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

Writ Petition No. 21 of 2002

IN THE MATTER OF :
An application under Article 102 read with Article 44 of the Constitution of the People's Republic of Bangladesh;

And

IN THE MATTER OF

Md. Matiur Rahman
…….petitioner

-Versus-

Government of Bangladesh through the Secretary Ministry of Home Affairs, Bangladesh Secretariat, Ramna, Dhaka and others.

.....Respondents

Mr. Rokon Uddin Mahmud with
Mr. Subrata Chowdhury, Advocates.

…….for the petitioner

Mr. A. B. M. Altaf Hossain, D.A.G with
Ms. Yehida Zaman, A.A.G

…….for the Respondent

Heard and Judgment on: 15.01.2012

Present:

Mr. Justice A.H. M. Shamsuddin Choudhury

And

Mr. Justice Jahangir Hossain

A. H. M. Shamsuddin Choudhury, J:

The Rule under adjudication, issued on 2.1.2002, was in following terms:

"Let a Rule Nisi issue calling upon the respondents to show cause as to why section 9(2) of the Public Servants (Retirement) Act, 1974 should not be declared to be void and ultra vires the Constitution and why the impugned order issued under Notification bearing Memo No. Sha-Ma/Uni-2(Poll)-Misc-12/2001/697 dated 11.11.2001 issued by the Deputy Secretary (Po) Ministry of Home Affairs directing retirement of the Petitioner in purported exercise of power under section 9(2) of the Public Servants Retirement Act (Act No. XII of 1974) as contained in Annexure-B should not be declared to have been made 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."

Averments figured in the petition are, briefly, as follows:

The petitioner was appointed in Bangladesh Civil Service cadre in 1973 from the Freedom Fighters' Batch. He joined the Police Service in 1973 and served the government for long 28 years in different capacities with great efficiency, honesty and dedication.

On completion of training, he commenced his job at Jalakhiti as a Sub-Divisional Police Officer (S.D.P.O.) in 1974, was promoted to Additional Police Superintendent (ASP) and then promoted to the rank of Superintendent of Police on 28.7.98. He was promoted to the post of Deputy Inspector General (DIG) of Police and was deployed in Dhaka Range. Thereafter, on 10.6.99 he was posted as the Metropolitan Police

Commissioner, Dhaka. On 16th January, 2001, he joined as Deputy Inspector General for Chittagong Zone and on 8th October he was transferred to the Police Academy, Sardha, Rajshahi as the Principal. While he was serving there, the impugned order of retirement was issued on 11.11.2001.

The petitioner actively participated in the Liberation War in 1971 and throughout his service career actively promoted the values and ideas of the liberation struggle.

He received training at home and abroad and was awarded on several occasions for his commendable performance and achievements. He obtained training on Dignitaries Protection and Anti-terrorist action in the U.S.A. The petitioner is the 1st officer to command the Bangladesh contingent to European Missions

and was awarded with U.S. medal. For his brilliant achievement, the petitioner received the highest police award on March 2000. The petitioner received Inspector General of Police (IGP) Medals on 3(three) occasions for his exemplary service.

He was retired from the service of the government on 11.11.2001, and the decision thereto was issued by the Deputy Secretary (Police), Ministry of Home Affairs, in exercise of power conferred under Section 9(2) of the Public Servant Retirement Act 1974 (henceforth the Act).

Section 9(2) of the Act, reads;

"The Government may, if it considers necessary in the public interest so to do retire from service a public servant at any

time after he has completed twenty five years of service without assigning any reason".

Prior to the amendment by Ordinance No. 1 of 1983, Section 9(2) used to read;

"The Government may, at any time, retire from service a public servant who has completed twenty five years of service without assigning any reason".

This petition does not relate to any proceeding nor does it fall within the jurisdiction of the Administrative Tribunal constituted under Art. 117 of the Constitution but arises out of violation of fundamental Rights of the Petitioner, as guaranteed under Article 27 and 31 of the Constitution and therefore, the impugned decision is amenable to review under Article 102 of the

Constitution in as much as the tribunal can not go or look into the moral and ethics of law but to see the law as it is.

