

In the Supreme Court of Bangladesh

High Court Division

(Special Original Jurisdiction)

Writ Petition No. 10587 of 2010

In the Matter of:

An application under article 102 (2) (a) (ii) of

the Constitution of the People's Republic of

Bangladesh.

-And-

In the Matter of:

Dr. S.M. Ali Akkas

...petitioner.

-Versus-

Bangladesh Open University and others

...Respondents.

Mr. Md. Masder Hossain with Kazi Shahina Niger,

Advocates

...for the petitioner.

Mr. Md. Salauddin, Advocate

..for the respondent No.3.

Present:

Mr. Justice Farid Ahmed

And

Mr. Justice Abdur Rahman

Heard on: 03.09.2025, 27.10.2025, and
03.12.2025.

Judgment on: 4.12.2025 A.D. corresponding
to 19 Agrahayan, 1432 B.S., Thursday.

Judgment

Abdur Rahman, J:

By the instant Rule, the petitioner seeks to challenge the legality and propriety of the dismissal order issued vide Memo No. বাউবি/ প্রশা-২(৩৮১)/০৬/৪৮০২, তারিখ: ২৯-০৯-২০১৩ (as contained in Annexure-G) issued under the signature of the respondent No.3 by which the Board of Governors on the 139th Board Meeting (Resolution-11) following the provision of Section 38(2) and 13(5) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯) dismissed the petitioner from the service is absolutely *mala-fide* and without jurisdiction as well as should not be declared to have been passed without lawful authority

and is of no legal effect, and/or pass such other or further order or orders as to this Court may seem fit and proper.

1. Background of Facts:

1.1 The facts concomitant to the instant Rule for disposal are that the petitioner joined the office of the Planning and Development Division of the Bangladesh Open University on 5.10.2006, and his joining was accepted on that date; the authority handed over the charge to the petitioner, who took over on 19.10.2006. Thereafter, the concerned authority registered the Deed for 0.33 acres of land for the establishment of the Kurigram Coordinating Office of Bangladesh Open University, and vested Tk. 1,66,592 only as an advance to the petitioner. The petitioner took responsibility for preparing the deed for registration, which was handled by the Penal Lawyer of the Bangladesh Open University. However, due to a delay, the deed registration was not completed in time. For this reason, the Director of Finance, presently a Member of the Board of Governors, Bangladesh Open University (herein Respondent No. 14), issued a letter on 2.11.2009, asking the petitioner to deposit the said amount. The petitioner, after receiving the demand letter, deposited the said amount of Tk. 1,66,592 on the same day, i.e., on 2.11.2009, and obtained a money receipt. Thereafter, the respondent No.3 issued an office order vide its Memo No. বাউবি/প্রশা-২(৩৮১)/৬/২৭৮ dated 31.1.2010 under the provision of section 38(2) of

the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯) as per resolution dated 17.1.2010 and 21.1.2010 respectively taken by the Board of Governors on the 113rd Board Meeting (resolution No.22) suspended the petitioner for defalcation of money without considering the provision of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯). Thereafter, the respondent No.3 issued a show cause notice on 25.2.2010, i.e., 25 days later of issuing suspension order, which is a clear violation of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯). Thereafter, on 7.11.2012, the authority of the University concerned, respondent No.3, issued another show cause notice to the petitioner, which was received on 22.11.2012. The petitioner replied to the show cause notice, stating all relevant facts. Thereafter respondent No.3 without complying the provision of section 38(2) of the Bangladesh Open University Ain, 1992 (as amended 2009) at without forming Inquiry Committee and without giving ample opportunity to the petitioner of being heard before issuing provisional suspension order took decision by resolution dated 19.9.2013 through Board of Governors on the 139th Board Meeting (resolution No.11) and dismissed the petitioner from the service under the provision of section 38(2) and section 13(5) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯) on 29.9.2013 giving effect from 19.9.2013.

1.2 Thereafter, the petitioner, being aggrieved by and dissatisfied with the dismissal order as stated above, invokes this forum. Later, the petitioner filed supplementary affidavits with Annexures, which shall be considered part of the original petition.

