10 SCOB [2018] HCD

HIGH COURT DIVISION
SPECIAL ORIGINAL JURISDICTION

WRIT PETITION NO. 3178 OF 2011

Moulana Md. Abdul Hakim alias Md. Abdul Hakim
..... Petitioner
Vs.
Government of Bangladesh and others
..... Respondents.

Mr. Rehan Husain, Advocate with
Ms. Asma Akhter, Advocate
..... For the Petitioner.

Mr. Md. Idrisur Rahman, Advocate
… For the Respondent No. 10.

Mr. Mahmudul Islam, Senior Advocate
and
Mr. Rokanuddin Mahmud, Senior Advocate
… Amici Curiae

Ms. Israt Jahan, A.A.G.
… For the Respondents.

Heard on: 3.1.2012, 4.1.2012 and 19.3.2012
Judgment on: 3.10.2013.

Present :
Mr. Justice Syed Refaat Ahmed
And
Mr. Justice Md. Ashraful Kamal

Article 102 of the Constitution of the People's Republic of Bangladesh:

Indeed, under our Constitutional scheme an aggrieved person, in order to agitate his claim and case in judicial review, can do so by invoking Article 102(1) and/or (2) depending on the nature of the grievance as well as of status of the perpetrator.
Article 102(1) comes into play in relation to the infringement of any fundamental right guaranteed under Part III of the Constitution. Article 102(2) presupposes the availability of the various Writs that may be appealed to for reviewing actions and operations in the public domain, such actions being otherwise the preserve of the Executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries. … (Para 9 & 10)

The emerging judicial consensus in this jurisdiction as noted earlier is that Article 102(a) (ii) allows for identifying amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The ever increasing reality of public-private partnership of providing services to the public at large and in regulating public activity has blurred the traditionally held view that a Writ in Certiorari, in particular, under Article 102(2) can only validly be addressed to public functionaries. This traditional view indeed risks being exposed as fallacious as it belies the fact that public functionaries in the strictest sense have in reality long forsaken their perceived monopoly over public affairs and that private and public enterprise and endeavour are inextricably intertwined in the conduct of business of the Republic or of a local authority. … (Para 14)

Viewed from a different perspective, the postulation here, therefore, is that even given the truism that private persons or bodies generally do not have an overreach in the public realm, it cannot, however, be gainsaid that they never do, and in instances they do so there indeed remains the possibility of their treading on constitutional guarantees and arriving at erroneous and arbitrary decisions while performing a "public function" and unwarrantedly so. Such function could ideally have as its objective the granting of some collective benefit in the public realm. The complexities of social or economic enterprise in the public realm create opportunities for private bodies to strike a partnership with the public sector to keep the wheels of commerce and service delivery well-oiled and operational. Allowance is, therefore, made for private bodies and individuals to assume a hybrid character in discharging responsibilities in the public interest. … (Para 15)

Judgment

SYED REFAAT AHMED, J:-

1. In this Application under Article 102 of the Constitution a Rule Nisi was issued calling upon the Respondents to show cause as to why the Impugned Order vide Memo No. Ma.Gu.Da.Aa. 912 dated 12.2.2011 (Annexure-'J') signed and issued by the Respondent No. 10 purporting to dismiss the Petitioner should not be declared to be without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The Petitioner who is a Superintendant of a non-Governmental Madrasah has filed this Writ Petition challenging an order dated 12.2.2011 issued by the Respondent No. 10, the Chairman of the Madrasah's Managing Committee. The backdrop to the filing of this Application is that the concerned Upazila Nirbahi Officer upon first suspending the Petitioner formed an inquiry committee leading to a report adverse to the Petitioner. Thereafter, upon a show cause notice issued, the Petitioner was dismissed under Section 11 (ঙ) of বেসরকারী মাদ্রাসা শিক্ষকের (চাকুরীর অবস্থা ও শর্তাবলী) বিধি ১৯৭৯ on 28.11.2002 as submitted by the learned Advocate for the Petitioner Mr. Rehan Husain by reference to the said 1979 Rules. The dismissal order having received due approval of the Appeal and Arbitration Committee ("Committee"), Bangladesh Madrasah Education Board ("Board") on 22.7.2004, the present Petitioner filed Writ Petition No. 6855 of 2004 (hereinafter referred to as the "earlier Writ Petition") challenging the Memo dated 27.11.2004 issued by the Board's Registrar communicating such approval. It so transpired that the Petitioner, having been acquitted from a criminal case lodged against him, decided, however, not to prosecute the Rule issued in the earlier Writ Petition as per agreement with the Respondents leading to his reinstatement vide the Madrasah's Memo dated 30.7.2009. Having been granted a time-scale since and being duly paid up to December 2010, the Petitioner suddenly received a show cause notice on 30.1.2011 to which he replied on 7.2.2011. It is against this backdrop that he was dismissed vide Memo dated 12.2.2011 issued by the Respondent No. 10, Chairman of the Madrasah leading to the filing of this Writ Petition

