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

Writ Petition No. 5323 of 2016

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 :

Md. Mahboob Murshed

…… Petitioner

-Versus-

Bangladesh, represented by the Secretary, Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs, Dhaka and others.

……Respondents

Mr. Mahboob Murshed, Advocate

…. In person

Mr. Sk. Shaifuzzaman, DAG with
Ms. Abantee Nurul, AAG,
Ms. Rokeya Akther, AAG and
Ms. Afroza Nazneen Akther, AAG

…….. For Respondent No. 4

Present:
Mr. Justice Zubayer Rahman Chowdhury
And
Ms. Justice Kazi Zinat Hoque

Date of Hearing : 19.11.2020, 23.11.2020, 07.12.2020 & 11.01.2021

Date of Judgment : 18.03.2021

Zubayer Rahman Chowdhury, J :

The constitutional validity of Rule 300 of the Bangladesh Service Rules, Part I is being challenged by the instant Rule, issued upon an application filed under Article 102(2) of the Constitution by the petitioner,

a former Additional District Judge, who had tendered his resignation from service. In deciding the issue, this Court is being led into an unchartered territory in that although a period of fifty years has elapsed since the independence of the country, this particular Rule appears to have remained unchallenged; at least that appears to be the factual position, given the dearth of any reported or unreported decision on the issue.

A short narration of the facts leading to issuance of the instant Rule is called for. The petitioner joined the Bangladesh Judicial Service in December, 1991 as an Assistant Judge and he was eventually promoted to the post of Additional District Judge. In January 2010, the petitioner joined the United Nations Development Program (briefly, 'UNDP') on lien for a period of one year. Upon completion of the same, he applied for extension of the period of lien, but it was not granted by the concerned respondent. Subsequently, the petitioner tendered his resignation from the post of Additional District Judge.

Having completed nineteen years of service as a Judicial Officer, the petitioner applied for his pension and other benefits, which was approved by Memo dated 02.03.2015, as evident from Annexure A. Subsequently, respondent no. 5, being an official of the office of the Comptroller and Auditor General, Bangladesh (briefly, 'CAG') issued the impugned Memo dated 25.03.2015, as evidenced by Annexure B, stating that the petitioner was not entitled to receive any pension since his service stood forfeited by dint of Rule 300(a) of the Bangladesh Service Rules, Part I. Being aggrieved thereby, the petitioner moved this Court and obtained the instant Rule challenging the legality of the Memo dated

25.03.2015 as well as the constitutional validity of Rule 300 of Bangladesh Service Rules (briefly, 'BSR'), Part I. At the same time, the petitioner has prayed for issuance of a direction upon the concerned respondents to provide him with pension and other benefits to which he is entitled under the law.

The petitioner appears in person in support of the Rule, while the same is being opposed by respondents no. 2, 3, 4 and 5 by filing an affidavit-in-opposition. The petitioner has also filed two supplementary affidavits.

Mr. Md. Mahboob Murshed, the petitioner appearing in person, submits that although the Ministry of Law, Justice and Parliamentary Affairs had granted his pension benefits, subsequently respondent no. 5 issued the impugned Memo stopping his pension benefits, which is arbitrary and malafide. He submits forcefully that during the course of his service career, there was never any complaint against him and therefore, in the absence of any adverse or negative remarks in his service record, there is no legal ground to deprive him of his pension and other related benefits.

Mr. Murshed refers to Rule 300(a) of the Bangladesh Service Rules and submits that although the Rule provides for forfeiture of "past service", it is silent with regard to the issue of "pension". He further submits that Rule 300 (a) provides that apart from resignation, if a person is dismissed or removed from service for misconduct, insolvency, insufficiency or fails to pass a prescribed examination, the past service will stand forfeited. According to Mr. Murshed, it is apparent that a

person whose service record is unblemished and has simply resigned from service is being treated at par with a person who has been dismissed or removed from service for misconduct, inefficiency etc. He submits forcefully that treating these two different categories of persons on the same scale is not only improper, it is also violative of the equality clause guaranteed under the Constitution. Referring to Rule 300 (b), the learned Advocate submits that when a person takes up another appointment after his resignation, the resignation so tendered shall not be deemed to be a resignation from public service. According to Mr. Murshed, discrimination is apparent in Rule 300(b) itself.

Mr. Murshed submits that the Judicial service is separate and distinct from any other service in the Republic. He submits that Rule 300 (a) is inapplicable to Judicial Officers as because if a Judicial Officer resigns from service, it will not only deprive him of his pension benefits, but it will also forfeit all the judgments rendered by the concerned Judicial Officer during the tenure of his service. Referring to the Service Rules of the University of Dhaka, Mr. Murshed submits that if any teacher of the University resigns from service, he/she is entitled to receive full pension. Mr. Murshed submits that the University of Dhaka, being an autonomous body, is also subject to the very same Constitution. He contends the forfeiture of pension cannot stand the test of reasonableness; rather it is arbitrary and violative of Articles 27 and 31 of the Constitution.