1.3 The Rule is opposed by the respondent No.3 by filing an affidavit-in-opposition, contending *inter alia* that the writ petitioner was dismissed by the Respondent No. 03 by the order vide under Memo No. বাউবি/প্রশা-২ (৩৮১)/০৬/৪৮০২ dated 29.09.2013, and the writ petitioner has challenged the decision of the Respondent, which does not stand on any legal basis as a dismissal order issued by the respondent No. 3 by which the Board of Governors on the 139th Board Meeting (Resolution-11) under the provision of section 38(2) and 13(5) of the Bangladesh Open University Ain, 1992 (as amended, 2009), and the petitioner has been absent from work place, though the attendance was mandatory during suspension, and the petitioner submitted an explanation in his defence on 16.10.2012, where it was revealed that he filed a Civil Suit challenging the dismissal order vide No. 79 of 2011 in the Gazipur Court, and following all the legal formalities, the Board of Governors decided to remove the petitioner as per the provisions of sections 38(2) and 13(5) of the Bangladesh Open University Ain, 1992, and

subsequently, the petitioner was dismissed on 29.09.2013, and as such the Rule is liable to be discharged.

2. Submissions:

2.1 Mr Md. Masder Hossain, the learned Counsel appearing on behalf of the petitioner, has made the following submissions:

i) That the due approval of the higher authority regarding the registration of the documents and the law department regarding the finalization of the draft copy of the documents was not received in time, and then the petitioner returned the said amount of money by depositing through receipt as per the demand of the concerned authority. The mandatory provisions of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯) as to show cause notice was not served upon him, rather suspended on 31st January 2010 without giving any reason, which was highly illegal and unreasonable. Moreover, the respondents did not pay a single penny in subsistence allowance during the suspension period.

ii) That the purported dismissal order was made with *mala fide* and without lawful authority, and he referred to the decision of the Hon'ble High Court Division, Supreme Court of Bangladesh, in a similar case in Writ Petition No. 5506 of 2010 vide judgment dated 12.3.2019 in the case of Md. Rawshan Ali Vs. Bangladesh Open University, represented by its Vice-Chancellor,

Gazipur, Bangladesh, where a similar dismissal order has been declared without lawful authority due to the violation of the provision of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯).

iii) That Article 135 of the Constitution of the People's Republic of Bangladesh is available to both permanent and temporary government servants, and this Article requires a show cause notice and a reasonable opportunity to a servant who is in the service of the Republic charged with any allegation if he is sought to be dismissed, removed, or reduced in rank. He also specified that orders of punishment given in violation of laws and rules are not enforceable. In this regard, he referred to the decision of 9 MLR (AD) 221, as follows:

“When disciplinary proceedings are not conducted in accordance with the rules of procedure and the principle of natural justice, the order of punishment passed therein is not sustainable in law.”

2.2 On the other hand, learned counsel for the respondents, Mr Md. Salauddin, as against the above, made the following submissions:

(a) That admittedly the writ petitioner was dismissed by the Respondent No. 03 by the order vide under Memo No. বাউবি/প্রশা-২ (৩৮১)/(০৬)/৪৮০২ dated 29.09.2013, and the writ petitioner has challenged the

decision of the Respondent, which does not stand on any legal basis as a dismissal order issued by the respondent No. 3 by which the Board of Governors on the 139th Board Meeting (Resolution-11) under the provision of section 38(2) and 13(5) of the Bangladesh Open University Ain, 1992 (as amended, 2009) dismissed the petitioner from the service against an specific allegation which has been proved beyond reasonable doubt the writ petitioner does not have any locus standi to file the instant writ petition challenging the decision of his dismissal for criminal charge.

(b) That it is revealed from the contents of Annexures-3, 4, 5, & 6 that the petitioner, against the letter issued by the Department of Finance and Accounts, the alleged amount was adjusted on 02.11.2009, and subsequently, the said issue was raised in the 113th Board Meeting. It was decided to appoint an investigating officer regarding the temporary suspension and to provide an explanation to the petitioner, who was absent from the workplace. However, attendance was mandatory during suspension.

(c) That thereafter, one Dr Md. Abdur Rashid was appointed as the investigating officer on 25.02.2010. Still, he could not submit the report in due time, and thereafter, Dr Abul Hossain Ahmed Bhuiyan was appointed as an investigating officer on 14.01.2012. He submitted the report on 13.02.2012, and the petitioner submitted an explanation in his defence on 16.10.2012, in

which it was revealed that he had filed a Civil Suit challenging the dismissal order vide No. 79 of 2011 in the Gazipur Court.

(d) That there were some specific allegations against the petitioner for embezzlement of the money of the Bangladesh Open University, and following all the legal formalities, the Board of Governors decided to remove the petitioner as per the provisions of sections 38(2) and 13(5) of the Bangladesh Open University Ain, 1992, and subsequently, the petitioner was dismissed on 29.09.2013, and as such the Rule is liable to be discharged.

