction of the High Court Division under Article 102 of the Constitution.

32. Mr. Syed Apurba Islam next submits that although no formal deed of contract was drawn up between the parties to the contract, that is to say, the petitioner and the Board of Governors; yet the fact remains that Annexure-‘C’ dated 13.05.2013 is an offer and that offer was accepted by the petitioner by Annexure-‘C-1’ dated 13.05.2013 and in this backdrop, the petitioner was effectively a contractual appointee as the MD of the PDBF.

33. Mr. Syed Apurba Islam also submits that through inadvertence, Regulation 61(2) was referred to in Annexure-‘E’ dated 28.12.2016 and since the petitioner was not appointed to the post of the MD of the PDBF in accordance with the provisions of the Regulations of 2011, this reference to Regulation 61(2) in the impugned Annexure-‘E’ is of no avail to the petitioner.

34. Mr. Syed Apurba Islam further submits that according to sub-section (6) of section 11 of the Act No. 23 of 1999, the PDBF had a legal obligation to frame necessary regulations for the purpose of implementation of the provisions of section 11 of the aforesaid Act and as such necessary regulations were framed pursuant thereto under the name and style-‘Service Rules for the position of the Managing Director’ and the nomenclature ‘Service Rules’ instead of ‘Regulations’ (Probidhanmala) is a mere misnomer and the petitioner can not capitalize on that misnomer as an insider of the PDBF.

35. Mr. Syed Apurba Islam also submits that as an insider, the petitioner knew everything about the appointment process of the MD and that is why, as the officiating MD of the PDBF and the ex-officio Member-Secretary of the Board of Governors, he orchestrated the entire process leading to his appointment as the MD of the PDBF and in good faith, the Board Members relied on him pertaining thereto; but through adoption of some backstage manoeuvres by him, the terms and conditions of his appointment as the regular MD were a conspicuous deviation from those of the three previous MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman.

36. Mr. Syed Apurba Islam further submits that beyond the knowledge and without the approval of the Board of Governors, the petitioner published the gazette notification (Annexure-‘1’ to the Affidavit-in-Opposition) on 19.09.2016 so as to suit his convenience and eventually after detection of this fraud, he had to issue another gazette notification dated 06.11.2016 (Annexure-‘2’ to the Affidavit-in-Opposition) revoking the earlier notification, that is to say, Annexure-‘1’ to the Affidavit-in-Opposition and in such a situation, it is

manifestly clear that the petitioner committed gross misconduct and by reason of that misconduct, the Board of Governors intervened and terminated him from the post of the MD of the PDBF by Annexure-‘E’ dated 28.12.2016.

37. In support of the above submissions, Mr. Syed Apurba Islam adverts to the decisions in the cases of Bangladesh Power Development Board and others...Vs...Md. Asaduzzaman Sikder, 9 BLC (AD) 1; Superintending Engineer, RHD, Sylhet and others...Vs...Md. Eunos and Brothers (Pvt) Ltd and another, 16 BLC (AD) 73; Government of Bangladesh represented by the Secretary, Ministry of Communications, Dhaka and others...Vs...Zafar Brothers Limited and another, 69 DLR (AD) 52; Professor Dr. Md. Yusuf Ali...Vs..Chancellor of Rajshahi University, Rajshahi and others, 50 DLR (HCD) 1; Messrs Malik & Haq and another...Vs...Muhammad Shamsul Islam Chowdhury and two others, 13 DLR (SC) 228 and M/s. Eastern Mercantile Bank Ltd...Vs...Mohammad Shamsuddin, 21 DLR (SC) 365.

38. We have heard the submissions of the learned Advocate for the petitioner Mr. Nurul Islam Sujon and the counter-submissions of the learned Advocate for the respondent nos. 2 and 3 Mr. Syed Apurba Islam and perused the Writ Petition, Supplementary Affidavits, Affidavit-in-Opposition, Supplementary Affidavits-in-Opposition and Affidavit-in-Reply and relevant Annexures annexed thereto.

39. It is admitted that prior to the appointment of the petitioner as the MD of the PDBF on 13.05.2013, he was a Director of the PDBF and since 2009, he had been functioning as the officiating MD of the PDBF. It is also admitted that the petitioner was appointed to the post of the MD of the PDBF under certain terms and conditions pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999. It is further undeniable that the terms and conditions of the appointment of the petitioner as the MD of the PDBF were spelt out in the proceedings of the 61st Meeting of the Board of Governors.