Mr. Sk. Shaifuzzaman, the learned Deputy Attorney General (briefly, DAG) appearing along with Ms. Abantee Nurul, Ms. Rokeya Akther and Ms. Afroza Nazneen Akther, the learned Assistant Attorney

Generals in opposition to the Rule submits that as the petitioner resigned from service, he was not entitled to receive any pension by operation of law. He submits that although the petitioner was initially granted his pension and other benefits, it was done inadvertently. However, the office of the CAG had rightly pointed out this aspect of the case and accordingly, the concerned respondent declined to grant his pension. The learned DAG submits that pension is only granted to an official or employee upon completion of the tenure of service. Referring to Rule 300(a) of the 'BSR', the learned DAG submits forcefully that in the event of resignation from service, the past service stands forfeited and there is no scope to grant pension. He submits that the instant Rule is misconceived and therefore, the same is liable to be discharged.

In the backdrop of the factual matrix noted above, we are called upon to examine the relevant legal and constitutional provisions.

Rule 300 of the Bangladesh Service Rules reads as under :

> "বিধি-৩০০। (এ) সরকারী চাকরি হইতে পদত্যাগ করিলে, অথবা অসদাচরণ, দেউলিয়া, বয়সের কারণ ব্যতীত অদক্ষতা, অথবা নির্ধারিত পরীক্ষায় উত্তীর্ণ হইতে না পারার কারণে চাকরি হইতে বরখাস্ত বা অপসারণ করা হইলে পূর্ব চাকরি বাজেয়াপ্ত হইবে।
>
> (বি) অন্য কোন পেনশনযোগ্য চাকরিতে যোগদানের উদ্দেশ্যে চাকরি হইতে পদত্যাগ করিলে, উক্ত পদত্যাগ সরকারী চাকরি হইতে পদত্যাগ হিসাবে গণ্য হইবে না।"

The English version reads as follows :

> "Rule 300 (a) : Resignation of the public service, or dismissal or removal from it for misconduct, insolvency, inefficiency not due to age, or failure to pass a prescribed examination entails forfeiture of past service.
>
> (b) Resignation of an appointment to take up another appointment, service is which counts, is not a resignation of the public service.

On a perusal of Rule 300(a), it appears that the Rule envisages two situations; firstly, if a person resigns from public service, it will entail forfeiture of his past service and secondly, if a person is dismissed or removed from service for misconduct, insolvency, inefficiency (not due to age) or if such person fails to pass a prescribed examination, it will also entail forfeiture of past service. Rule 300(b) provides that if resignation is tendered to take up another pensionable job or service, in such event, the resignation so tendered shall not be deemed to be a resignation from public service. In other words, Rule 300(b) allows an employee who has resigned, but takes up another employment under the Government, to receive his pension benefits. However, the same privilege is not extended to an employee who has resigned, but did not take up any other employment under the Government.

For a proper understanding of the issue before us, we are required to examine the provisions of Rule 300 minutely. It appears that there are two key words in the said Rule, namely ‘resignation’ and ‘forfeiture’. It is to be noted that the term ‘pension’ is absent in the Rule.

Now, let us examine closely the term ‘forfeiture’.

The term forfeiture, according to Webster Dictionary, means

> “The loss of rights, property or money by way of penalty”.

Lexico defines the term as

> “the loss or giving up of something as a penalty for wrongdoing”.

Merriam – Webster dictionary defines the term as

> "the loss of property or money because of a breach of a legal obligation."

Cambridge Dictionary defines the term as

> "the loss of rights, property or money, especially as a result of breaking a legal agreement."

In other words, forfeiture is a form of censure or punishment occasioning loss of some valuable right or property. Generally, a person is censured or punished when he has committed any offence or, at the very least, any misdemeanour. As is evident from Rule 300(a) of BSR, it is applicable to two categories of persons - (i) a person who has resigned from service without any stigma being attached to his name and (ii) a person who has been dismissed from service on account of being guilty of misconduct. To put it plainly, an employee with an unblemished service record is being treated on the same scale as an employee who has been found guilty of some misdemeanour and therefore dismissed from service. It is apparent that two different categories of persons are being subjected to the very same treatment, although there is a gross distinction between 'resignation' and 'dismissal'.

It is important to note that prior to dismissal from service, as a mandatory requirement of law, a person has to be given a show-cause notice, usually followed by a departmental enquiry. This is commonly known as 'the due process', whereby the person concerned is afforded an opportunity to explain his/her position. However, in the case of resignation from service, there is no such requirement. Merely upon tendering resignation from service, a person loses his right to pension

forthwith. There is no provision for holding an enquiry, let alone issuance of any show cause notice to the person concerned, which is tantamount to non-compliance with the right to be treated in accordance with law.