3. Deliberations and Findings:

3.1 Heard the learned counsel of both parties, the issues involved in the writ petition, annexures thereto, and affidavit in opposition, along with annexures appended therewith.

3.2 On sifting the petition as well as the annexed documents in the instant petition and affidavit-in-opposition, it is found core argument of the petitioner that the concerned authority sent a letter to the petitioner on 2.11.2009 for adjusting the advance money taken by him mentioning in Annexure-B, as: “কিন্তু রেকর্ড দৃষ্টে দেখা যায় যে, আপনার নামে প্রদত্ত নিম্ন লিখিত অগ্রীম সমূহ এখন পর্যন্ত সমন্বয়

করা হয় নি।পত্র প্রাপ্তির সাত (০৭) দিনের মধ্যে আপনার নামে গৃহীত অসমর্থকৃত অগ্রীমসমূহ সমন্বয়ের জন্য অনুরোধ করা হলো। অন্যথায় বিধি মোতাবেক ব্যবস্থা গ্রহণ করতে হিসাব বিভাগ বাধ্য হইবে।” In consonance to this letter the petitioner on the same date deposited the money to the concerned authority and the pertinent authority took back the said amount giving a receipt vide serial number 02119, dated 02.11.2009 to the petitioner mentioning, “অগ্রিম অব্যয়িত (সম্পূর্ণ) টাকা=১,৬৬,৫৯২/=(এক লক্ষ ছেষটি হাজার পাঁচশত বিরানব্বই) মাত্র বুঝিয়া পাইলাম।”, and thereafter the petitioner on the next day i.e. on 03/11/2009 sent a letter to the director Finance Division, Open University giving specific to the effect of delay for adjustment of the said advance money (Annexure-B1).

3.3 However, the respondent No.3 issued an office order vide Memo No. বাউবি/প্রশা-২(৩৮১)/৬/২৭৮ dated 31.1.2010 (Annexure-C) under the provision of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯) as per resolution dated 17.1.2010 and 21.1.2010 respectively taken by the Board of Governors on the 113th Board Meeting (resolution No.22) suspended the petitioner for defalcation of money. Upon

perusal of the contents of the Annexure-C, it was found that no show cause notice was issued before the suspension of the petitioner. So it is crystal clear that the transaction was recorded (রেকর্ড দৃষ্টে দেখা যায়) one, and if we consider the letter dated 02.11.2009 (Annexure-B) as a notice which specifically denotes that “পত্র প্রাপ্তির সাত (০৭) দিনের মধ্যে আপনার নামে গৃহীত অসমবয়স্ক অগ্রীমসমূহ সময়ের জন্য অনুরোধ করা হলো। অন্যথায় বিধি মোতাবেক ব্যবস্থা গ্রহণ করতে হিসাব বিভাগ বাধ্য হইবে।”, and the petitioner admittedly deposited the said money on the same day, and as such no cause of action arises so far as it relates to “অন্যথায় বিধি মোতাবেক ব্যবস্থা গ্রহণ করতে হিসাব বিভাগ বাধ্য হইবে।”, which also exhausted the further course of action, and consequently, it makes privation the mandatory provisions of show cause notice before suspension.

3.4 The principal issue involved in the instant writ petition is whether the petitioner has been granted the natural justice under the law. The answer is rested in the provisions of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯), which reads as under:

”৩৮। (১) বিশ্ববিদ্যালয়ের বেতনভুক্ত সকল শিক্ষক, কর্মকর্তা ও কর্মচারী লিখিত চুক্তির ভিত্তিতে নিযুক্ত হইবেন, চুক্তিটি বিশ্ববিদ্যালয়ের রেজিস্ট্রারের নিকট গচ্ছিত থাকিবে এবং প্রত্যেক সংশ্লিষ্ট শিক্ষক, কর্মকর্তা বা কর্মচারীকে উহার একটি অনুলিপি দেওয়া হইবে।

(২) ভাইস-চ্যান্সেলর, প্রো-ভাইস-চ্যান্সেলর ও কোষাধ্যক্ষ চাকুরীর শর্তাবলী অনুযায়ী চাকুরীতে বহাল থাকিবেন বা অপসারিত হইবেন। বিশ্ববিদ্যালয়ের বেতনভুক্ত শিক্ষক, কর্মচারী বা উপরোক্ত তিনজন কর্মকর্তা বাদে অন্য কর্মকর্তাগণকে তাহার কর্তব্যে অবহেলা, অসদাচরণ, নৈতিক স্থলন, অর্থ আত্মসাৎ, সম্বাস, জালিয়াতি বা অদক্ষতার কারনে চাকুরী হইতে অপসারণ করা যাইবে;