40. The bone of contention is that according to Mr. Nurul Islam Sujon, the petitioner was a regular appointee under certain terms and conditions as evidenced by Annexure-‘C’ to the Writ Petition whereas according to Mr. Syed Apurba Islam, the petitioner was a contractual appointee thereunder. In this regard, clause 14 of Annexure-‘C’ may be gone into. As per clause 14, the petitioner was set to function as the MD of the PDBF up to the age of 60 years at the most. It is his claim that before attainment of 60 years of age, he can not be terminated from service as was done by Annexure-‘E’ to the Writ Petition. The record indicates that the previous 3(three) MDs, namely, Mr. A. Q. Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman were appointed pursuant to the Service Rules (in fact, Regulations) for the position of the MD and all of them signed their respective contracts in presence of witnesses; but in the instant case before us, no independent deed of contract was drawn up. But nevertheless, Annexures- ‘C’ and ‘C-1’ to the Writ Petition, as we see them, respectively partake of the nature of an offer and acceptance. If Annexures- ‘C’ and ‘C-1’ both dated 13.05.2013 are read conjointly, it becomes signally clear to us that the petitioner was a contractual appointee by necessary implication.

41. As admittedly the petitioner had been functioning as the officiating MD of the PDBF since 2009, he had access to various files and papers of the PDBF as a matter of course and probably for that reason, the terms and conditions of his appointment as spelt out in the minutes of the 61st Meeting of the Board of Governors and Annexure-‘C’ to the Writ Petition are singularly distinguishable from those of all the previous 3(three) MDs, namely, Mr. A. Q.

Siddiqui, Mr. Mohammad Mortuza and Mr. Md. Shamsuzzaman. In this perspective, the facts and circumstances of the present case unerringly reveal that as an insider, that is to say, as the officiating MD of the PDBF, the petitioner orchestrated the entire process of his appointment as the MD of the PDBF so as to suit his convenience and the Board of Governors simply relied on him. He was indeed the protagonist of the drama of his appointment process as the MD of the PDBF.

42. Even unauthorizedly the petitioner went to the extent of publishing a gazette notification dated 19.09.2016 (Annexure-‘1’ to the Affidavit-in-Opposition) to the effect that the MD is a permanent appointee and the post of the MD stands incorporated in the Schedule of the Regulations of 2011, though indisputably the Regulations of 2011 are not applicable to the post of the MD of the PDBF. So we smell a rat on the part of the petitioner in this respect. Eventually he had to rescind the gazette notification dated 19.09.2016 as evidenced by Annexure-‘1’ by publishing another gazette notification dated 06.11.2016 as evidenced by Annexure-‘2’ to the Affidavit-in-Opposition. What does this obnoxious, freakish and unseemly conduct of the petitioner demonstrate? This conduct of the petitioner, to our mind, demonstrates that he has approached the High Court Division under Article 102 of the Constitution with unclean and dirty hands. It goes without saying that the Writ Court is also a Court of equity. It is a settled proposition of law that one who seeks equity must come with clean hands. In this case, the petitioner’s hands being unclean and dirty can not invoke the writ jurisdiction of the High Court Division. This is one dimension of the case.

43. Assuming that the petitioner was appointed legally by Annexure-‘C’ to the Writ Petition, yet the terms and conditions specified therein positively show that the petitioner was a contractual appointee in accordance with sub-section (1) of section 11 of the Act No. 23 of 1999. We have already observed that the Regulations of 2011 are not applicable to the petitioner. So the question of applicability of the Schedule of the Regulations of 2011 in the case of the petitioner is out of the question. Hence it is easily deducible that the petitioner published the gazette notification dated 19.09.2016 (Annexure-‘1’ to the Affidavit-in-Opposition) with mala fide intention.

44. It is curious to note that 6(six) Members out of 9(nine) Members of the Board of Governors of the PDBF did not record their notes of dissent on the very date of the holding of the 69th Board Meeting on 28.12.2016. Those 6(six) Members did so on subsequent dates (29.12.2016 and 01.01.2017). Even the petitioner being the ex-officio Member-Secretary of the Board did not record his note of dissent on 28.12.2016. Anyway, 4(four) dissenting Members comprehended their mistakes arising out of the machinations resorted to by the petitioner and ultimately withdrew their notes of dissent and consequently the proceedings of the 69th Board Meeting dated 28.12.2016 were subsequently approved at the 70th Board Meeting. This being the panorama, the decision made at the 69th Board Meeting dated 28.12.2016 by majority view as to the termination/release of the petitioner from the post of the MD of the PDBF can not be found fault with.