Let us now examine the term 'resignation'. Generally understood, resignation means cessation or discontinuation of a person's service with the employer. The act of resignation is a unilateral act on the part of the employee, tendered in writing to the employer. It formally brings to an end the relationship between an employer and an employee. That being the universally accepted position, can resignation from service be deemed to be an offence or misdemeanor? Does any law or rule forbid an employee from resigning? Has any punishment been prescribed, either in our legal system, or for that matter, in any other legal system, for an employee who has resigned from service? In such context, how can a person who has tendered his resignation from service (for whatever reason) be visited with such a drastic form of punishment which deprives him of his hard earned pension to which he has become entitled by rendering service to the employer for a considerable period of time? Can such a rule be said to be in consonance with our Constitution? Obviously, the answer has to be in the negative. To hold otherwise would be contrary to the intent and spirit of our Constitution.

Each and every person, who resigns from service, form a single category or class. By virtue of Rule 300(b), a privilege is being granted to those who take up another pensionable job subsequent to their resignation from service. Hence, the issue of discrimination is manifest in Rule 300(b). However, persons not taking up any pensionable job post

resignation lose their pension forthwith by operation of Rule 300(a). In our view, this is discrimination and is, therefore, hit by Article 27 of the Constitution. Additionally, the immediate and automatic forfeiture of pension without issuing any notice or observing any legal procedure is also hit by Article 31 of the Constitution.

At this juncture, let us examine the relevant constitutional provisions.

Article 27 of the Constitution reads as under :

> "All citizens are equal before law and are entitled to equal protection of law".

Article 31 of the Constitution of the states 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."

On a careful reading of the Articles, it emerges that the Legislature had clearly intended that the citizens should be treated equally by and under the law. It is indeed pertinent to note that the term "equal" has occurred twice in Article 27, thereby indicating both the relevance and importance of the equality clause. Equally important is the fact that both Article 27 and Article 31 find a place in Part III of the Constitution, which relates to 'Fundamental Rights". As has been stated by noted Jurist Mahmudul Islam :

> "This article more than others firmly embodies the concept of rule of law the establishment of which is one of the prime objectives of the Constitution."
>
> [Constitutional Law of Bangladesh, Third Ed, at page 146]

Let us now refer to another relevant Article, namely Article 26 of the Constitution, which reads as under :

> "26. (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
>
> (2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void."

A plain reading of Article 26 indicates that all the laws that existed before coming into force of the Constitution, to the extent of their inconsistencies, shall become void on the commencement of the Constitution. Furthermore, the State has been categorically restricted from enacting any laws which are inconsistent with the provisions of Part III relating to Fundamental Rights.

Equal protection, a sacred constitutional right, embodied as one of the 'Fundamental Rights' in our Constitution, mandates that each and every person is to be treated as equal in the eye of law and be entitled to enjoy the same privilege and also bear the same obligation as the other person, similarly circumstanced. The concept of equal treatment of citizens, similarly placed, is not novel. In the early part of the twentieth century, in the case of Southern Railway Co. vs Greene [216 US 400 (1909)], the United States Supreme Court held :

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation".
>
> (per Day, J)

Much later, a similar view was also expressed in the case of State of Jammu & Kashmir Vs. T. N. Khosa (AIR 1974 SC 1) in the following words:

> "Equality is for equals, that is to say the those who are similarly circumstanced are entitled to an equal treatment".
>
> (per Chandrachud, J, as the learned Chief Justice then was)

In our own jurisdiction, in the case of Director General, NSI vs. Md. Sultan Ahmed, reported in 1 BLC (AD) (1996) 71, while negating the Governments' action in treating two Government officials differently, both of whom had earlier been retrenched but subsequently absorbed in Government service, the Supreme Court observed :

> "In spite of some amount of dubiousness on the part of the Government as regards the absorption of the respondent we have thought it just and proper to extend the benefit of doubt in favour of the respondent, for, otherwise, it will amount to endorsing a double standard on the part of the executive Government giving a benefit to a particular person and denying the same to another although they are otherwise equal."
>
> (per A.T.M. Afzal, CJ)

Although classification per se is permitted both by law and under the Constitution, it has to be reasonable. However, what is 'reasonable' has to be determined in the context of the society and should not be based on some hypothetical analysis, totally unconnected with the realities of life. As has been so aptly stated in the case of Kerala Hotel and Restaurant Association vs. State of Tamil Nadu, reported in AIR 1990 SC 913, and I quote :

> "Reasonableness of the classification has to be decided with reference to the realities of life and not in the abstract."
>
> (per J.S. Verma, J, as the learned Chief Justice then was)

In the case of Kasturi Lal vs. State of J & K, reported in AIR 1980 SC 1992, it was held :

> "..... the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights."
> (per Bhagwati, J, as the learned Chief Justice then was)

During the course of hearing, Mr. Murshed has referred to the case of Asger Ibrahim Amin vs. Life Insurance Corporation of India ('LIC'), reported in (2016) 13 SCC 797, where the Supreme Court of India held that the appellant was entitled to receive pension although he had resigned from service. However, in the case of Senior Divisional Manager, LIC vs. Sree Lal Meena, reported in (2015) 17 SCC 43, the decision rendered in Asger Ibrahim's case was called into question, consequent upon which the matter was referred to a larger Bench. A three Judge Bench of the Supreme Court of India, by their judgment reported in (2019) 4 SCC 479, overruled the decision taken in Asger Ibrahim's case.