তবে শর্ত থাকে যে, তাহাকে তাহার নিয়োগকারী কর্তৃপক্ষ লিখিতভাবে দুই সপ্তাহের নোটিশ দ্বারা কৈফিয়ত তলব করিবেন। কৈফিয়তের জবাব সন্তোষজনক না হইলে তাহার উপরস্থ কর্মচারী দ্বারা একটি তদন্ত করিতে হইবে এবং তাহাকে আত্মপক্ষ সমর্থনের সুযোগ দিতে হইবে। তদন্তের রিপোর্ট তিন মাসের মধ্যে দাখিল করিতে হইবে। তদন্তের রিপোর্ট সন্তোষজনক না হইলে তাহাকে চাকুরী হইতে অপসারণ বা পদচ্যুত বা অন্য কোন শাস্তি প্রদান করা যাইবে। তদন্তকালীন সময়ে তাহাকে সাময়িকভাবে বরখাস্ত করা যাইবে এবং সাময়িক বরখাস্তকালীন তিনি জীবন-ধারণ ভাতা (Subsistence allowance) পাইবেন। যে

কোন শাস্তির বিরুদ্ধে তিনি ৪৪ দফা মোতাবেক চ্যাম্পেলরের নিকট (এক মাসের মধ্যে) আপিল করিতে পারিবেন।”

3.5 From a careful reading of the section, it is ostensible that a mandatory duty has been cast upon the authorities to take the due course to issue a show cause notice giving two weeks before taking any disciplinary measure against the person concerned. If the reply to the show cause notice is not satisfactory, an enquiry committee has to be formed with a person holding a superior rank to that person, and the said enquiry has to be concluded within three months, and again, the authority has to allow self-defense, after completing all legal formalities the authority can endorse the safe navigation to remove the person concerned from his service.

3.6 The learned Counsel for the petitioner showed us a decision of this jurisdiction where their Lordships, Mr. Justice Zubayer Rahman Chowdhury and Mr. Justice Sashanka Shekhar Sarkar, in Writ Petition No. 5506 of 2010 (Md. Rawshan Ali Vs. Bangladesh Open University, et al.) vide judgment and order dated 12.03.2019, opined that, *“In the instant case, the order of suspension was issued on 31.05.2010, but the show cause notice was issued on 20.06.2010, as evidenced by Annexure D. Therefore, admittedly, the order of the suspension was issued at an earlier point of time. This is where the respondents went wrong. In other words, the cart was put before the horse.”* Similarly, the case in

our hand shows that the suspension was issued on 31.01.2010 (Annexure-C), and the show cause notice was served upon the petitioner on 25.02.2010 (Annexure-D).

3.7 Aforementioned legal position clearly indicates that the authority is devoid of issuing a show cause notice of two weeks before suspending the petitioner, and concomitantly violates the principle of natural justice. But we wish to be more certain of reaching any result. It is evident from Annexure-6 of the Affidavit in opposition that on the 113th Board Meeting dated 17.01.2010, the authority got decisions vide resolution No.22(Ka) to suspend the petitioner and resolution No.22(Kha) appointed Prof. Dr. Mohammad Abdur Rashid as investigating officer and resolution No.22(Ga) directed the investigating officer one month time to submit the enquiry report, and so swiftly suspend the petitioner on 31.01.2010. The authority has broken all the modalities by adopting the decisions to suspend and appoint an investigation officer, and has determined a period of enquiry of one month instead of three months in a single sitting. However, the investigating officer did not submit any enquiry report more than 2(Two) years, which is a clear violation of the mandatory provisions of section 38(2) of the said Act, and then the authority appointed Prof. Dr. Abul Hossain Ahmed Bhuiyan as an investigating officer on 24.01.2012 (Annexure-15 of Affidavit in opposition), who submitted report on 13.02.2012 (Annexure-16)

which revealed that he discovered some new facts relating to misappropriation of Tk.10,000/= and absence from work place by the petitioner, that does not make any consonance with demand letter dated 02.11.2009 and suspension order dated 31.01.2010. These types of juggling by respondents indicated that they sowed the seeds of *mala fides* in their own domain.