45. Leaving aside the question of applicability of the Service Rules to the position of the MD of the PDBF, a pertinent question arises: did the Board of Governors terminate the petitioner from service by Annexure-‘E’ to the Writ Petition lawfully? To answer this question, first of all, we are to decide as to whether the contract entered into between the petitioner and the Board of Governors was a statutory contract or not taking Annexures- ‘C’ and ‘C-1’ into account.

46. In the case of the Government of Bangladesh represented by the Secretary, Ministry of Communications, Dhaka and others...Vs...Zafar Brothers Limited and another, 69 DLR (AD) 52, it has been held in paragraph 21:

“21. Considering the decisions reported in a good number of cases, this Division in the case of Bangladesh Power Development Board and others...Vs...Md. Asaduzzaman Sikder, 9 BLC (AD) 1, held that the writ jurisdiction is available in case of breach of contracts of the following categories.

- (a) the contract is entered into by the Government in the capacity as sovereign;
- (b) where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;
- (c) where contract is entered into in exercise of an enabling power conferred by a statute that by itself does not render the contract a statutory contract, but ‘if entering into a contract containing prescribed terms and conditions is a must under the statute, then that contract becomes a statutory contract. If a contract incorporating certain terms and conditions is a must under the statute, then the contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory, then the said contract to that extent is statutory’;
- (d) where a statute may expressly or impliedly confer power on a statutory body to enter into any contract in order to enable it to discharge its functions and the contract so entered into by the statutory body is not an exercise of statutory power, then merely because one of the parties to the contract is a statutory or public body, such contract is not a statutory contract;
- (e) when contract is entered into by a public authority invested with the statutory power, in case of breach thereof, relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;
- (f) where the contract has been entered into in exercise of statutory power by a statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligations.”

47. Similar view has also been taken in the case of the Government of Bangladesh and others...Vs...Excellent Corporation, 20 BLC (AD) 255.

48. We have already found that the petitioner was a contractual appointee as the MD of the PDBF, no matter whether the terms and conditions of his appointment were governed by those specified in Annexure-‘C’ to the Writ Petition or by the Service Rules for the position of the MD of the PDBF. There is no gainsaying the fact that he was appointed to the post of the MD of the PDBF pursuant to sub-section (1) of section 11 of the Act No. 23 of 1999. The facts and circumstances of the case, in our opinion, attract clause (d) of the categories of contracts as spelt out by the Appellate Division in 69 DLR (AD) 52 (supra). From this clause (d), it is explicit that the contract executed between the petitioner and the Board of Governors by necessary implication is not a statutory contract. Since it is not a statutory contract, it is an ordinary contract.

49. The decisions in the cases of Superintending Engineer, RHD, Sylhet & ors...Vs...Md. Eunus and Brothers (Pvt) Ltd and another; 16 BLC (AD) 73 and Bangladesh Power Development Board and others...Vs...Md. Asaduzzaman Sikder; 9 BLC (AD) 1 are in line with the decision reported in 69 DLR (AD) 52. So we find that there is a consensual view in a catena of judicial pronouncements on this issue.

50. In the case of M/s. Eastern Mercantile Bank Ltd....Vs...Mohammad Shamsuddin reported in 21 DLR (SC) 365, the Pakistan Supreme Court has held, inter alia, in paragraph 7:

“7. The primary question arising in the appeal is concluded by the decision of this Court in Malik and Haq...Vs...Muhammad Shamsul Islam (PLD 1961 S.C. 531). On similar facts, it was held in that case:

“...in the absence of any statutory provision protecting the servant it is not possible in law to grant to him a decree against an unwilling master that he is still his servant. A servant can not be forced upon his master. The master is always entitled to say that he is prepared to pay damages for breach of contract of service but will not accept the services of the servant. A contract for personal service as will appear from section 21(b) of the Specific Relief Act can not be specifically enforced. But it is not even necessary to invoke section 21(b) for such a contract is unenforceable on account of section 21(b) wherein it is provided that a contract for the non-performance of which compensation in money is adequate relief can not be specifically enforced. In a case where there is a contract between a master and a servant the master agreeing to pay the salary and the servant agreeing to render personal service it is obvious that money compensation is full relief, for all that the servant was entitled to under the contract was his salary. A breach of contract can give rise to only two reliefs: damage or specific performance. If specific performance be barred, the only relief available is damages. When a master, in breach of his contract, refuses to employ the servant, the only right that the servant can claim is the right to damages and a decree for damages is the only decree that can be granted to him.”

51. The decision in the case of Messrs Malik & Haq and another...Vs...Muhammad Shamsul Islam Chowdhury and two others reported in 13 DLR (SC) 228 is in tune with the decision quoted above.