It would perhaps be relevant to refer to the aforementioned cases briefly. In Asger Ibrahim Amin's case, the appellant had resigned from service in 1991 after twenty three years of service on the ground of family circumstances and indifferent health. Subsequently after the introduction of the Life Insurance Corporation of India (Employee) Pension Rules 1995, which was given retrospective effect from November, 1993, the appellant approached LIC to inquire whether he was entitled to receive pension under the new Rules of 1995, which was answered in the negative. However, in 2011, the appellant sent a legal notice to LIC and subsequently approached the High Court, but his application was dismissed against which he preferred an appeal before the Supreme Court. While allowing the appeal, the Court held :

> "The Appellant ought not to be deprived of pension benefits merely because his styled his termination of service as "resignation" or because there was no provision to retire voluntarily at that time."

Subsequently, in the case of Senior Divisional Manager, LIC vs. Sree Lal Meena, referred to above, a larger Bench of the Supreme Court of India made a distinction between resignation and voluntary retirement and overruled the decision in Asger Ibrahim Amin's case holding that :

> "What a most material is that the employee in this case had resigned. When the pension Rules are applicable, and an employee resigns, the consequences are forfeiture of service under Rule 23 of the Pension Rules."

Later, in 2019, in the case of BSES Yamuna Power Limited vs. G.C. Sharma and another (Civil Appeal No. 9076 of 2019), a Division Bench of the Supreme Court of India endorsed the judgment passed in Lal Meena's case holding that where an employee has resigned from service, there arises no question as to whether he has 'voluntarily retired' or 'resigned'. The decision to resign is materially distinct from the decision to seek voluntary retirement. In that case, the Court held that the decision passed earlier in Asger Ibrahim's case was incorrect as "it removes the important distinction between resignation and voluntary retirement".

It has to be noted that in Asger Ibrahim's case, the Court considered the 'resignation' of the appellant as 'voluntary retirement' and allowed the appeal. However, both the larger Bench and another Division Bench of the Supreme Court of India held that terming resignation as voluntary retirement was incorrect and further endorsed Rule 23 of the Service Rules of LIC which provides that in the event of resignation, the pension

of the employee was to be forfeited. It is important to note that the legality of the Rule 23 was not challenged in any of the aforesaid cases. However, in the instant case, the petitioner has challenged the legality of Rule 300 of BSR which provides for forfeiture of the pension in the event of resignation from service. In that view of the matter, the decisions referred to above are clearly distinguishable from the present case before us.

At this juncture, it is perhaps pertinent to examine the term 'pension'. The term pension is well defined and requires no further elaboration. Briefly stated, a pension is a quantified sum of money that is paid by the employer to the employee, upon the retirement of the employee, in consideration of the service rendered so as to enable the employee to defray the living expenses and to meet the basic necessities of life. The primary purpose of pension is to ensure that an employee, who has given the best part of his/her life in the service of the employer, has some means to fall back on during old age, when he/she is no longer able to work. Can it be said that this particular class or group of people are not affected by the gradual and sharp rise of the living index coupled with the decline in the purchasing power of essential commodities? It is an undeniable scenario that prevails in today's society.

Almost a century earlier, in Dodge vs. Board of Education of Chicago, [302 U.S. 74 (1937)] the United States Supreme Court held :

> "A pension is closely akin to wages in that it concept of payment provided by an employer, is paid inconsideration of past service and serves the purpose of helping the recipient meet the expenses of living."
>
> (per Roberts, J)

In the case of D. Prasad vs. State of Bihar, reported in AIR 1971 SC 1409, the Supreme Court of India, while endorsing its earlier decisions on the issue of pension, held :

> "In our opinion, the right to get pension is "property" and by withholding the same, the petitioner's fundamental rights guaranteed under Arts. 19 (1) (f) and 31 (1) are affected."
>
> (per Vaidialingam, J)

In this context, we may also refer to the case of Smt. Bhagwanti vs. Union of India and Smt. Sharada Swamy vs. Union of India, reported in AIR 1989 SC 2088, wherein the first petitioner was the widow of an ex Army Subhedar and the second petitioner was the wife of a retired railway employee. Admittedly, both the petitioners married the respective husbands after their retirement from service. Following the death of their husbands, both the petitioners applied to the Government seeking payment of family pension, which was rejected on the ground that the definition of "Family", as provided in the Central Civil Service (Pension) Rules 1972, provides that family includes husband or wife, as the case may be, provided the marriage took place before retirement of the concerned employee. In deciding the matter, the Supreme Court of India acknowledged that the definition of family, as provided in the Rules, excluded the spouse where the marriage had taken place after retirement of the concerned employee. While allowing the cases, the Court directed the Government to extend the 'family pension' to the respective petitioners, thereby expanding the definition of 'family' by including the widows of retired employees, who had married such employees post-retirement. In a pragmatic decision, the Court held :

> "Considered from any angle, we are of the view that two limitations incorporated in the definition of 'family' suffer from the vice of arbitrariness and discrimination and cannot be supported by nexus or reasonable classification."
> (per Ranganath Misra, J, as the learned Chief Justice then was).