3.8 The authority that vested the power to show cause, take evidence, make inquiry, give self-defence, and examination of witnesses of any proceeding leading to impose punishment or acquittal upon the employees concerned is all consonant with a quasi-judicial act. So, the authority has to go through the mandates of law with due care and diligence to the periphery of the proceedings, showering equal justice under the principle of “*Actus legis nemini facit injurium*,” i.e., the act of the law does injury to none.

3.9 The learned Counsel for the opposite party vehemently tried to get the attention of this Court, stating that the petitioner was absent from the workplace for a long time. If so be that it's our contention whether the authority had created any situation to make presence from the part of the authority concerned, thus record displayed that the respondent did not complete the enquiry of the alleged allegation within 3(Three) months of mandatory period, which stands that the authority did not act fairly and judicially, as well as the said disciplinary authority failed adhere to the principle

of natural justice, and accordingly, all the subsequent events will be treated as frustrating and unreasonable attribution toward the legal accountability.

3.10 The principle of *audi alteram partem* is now firmly established universally, that is, whenever an individual's right, liberty, or protection of law is affected deliberately by the exercise of power of a decision maker, the person so affected must have an opportunity to be heard. Article 27 of the Constitution of the People's Republic of Bangladesh endorsed the inalienable fundamental right of the citizens, i.e., the entitlement to "equal protection of law," and Article 31 significantly declared the right "to be treated in accordance with law," and these molded our legal system as a basic part of the "natural justice."

3.11 The contesting respondent raised another question through an affidavit in opposition, stating that the petitioner had filed a Civil Suit in the competent Court of Gazipur. However, Annexure-J of the supplementary affidavit filed by the petitioner showed that Civil Suit No. 79 of 2011 had been withdrawn by the plaintiff on 17.11.2013. Moreover, the petitioner mentioned the said suit in his reply dated 02.12.2012 (Annexure-E), thereby indicating that no facts were suppressed.

3.12 However, we noticed that the petitioner had an opportunity to appeal to the Chancellor of the Bangladesh Open University as per section 44

of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯), but the petitioner did not avail the opportunity. Upon perusal, it can be observed that the contents of the said section indicate a directory provision, rather than it may be termed as a mere formality. Otherwise, we find the whole proceedings against the petitioner stand upon a rootless tree, because of the patent violation of the mandatory provisions of section 38(2) of the বাংলাদেশ উন্মুক্ত বিশ্ববিদ্যালয় আইন, ১৯৯২ (সংশোধিত ২০০৯), so far as it relates to the show cause notice and enquiry report having a mandatory nature of stipulated time, no being complied with, and thus culminating the impugned proceedings into the scale of *void ab initio*. All the more, it is the established principle of law that a *mala fide* act is an act without jurisdiction, and no legislature grants power for the *mala fide* exercise of it; coherently, *mala fide* goes to the root of jurisdiction, and if the impugned action is *mala fide*, the alternative remedy provided by statute need not be availed of.

3.13 In view of the above facts, circumstances, and laws applicable herein, we are of the view that the facts adhere to the affidavit-in-opposition and submissions of the learned Advocate for the respondent No.3 have no substance and are barren of merit in the case, and thus the challenged dismissal order issued vide Memo No. বাউবি/প্রশা-২(৩৮১)/০৬/৪৮০২, তারিখ: ২৯-০৯-২০১৩ খ্রি. (Annexure-G) stands on no leg of law; consequently, no legal effect.

3.14 Be that as it may, the petitioner did not get a single penny since the illegal suspension, and now the petitioner has reached the age of retirement. The Bangladesh Open University failed to receive proper contributions from a potential employee due to the arbitrary and *mala fide* activities of the respondents.

4. Directions:

4.1 Our considered view is that the petitioner has the right to get all the financial benefits till to the age of retirement from the date of suspension as per the conditions of his service. The respondents have the duty to provide all the service benefits to the petitioner within 60 (Sixty) days from the date of receipt of the copy of this judgment, failing which, the respondents in position respectively shall have to bear the consequence of personal liabilities of indiscipline, negligence, *mala fide*, violative of the rule of justice, and of committing contempt of Court as per law.

5. Disposition:

5.1 In the light of the above, and having found merit in the writ petition and substance in the Rule Nisi, the Rule Nisi is, hereby, made absolute subject to the directions above.

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5.2 There is no order of costs. Communicate this judgment to the contesting parties for taking necessary steps expeditiously, or within the stipulated time.

5.3 The Court duly acknowledges and appreciates the efforts of the learned Counsels representing both parties.

(Abdur Rahman, J)

Farid Ahmed, J:

I agree.

(Farid Ahmed, J)