52. Regard being had to the above discussions, we are led to hold that for breach of any of the terms and conditions of the contract in the present case before us, say for example, clause 14 of Annexure-‘C’ to the Writ Petition, the remedy of the petitioner lies in a properly constituted suit in the competent Civil Court for damages under section 73 of the Contract Act. So it necessarily follows that the writ jurisdiction of the High Court Division under Article 102 of the Constitution is not available to him.

53. Undeniably there is no termination clause in Annexure-‘C’, that is to say, in the appointment letter of the petitioner. But none the less, the Board of Governors terminated him from service by Annexure-‘E’ dated 28.12.2016. The facts and circumstances of the case irresistibly lead us to uphold the contention of the contesting respondents that the petitioner was governed by the Rule of Master and Servant. As such the Board of Governors, that is to say, the master had the authority to terminate the petitioner (servant) at any time even before his attainment of 60 years of age as contemplated by clause 14. This is because no servant can be forced upon an unwilling master, for whatever reason it is.

54. There is another aspect of the case. Section 16 of the General Clauses Act, 1897 provides that where, by any Act of Parliament or Regulation, a power to make any appointment is conferred, then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power. By virtue of the provisions of section 16 of the General Clauses Act, the Board of Governors being the appointing authority had the power to terminate the appointment of the petitioner as the MD of the PDBF and accordingly it terminated the appointment. This power of termination under section 16 of the General Clauses Act has been dealt with in the decision in

the case of Professor Dr. Md. Yusuf Ali...Vs...Chancellor of Rajshahi University, Rajshahi and ors. reported in 50 DLR (HCD) 1.

55. It is an indubitable fact that the petitioner was not afforded any opportunity of being heard prior to his termination by the Board of Governors as evidenced by Annexure-‘E’ to the Writ Petition. Can the Board of Governors terminate him without giving him any prior show cause notice? The 3-Member Inquiry Committee examined the petitioner and he submitted his written statement to the Inquiry Committee. The Inquiry Committee in its turn considered the pros and cons of the matter under inquiry and made its own findings. On the basis of the findings arrived at by the 3-Member Inquiry Committee, the Board of Governors terminated the petitioner by Annexure-‘E’ to the Writ Petition and that was subsequently endorsed by the Board of Governors at its 70th Meeting.

56. It is a truism that no servant is entitled to any prior show cause notice in case of his dismissal, removal, termination etc. by his master. Had the Rule of Master and Servant not been applicable to the case of the petitioner, in that event, he would have been entitled to a prior show cause notice. As the relationship between the petitioner and the Board of Governors of the PDBF was regulated by the Master and Servant Rule, we opine that the Board of Governors did not commit any illegality in terminating the petitioner from the post of the MD without any prior show cause notice.

57. We have discussed earlier that erroneously instead of Regulations, Service Rules for the position of the MD have been framed pursuant to sub-section (6) of section 11 of the Act No. 23 of 1999. The “Rules” must be “Regulations” as mandated by sub-section (6) of section 11. This apparent mistake must be corrected by the Board of Governors. Furthermore, the Board of Governors must take concrete steps for immediate gazette notification of the Regulations (mistakenly called Service Rules) for the position of the MD of the PDBF for information of all concerned.

58. Before parting with this case, we feel constrained to make some observations about the conduct of the Members of the Board of Governors of the PDBF. A reference to the materials on record reveals in unmistakable terms that the Board Members of the PDBF conducted themselves in a very negligent, callous and lackadaisical manner. For all the ills centring round the process of the appointment of the petitioner to the post of the MD of the PDBF, they blamed the then officiating MD of the PDBF, that is to say, the present petitioner. They did not feel even a twinge of conscience at their irresponsible conduct of the whole affair. They even heavily relied upon the petitioner who fully exploited his position to his advantage as the officiating MD and the ex-officio Member-Secretary of the Board of Governors of the PDBF at the relevant time. This blind reliance of the Board of Governors upon its Member-Secretary (the then officiating MD), in our opinion, led to all the ills in the matter of his appointment as the Managing Director of the PDBF. The Board of Governors, in this regard, can not skirt round their liability and the consequential blame. We hope, the Board of Governors will be vigilant and responsible in the conduct of the affairs of the PDBF in the days to come.

59. From the foregoing discussions and having considered the various dimensions of the case, our conclusion is that the Rule is not maintainable. The Rule, therefore, fails.

60. Accordingly, the Rule is discharged. However, in the peculiar facts and circumstances of the case, we make no order as to costs.