Employment, in our view, is a two way traffic. While the employer cannot be forced to retain an employee who is either inefficient, incompetent or even unruly and can therefore be terminated with proper notice or even be dismissed (in appropriate cases), at the same time, an employee has a similar right to tender his resignation from service and there may well be various reasons for doing so. Let me cite an example. A person belonging to a business family, having a good academic background, may choose to take up Government service. Having served for several years as a Government servant, there may arise a situation whereby he is required to devote full time to the family business in the absence of any person to look after the said business. In such circumstances, the person concerned may have to resign from Government service for family and/or personal reason. However, by dint of Rule 300(a) of BSR, the pension would stand forfeited.

We are mindful of the argument advanced by the learned DAG to the effect that as the forfeiture of the petitioner's pension was on account of Rule 300(a) of BSR, the petitioner is now estopped from challenging the same. However, in contracts relating to service, there is a clause whereby employers can terminate the service of an employee upon giving due notice, although the employee is deemed to have been aware that his

service could be terminated by the employer upon giving due notice. Can it be said that the employee is therefore estopped from challenging the termination order in a Court of law? There are a plethora of decisions to the effect that despite such a provision in a contract of employment, the concerned employee is entitled to be given a show cause notice before issuance of the termination order. This, no doubt, is in consonance with the well-settled principle of natural justice. By the same corollary, it can be said that although he concerned official is bound by the Service Rules, that cannot, ipso facto, negate the application of the principle of natural justice. It is now universally accepted and well-settled that unless expressly excluded, the principle of natural justice shall apply in all cases. As Professor A. W. Bradley and Professor K. D. Ewing had stated :

> "With the growth of governmental powers affecting an individual's property or livelihood, natural justice served to supplement the shortcomings of legislation".
>
> (Constitutional and Administrative law, 14th Ed, page 743)

In the case in hand, the forfeiture of the petitioner's pension together with past service has very serious legal and practical ramification. It is an admitted position that the petitioner had served for long nineteen year in the Judicial service holding various positions and in doing so, he had invariably, at some point in time, exercised Sessions power. If, and as Rule 300(a) provides, his past service is forfeited, what would be its practical implication? Let me elaborate. The petitioner, while exercising Sessions power in a case under section 302 of the Penal Code, might have had, in all likelihood, imposed either capital punishment or a sentence of imprisonment for life. In either event, as a mandatory

requirement, the appeal by the appellant would have travelled upto the Appellate Division of the Supreme Court, where it had either been allowed or dismissed by the Apex Court. In the event of an appeal involving capital punishment or imprisonment for life being dismissed, the judgment passed by the petitioner would stand affirmed. However, as in the present case, the petitioners' past service stands forfeited on account of his resignation from service, what would be the fate of such an appeal decided by the Apex Court? Would it stand annulled as well? If so, Rule 300 (a) of BSR would have the effect of nullifying a judgment upheld by the highest Court of country. This would give rise to an absurd scenario. Can such a position be even conceived, far less accepted? The answer is an empathic no. I am reminded of the judicious words of one of the most distinguished jurists, Lord Coke, Chief Justice, pronounced more than four centuries ago in Dr. Boham's case [(1610) 8 Co. Rep 113b] to the effect that the Court could declare an Act of Parliament void if it was "against common right and reason".

Similarly, in Ipswich Tailors case, reported in (1614) 11 Co. Rep 53, the Rule imposing certain restrictions in pursuing the trade of a tailor was set aside, once again by Lord Coke, CJ, on the ground of being "against the liberty and freedom of the subject". Sir William Wade, one of the most distinguished Jurists of the modern era, observed :

> "The principle of reasonableness applies just as much to the making of rules and regulations as it does to other administrative action".
> (Administrative Law, Eleventh Ed, H.W.R. Wade & C.F. Forsyth, at pg 350).

In our considered view, inequality is writ large in Rule 300(a) of BSR, plain and simple. Not only is it devoid of any reason or logic, it is also an affront to common sense to say that a person, having an unblemished service record, should be barred from receiving pension and other benefits, merely because he/she has resigned from Government service. Can it be said that these two classes of persons, i.e., persons resigning from service and persons being dismissed from service form a common class? To treat a person who has simply tendered his resignation from service in the same bracket as a person who has been dismissed or removed from service for misconduct tantamounts to punishing a person although he has not committed any offence. This is not only violative of the right to be treated in accordance with law, it is also violative of the equality clause, both of which are embodied in our Constitution as Fundamental Rights. To do so would be to condemn the good and reward the indolent. Obviously, that could never be the legislative intent. Relying on a decision of the US Supreme Court, passed in Traux vs Raich [(1915)239 US 33], noted Jurist Mahmudul Islam observed :

> "The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens from which others in the same locality or class are exempt."
>
> (Constitutional Law of Bangladesh, Third ed. page 177)

The noted Jurist further observed (at page 145) :

> "Equal protection of law means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment of privileges or imposition of liabilities".