In the case of Dr. Nurul Islam-v- Bangladesh (33DLR (AD) 201), it was held, amongst other, that no guideline of exercising the direction by the government has been laid down in the Act, nor has any rule been framed under it. It was further held that any law dealing with termination of service by retirement before the age of superannuation must be made to safeguard the rights of the government servants under the fundamental rights as well as under Article 135 of the Constitution.

Issuing the notification under the stretcher of impugned Act is a pure case of discrimination and victimization.

Power to retire a public servant without mentioning any basis whatsoever and also without any notice is liable to be declared void and ultra virus the Constitution.

Although plunging to retirement is not a punishment, yet, deprivation of some benefits seriously impairs rights of the victims, and these being part of right to life as guaranteed by the Constitution, Section 9(2) is repugnant to more than one fundamental rights as enshrined in our Constitution.

The authority prior to the passing of the order must form the opinion not –"subjective but objective and bonafide", based on relevant material. The requisite opinion is that the retirement of the victim is in public interest not personal, political or other interest. The right to retire is not absolute. Naked and arbitrary

exercise of power is bad in law. In as much as this impugned Section, which empowers the government to take action nakedly and arbitrarily, the same can not pass the test of constitutionality.

The petitioner is the servant of the Republic and not of a political party. The appointment is made under the order of the President of the Republic. The petitioner was not appointed by a political party. If there is any allegation of involvement in party political activities, the punishment may not be under the impugned Act, but through Government Servant Appeal and Discipline Rules according reasonable opportunity to the petitioner.

The instant law is sparingly used when a public interest arises out of public demand on exceptional circumstances, but in

the instant case the blindfolded application of the impugned Act resulting in the petitioner's retirement, is a malafide act, propelled by political and extraneous consideration, with collateral purposes, as are evident from the report published in news papers.

With the change of the government, and in view of the fact that the politic having become adversarial and with the empowerment of one party there was a tendency of wholesale victimization, affecting the government service, the instant decision was taken to permeate victimization.

Whether retirement under the Act, has been made in the public interest or not can be scrutinized by the court which is

equipped with the power to see from the records whether the order was a bonafide one or in colorable exercise of jurisdiction.

Several states in India have laid down certain guidelines to determine on which criteria a government servant should be retired. The Bangladesh law has stopped saying merely that the government can pass the order of retirement in the "Public interest". These two words are the only guideline in our law. The Public (Servants) Retirement Rules 1975 does not shed any light either as to what criteria should be followed in determining "Public Interest".

The amendment to section 9(2) of the Act, vide Ordinance No. 1 of 1983, and the mere insertion of the phrases, "Public Interest", has not cured the malady. Unbridled discretion

conferred by the Act in case of retiring Public Servants has failed to improve the situation and instead there has been further deterioration, and as such insertion neither provides any guideline nor curtails the exercise of arbitrary and **caprisious** power, hence this change has miserably failed to remedy the mischief contained in the Act. The present situation is no different from that existed before the Judgment in Dr. Nurul Islam's case supra was delivered.

Public Interest has not been defined by the Act, nor has any yardstick or objective criteria been worked out for this purpose. No procedure has been laid down as to how and by whom conclusion has to be reached as to the compulsiveness for retiring a person on the ground of "Public Interest", nor does it provide the due process and procedural safeguard in the process of such

determination. It does not ensure impartiality of the forum by which such determination is to be made.

The impugned order, purporting to retire the petitioner under Section 9(2) of the Act does not disclose any ground of such retirements other than 'Public interest', which is vague, indefinite and lacks in objective criteria.

No objective standard, yardstick or criteria has been followed in choosing the name of the Petitioner to be retired nor does the impugned order contain any ground or lay down or specify any act of the Petitioner which makes it necessary to retire him from service.