3. In these proceedings, the Respondent No. 10 having at the outset raised reservation as to the reviewability of the Impugned Order issued by an ostensible private authority, this Court delved into the issue of maintainability by exploring the ambit of judicial review as we understand it today. Maneuvering within the perimeter of Article 102 of the Constitution in

an effort to understand better the avenues of protection pursuable thereunder, this Court posed certain queries to the Amici Curiae Mr. Mahmudul Islam and Mr. Rokanuddin Mahmud as to the interpretation of the Constitution pertaining, in particular, to the distinction in and between the application and the provisions of Article 102(1) and (2).

4. The purpose of the enquiry made of the Amici Curiae has been to ascertain the extent of judicial reviewability of actions and decisions of ostensible private bodies but which nevertheless operate in the public domain. Mr. Mahmudul Islam, relying upon the decisions, in particular, of the Appellate Division reported in *48 DLR (AD)121, 60 DLR (AD)12, 17 DLR (SC) 74* has submitted that it is a given that judicial review of an act of a private entity which is neither a statutory nor a local authority is not permissible under the Constitution. Proceeding on that premise, for his part Mr. Rokanuddin Mahmud has delved deeper into the forays made by Courts in various jurisdictions to chip away at that basic tenet so introduced by Mr. Islam.

5. Accordingly, Mr. Rokanuddin Mahmud has more pertinently introduced the premise of enquiry as postulates that the derivative status of a body's powers is of little concern as to the judicial reviewability of an order in the evolving realm of the Writ of Certiorari. Mr. Mahmud informs that such notion has long given way to the importance attached rather to the nature of the function that such body discharges or engages in. It is in that regard, discussing at length the judgment in the landmark case of *R. vs. Panel on Take-overs and Mergers, ex parte Datafin PLC and another ("Datafin")* reported in *(1987) QB 815,* Mr. Mahmud submits that in particular the English Courts have over the last two decades freed themselves of an overly restrictive approach in the application of the Writ of Certiorari. In doing so the English Courts have since come to recognize that instead of probing into the source of power exclusively the better more pragmatic view is instead to analyze the type of function performed by any decision-making body as can be made amenable to judicial review.

6. Tracing such jurisprudential development in this jurisdiction through cases like *Zakir Hossain vs. Bangladesh* reported in *55 DLR 130, Farzana Moazzem vs. Securities and Exchange Commission* reported in *54 DLR 66* and *Conforce Ltd. vs. Titas Gas Transmission and Distribution Co. Ltd.* reported in *42 DLR (HC) 33,* Mr. Mahmud has highlighted the fact that even in this jurisdiction it is now well recognized that the functional test approach enables a judicial review of an ostensibly private body but which nevertheless performs a public function that aims at benefiting the public at large.

7. Highlighting the fact, therefore, that public function need not be the exclusive preserve of the State, Mr. Mahmud interprets the provision of Article 102(2) of the Constitution as accommodating the idea of non-State actors operating in the commercial and professional arena that far exceed their nominally private terms of reference and takes them into the larger realm of functioning in the public domain. Article 102(2), therefore, permits of any function "*in connection with the affairs of the Republic*" which the Sate itself may not perform but necessarily other bodies, even private non-statutory bodies, may in substitution of the State or government perform, thereby, significantly complementing and supplementing the otherwise essential responsibilities of the Republic due its citizenry.

8. Mr. Mahmud has submitted that these bodies, therefore, almost assume the character of an alter ego of the State and should they have not been licensed or permitted to perform certain public duties then the Government or the local authority would invariably have had to step in and discharge obligatory functions in this regard. It is to be noted that such

empowerment of the private sector by the State is tolerated and licensed in the most obvious sectors of education and health.