In the case of Connolly vs Union Sewer Pipe Co. (1901) 184 US 540, the United States Supreme Court held :

> "The equality clause requires that no impediment should be interposed in the pursuits of anyone except as applied to the same pursuits by others under similar circumstances and that no greater burdens in engaging in a calling should be laid down upon one than are laid upon others in the same calling or condition."
>
> (per Harlan, J).

In the case of Caldwell vs Mann [157 Fla. 633 (1946), the Florida Supreme Court held :

> "where a law or Rule imposes restriction on a group or class of person which is different from those imposed upon another group or class under similar conditions with no rational or logical basis for such classification, it would tantamount to violation of the equality clause".
>
> (per Buford, J)

One of the Fundamental Rights guaranteed by our Constitution is the right to be treated in accordance with law and only in accordance with law (Article 31). This is akin to the American concept of due process, which is one of the most fundamental and universally accepted concepts that requires a person to be appraised of the charge levelled against him and be given an opportunity to reply to the same, generally in writing and/or by appearing before an enquiry committee, and thereafter, if found guilty, be visited with the legal consequence which the relevant law or rule prescribes.

It is now well settled that a 'discriminatory act' is also "arbitrary". There are a preponderance of decisions where the Courts have consistently equated 'discrimination' with 'arbitrariness'. I am fortified in my view by two decisions - one from the Supreme Court of Canada and

the other from the UK Supreme Court. In the first instance, the Supreme Court of Canada held that "the power to make byelaws does not include a power to enact discriminatory provisions". (Re. City of Montreal and Arcade Amusements Inc. (1985) 18 DLR (4th) 161). A similar tone is echoed in the case of Bank Mellat vs. HM Treasury, reported in (2013) UKSC 39, where the Supreme Court held :

> "A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of it being discriminatory in some respect that is incapable of objective justification".
>
> (per Lord Sumption)

As Prof. A.W. Bradley and Prof. K.D. Ewing observed :

> "What a constitutional guarantee of equality before the law may achieve is to enable legislation to be invalidated which distinguishes between citizens on grounds which are considered irrelevant, unacceptable or offensive".
>
> (Constitutional and Administrative Law, 14th Ed. at page 98)

We reiterate that despite our extensive research, we could not come across a single law or rule, either in our jurisdiction or for that matter in any other jurisdiction, where resignation has been classified or defined as an offence or misconduct.

In deciding the constitutionality of any law, we often look into the intent of the Legislature and construe its correct interpretation. In my view, we also need to look at the 'fairness' of the law or rule that is under consideration. Ever since Lord Denning propagated the theory of 'legitimate expectation' more than half a century ago in Schmidt vs Secretary of Home Affairs [(1966) All ER], it has been applied liberally by the Courts in the common law countries. However, there appears to

have been a significant shift from the earlier position, so much so that in Lloyd vs McMahon (1987) AC 625, Lord Templeman has referred to it as a 'catchphrase' and considered the term as an exposition of the Court's duty 'to act fairly'. In fact, Courts are now inclined to examine such issues on the scale of "administrative fairness". In the case of Re Preston [1985 AC 835 (HL)], Lord Scarman stated :

> "the principle of fairness has an important place in the law of judicial review"

On a similar note, I find no reason as to why the constitutionality of any law cannot be judged on the scale of "legislative fairness". In other words, the Courts ought to examine whether any particular Act or Rule stands contrary to the Fundamental Rights, thus operating unjustifiably to the prejudice or detriment of the citizens. I am fortified in my view by the decision of the Supreme Court of India, rendered in the case of A. L. Karla vs. P & E Corp. of India Ltd., reported in AIR 1984 SC 1361, where the Court held :

> "Wisdom of the legislative policy may not be open to judicial review but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights and if it trenches upon any of the fundamental rights, it is void as ordained by Art. 13."
>
> (per D. A. Desai, J)

In our own jurisdiction, the Apex Court, in Bangladesh Krishi Bank vs Meghna Enterprise, reported in 50 DLR (AD) (1998) 194, held :

> "The subordinate legislation must be knocked down when it comes in conflict with the fundamental rights as guaranteed under the Constitution."
>
> (per Latifur Rahman, J, as the learned Chief Justice then was)

Reverting to the case in hand, the petitioner has challenged Rule 300 of the BSR as being unconstitutional. It is now well settled through judicial pronouncements that when any particular law or Rule is challenged as being ultravires the Constitution, if the offending part can be segregated from the rest of the section or rule, then the proper course of action is to strike down the offending part without striking down the entire section or rule. This is commonly referred to as the "doctrine of severability".