As per Section 9(2) of the Act of 1974, which does not itself provide any principle or guideline for exercise of discretion by the

government and the mere term "public Interest" being vague and non specific, fails to provide any objective guideline and such absence of objective criteria leaves ample scope for discrimination between government servants having completed 25 years of service, which is violative of article 27 and 29 of the Constitution and mere reaching to a particular age could become ground for discrimination inasmuch as other officers similarly placed but not been chosen for termination under this act.

The impugned order is ex-facie bad as the power has been exercised to deprive the petitioner of his vocation or livelihood by virtue of an Act purporting such authorization which itself is ultra vires the Constitution, resulting in serious injustice and arbitrariness and the same is both malice is law and in fact and

extremely demoralizing for the servants of the Republic who are made to act subservient to a particular person, group or party rather then being in obedience to law as the primary concern. Due to such fear being in existence all the time as to what might happen on completion of 25 years of service, which is like a suspended sentence, perpetually hanging as a sword of Damocles, which may or may not fall at the end of 25 years of service, without knowing why it might not fall and also knowing that once the sword is struck in the name of public interest, there is nothing that can be done because of the so called "public interest" clause.

Colorable exercise of power initiated with the malafide motive for persecution of freedom fighter is ex-facie illegal and arbitrary, the same being violative of the fundamental rights of

the petitioner to equal protection of law and to be treated in accordance with law, as guaranteed under Articles 27, 29 and 31 of the Constitution.

No affidavit in opposition has been filed by any of the respondents.

As the Rule ripened to hearing, Mr. Rukonuddin Mahmud, along with Mr. Subrata Chowdhury, argued for the petitioner that even the amendment to Section 9(2) has not insulated the provision from abuse.

He went on to say that irrespective of the constitutionality of Section 9(2), the decision to plunge the petitioner to retirement is untenable in law, anyway, as the same was ignited by ulterior motive.

Mr. A. B. M. Altaf Hossain, the learned Deputy Attorney General could be of little assistance as being bare of instruction.

For us, the questions are twofold: (1) is Section 9(2) ulteravires the constitution?, (2) if not, is the decision void?

By resorting to comprehensive discussion on the constitutionality of Section 9(2), as it stood at that time, majority at the Appellate in the case of Dr. Nurul Islam-v-Bangladesh, supra, arrived at the conclusion that the Section could not be viewed as intra vires because unbridled and blank cheque power conferred by it enabled the authorities to be abusive and discriminatory.

The authorities, however, amended the Section to include the words "if it considers necessary in the "Public Interest", in substitution of the words, "at any time".

So, as the section is now phrased, it is not open to the authorities to plunge a public servant to retirement at whim because their action must be necessitated by "Public Interest".

True it is that this Act has not defined the concept "Public Interest". But the concept is self explanatory. There is no dearth of judicial authorities to locate the connotation and the meaning of this phrase.

It is always open to the courts to say whether a particular retiring action can be brought under the "Public Interest" umbrella.

So, we are of the view that the present Section 9(2) is not ultra vires the Constitution;

This takes us to explore the second issue.

It is apparent from all the attending circumstances that the decision was tainted with malafide exercise of discretion. It is also apparent that it is the political motive that prompted the government of the relevant time to force retire the petitioner by invoking Section 9(2) of the Public Servant Retirement Act 1974. Although the relevant section does not require the authorities to assign any reason, a malafide decision is always deemed to be vitiated. As lord Denning said, "Fraud unravels everything" (Lazarus Estates Ltd-v-Beasley 1956 1QB 702). Since we are of the view that the decision under review was malafide, we can not say that the same was taken within lawful authority. The decision is as such bound to be set aside. The rule is accordingly made Absolute without any order as to costs.

The authorities are directed to treat the petitioner never to have been made to retire under Section 9(2) of the Act and to pay him all the salaries and other benefit that he would have been paid upto the age of his superannuation had he not been forced to unlawful early retirement through purported action engaging Section 9(2) of the 1974 Act, as narrated above.

Jahangir Hossain, J

I agree