There is yet another important issue which requires deliberation. It relates to the quantum of pension to which the petitioner is entitled. Generally, pension is payable to a Government servant upon his retirement from service. However, the quantum of pension depends on the length of service. This is evident from the Circular (স্মারক পত্র) dated 04.11.1996, annexed as Annexure M to the supplementary affidavit dated 23.10.2019, filed on behalf of the petitioner. It reads as under :

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়
অর্থ বিভাগ
প্রবিধি শাখা-১
স্মারক পত্র

নং অম(বিধি-১)৩পি-২৮/৮৫/১০৬, তারিখ ৪-১১-১৯৮৯ ইং / ২০-৭-১৩৯৬ বাং

বিষয় ঃ সরকারী কর্মকর্তা/কর্মচারীদের পেনশনের পরিমাণ এবং উহার হার নির্ধারণ প্রসংগে।

এই মর্মে জানান যাইতেছে যে, অর্থ বিভাগের ৫-৭-৮৯ইং/২১-৩-৯৬ বাং তারিখের নং অমি/বিধি-১/৩পি-২৮/৮৫/৬১ সংখ্যক স্মারক পত্রের ক্রমধারায় প্রচলিত পেনশন টেবলটি নিম্নবর্ণিতভাবে সংশোধন করা হইল ঃ-

পেনশনযোগ্য চাকুরীকাল	পেনশনের পরিমাণ
১০ বৎসর	৩২%
১১ ”	৩৫%
১২ ”	৩৮%
১৩ ”	৪২%
১৪ ”	৪৫%
১৫ ”	৪৮%
১৬ ”	৫১%
১৭ ”	৫৪%
১৮ ”	৫৮%
১৯ ”	৬১%
২০ ”	৬৪%
২১ ”	৬৭%
২২ ”	৭০%
২৩ ”	৭৪%
২৪ ”	৭৭%
২৫ ”	৮০%

২। এই আদেশ ০১-৭-১৯৮৯ ইং তারিখ হইতে কার্যকর বলিয়া গণ্য হইবে।

৩। এই স্মারক পত্রে যে সংশোধনের উল্লেখ করা হইয়াছে, সেই মর্মে সংশ্লিষ্ট বিধিও অনুরূপভাবে সংশোধতি হইয়াছে বলিয়া গণ্য হইবে।

(আতাউল করিম)
যুগ্ম -সচিব”

However, the table now stands as under, having been amended by Memo dated 04.11.1989, issued by the Finance Division, Government of Bangladesh :

পেনশনযোগ্য চাকরিকাল	বিদ্যমান পেনশনের পরিমান	পুনঃ নির্ধারিত পেনশনের পরিমান
৫ বছর	-	২১ %
৬ বছর	-	২৪%
৭ বছর	-	২৭%
৮ বছর	-	৩০%
৯ বছর	-	৩৩%
১০ বছর	৩২%	৩৬%
১১ বছর	৩৫%	৩৯%
১২ বছর	৩৮%	৪৩%
১৩ বছর	৪২%	৪৭%
১৪ বছর	৪৫%	৫১%
১৫ বছর	৪৮%	৫৪%
১৬ বছর	৫১%	৫৭%
১৭ বছর	৫৪%	৬৩%
১৮ বছর	৫৮%	৬৫%
১৯ বছর	৬১%	৬৯%

২০ বছর	৬৪%	৭২%
২১ বছর	৬৭%	৭৫%
২২ বছর	৭০%	৭৯%
২৩ বছর	৭৪%	৮৩%
২৪ বছর	৭৭%	৮৭%
২৫ বছর এবং তদূর্ধ্ব	৮০%	৯০%

As is apparent from the aforesaid table, although the maximum tenure of service required for being entitled to full pension is 25 years or more, depending on the person's age at the time of entry into Government service, nevertheless, a sliding scale is provided for the person who retires before completing 25 years of service. By the same corollary, a person who resigns from service before reaching the age of superannuation should also be entitled to receive pension depending on the number of years of service rendered by such person. Although 'retirement' and 'resignation' are two distinct nomenclatures, in reality, they achieve the same purpose by bringing to an end the long standing, formal relationship between an employer and an employee ; in the former case, through operation of law and in the latter case, upon one's own volition. On a similar note, a person who tenders resignation from service, should also be entitled to receive pension, depending on the length of his/her service.

In the instant case, the petitioner's application seeking payment of his pension and gratuity, following his resignation from service, was approved by the Government through the Memo dated 02.03.2015, which reads as under :

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
আইন ও বিচার বিভাগ
বিচার শাখা-৪।

নং-১০.০০.০০০০.১২৮.০১৩.০১.২০১৫-৩৬৫ তারিখ ঃ ০২-০৩-২০১৫ খ্রিঃ

প্রেরক ঃ মোশতাক আহাম্মদ
সিনিয়র সহকারী সচিব।

প্রাপক ঃ প্রধান হিসাব রক্ষণ কর্মকর্তা,
আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়,
সিজিএ ভবন, সেগুনবাগিচা, ঢাকা।

বিষয় ঃ এককালীন পেনশন ও আনুতোষিক মঞ্জুর প্রসঙ্গে।

উপর্যুক্ত বিষয়ে আইন কমিশনের অবসরপ্রাপ্ত মূখ্য গবেষণা কর্মকর্তা (অতিরিক্ত জেলা জজ) জনাব মোঃ মাহবুব মোরশেদ এর এককালীন পেনশন ও আনুতোষিকের আবেদন সরকার মঞ্জুর করেছে।

জনাব মোঃ মাহবুব মোরশেদকে মাসিক মূল বেতন ২৯,৭৫০/- টাকা হিসাবে ২৯,২৬,২৮৪/৩৭ (উনত্রিশ লক্ষ ছাব্বিশ হাজার দুইশত চুরাশি টাকা সাঁইত্রিশ পয়সা) টাকা এককালীন আনুতোষিক প্রদানের মঞ্জুরী জ্ঞাপন করা হল। যদি পরবর্তী কালে দেখা যায় তাঁর নিকট সরকারের কোন পাওনা রয়েছে, তবে তিনি তা ফেরত প্রদান করতে বাধ্য থাকবেন।

বর্ণিত অবস্থায় জনাব মোঃ মাহবুব মোরশেদ যাতে স্বল্প সময়ের মধ্যে এককালীন আনুতোষিক পেতে পারেন সে বিষয়ে প্রয়োজনীয় ব্যবস্থা গ্রহনের জন্য স্বাক্ষরিত পেনশন ফরমসহ অন্যান্য কাগজাদি নির্দেশিত হয়ে প্রেরণ করা হল।

স্বা/-
২/৩/১৫ ইং
(মোশতাক আহাম্মদ)
সিনিয়র সহকারী সচিব"

However, vide Memo dated 25.03.2015, respondent no. 5, in a most arbitrary manner, returned the petitioner's case to the Ministry stating :

> "১। সরকারী চাকুরী হতে পদত্যাগ করলে পূর্বচাকুরীকাল বাজেয়াপ্ত হবে অর্থাৎ পেনশনের জন্য গননা যোগ্য হবে না (বি, এস, আর ১ম খন্ডের বিধি- ৩০০ সেকশেন-৩)।"

The petitioner's application seeking payment of pension and gratuity following his resignation from service was not only approved by the Government, it was officially communicated to him by the Ministry of Law, Justice & Parliamentary Affairs vide Memo dated 05.03.2015. However, without any further intimation to the petitioner, the office of the

'CAG' issued the impugned Memo on 25.03.2015 contending that the petitioner was not entitled to receive pension by the Government.

The manner in which the impugned Memo was issued leaves much to be desired. To begin with, the conduct of the concerned respondent was not only arbitrary and therefore malafide (as has been decided in so many cases), it was also in gross violation of the principle of natural justice since no prior notice was given to the petitioner, although the impugned order had the effect of taking away a benefit/privilege that had already been granted to the petitioner by the Government.

A right or privilege, once granted, and that too by the Government, cannot subsequently be curtained or taken away merely by issuing another order, since a presumption of correctness is attached to such executive actions and/or orders, meaning thereby that all necessary formalities, both legal and official, had been observed. It is now well settled that every administrative action prejudicially affecting a person's right, privilege or interest must be preceded by issuance of a notice to the person concerned. This is also a constitutional mandate, as stipulated in Article 31 of the Constitution, which requires every action affecting a citizen's right to be taken "in accordance with law and only in accordance with law." This vital pre-requisite was totally ignored in the instant case and on that count, the impugned action of the concerned respondent cannot be sustained. In view of the foregoing discussion, we are inclined to hold that Rule 300 (a) of the Bangladesh Service Rules, so far as it relates only to "forfeiture of

pension in the event of resignation from service" is contrary to and violative of the provisions enshrined in Part III of the Constitution.

In the result, the Rule is made absolute in part.

Rule 300(a) of the Bangladesh Service Rules, Part I, so far as it only relates to "forfeiture of pension in the event of resignation from service" is declared to be ultravires the Constitution. However, the remaining part of Rule 300 (a) and Rule 300 (b) remains unaffected and valid.

Consequentially, the impugned Memo dated 25.03.2015, as evidenced by Annexure B, issued by respondent no. 5, is declared to have been issued without lawful authority and accordingly, the same is set aside.

The concerned respondents are hereby directed to calculate the pension and other benefits due to the petitioner, on the basis of the length of his service and grant the same to him within a period of 90 (ninety) days from the date of receipt of the certified copy of the judgment passed today.

There will be no order as to cost.

Kazi Zinat Hoque, J :

I agree.

Shanti, B.O.