9. Indeed, under our Constitutional scheme an aggrieved person, in order to agitate his claim and case in judicial review, can do so by invoking Article 102(1) and/or (2) depending on the nature of the grievance as well as of status of the perpetrator.

10. Article 102(1) comes into play in relation to the infringement of any fundamental right guaranteed under Part III of the Constitution. Article 102(2) presupposes the availability of the various Writs that may be appealed to for reviewing actions and operations in the public domain, such actions being otherwise the preserve of the Executive organ of the State affecting the citizenry in their contacts and dealings with the Executive and its functionaries.

11. Article 102(1) and (2)(a) (ii) (as envisages a Writ of Certiorari) for our purpose relevantly read thus:

> *"Article 102. Power of High Court Division to issue certain orders directions etc. (1) The High Court Division on the application of any person aggrieved may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.*
> *(2) the High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-*
> *(a) on the application of any person aggrieved, make an order- ...*
> *(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect."*

12. Article 102(1) sets itself apart from Article 102(2) (a) (ii) by bringing within its purview a wider group of individuals and authority on whom the Court may on judicial review hold sway. When issues of fundamental rights are raised, the sanction under Article 102(1) is clearly of availability of redress against "*anyone*," or "*any authority*", inclusive of *"any person performing any function in connection with the affairs of the Republic*." The reference to government functionaries must accordingly, be seen as an appendage made to the broader category of *"anyone"* or *"any authority"* by way of abundant caution.

13. That appendage in Article 102 (1) appears in a similar avatar taking centre stage in a Writ of Certiorari under Article 102 (a) (ii), when fundamental rights aside the focus is on the legality or not per se of an action or decision emanating from any *"person performing functions <u>in connection with</u> the affairs of the Republic or of a local authority… ."*

(Emphasis added by this Court).

14. The emerging judicial consensus in this jurisdiction as noted earlier is that Article 102(a) (ii) allows for identifying amenability to judicial review not exclusively by reference to an obvious derivative public status of a person but increasingly by the public domain within which it operates and prevails irrespective of its derivative status. The ever increasing reality of public-private partnership of providing services to the public at large and in regulating public activity has blurred the traditionally held view that a Writ in Certiorari, in particular, under Article 102(2) can only validly be addressed to public functionaries. This traditional view indeed risks being exposed as fallacious as it belies the fact that public

functionaries in the strictest sense have in reality long forsaken their perceived monopoly over public affairs and that private and public enterprise and endeavour are inextricably intertwined in the conduct of business of the Republic or of a local authority.

15. Viewed from a different perspective, the postulation here, therefore, is that even given the truism that private persons or bodies generally do not have an overreach in the public realm, it cannot, however, be gainsaid that they never do, and in instances they do so there indeed remains the possibility of their treading on constitutional guarantees and arriving at erroneous and arbitrary decisions while performing a "public function" and unwarrantedly so. Such function could ideally have as its objective the granting of some collective benefit in the public realm. The complexities of social or economic enterprise in the public realm create opportunities for private bodies to strike a partnership with the public sector to keep the wheels of commerce and service delivery well-oiled and operational. Allowance is, therefore, made for private bodies and individuals to assume a hybrid character in discharging responsibilities in the public interest. How has this Court, therefore, to accept the intrinsic worth of such an assumption as posited by Mr. Rokanuddin Mahmud? The mode of ascertaining the strength of that argument has been to delve specifically into the legacy of certain English cases and examine the extent to which an entrenched judicial view has emerged since to clothe any identifiable test of reviewability with the status of invariability. That line of enquiry has brought to fore the *Datafin* test as highlighted by Mr. Rokanuddin Mahmud.

16. In *Datafin* the Court of Appeal was concerned with the actions of the Panel on Take-overs and Mergers which it termed *"a truly remarkable body"* in that it *"is an unincorporated association without legal personality"*, thereby, performing its functions without visible means of legal support. The Panel, the Court of Appeal found, is effectively a *"self-regulating"* body lacking any authority de jure but exercising considerable authority de facto in *"devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers ... ."* The issue of judicial reviewability of the Panel's actions wielding considerable collective power compelling compliance by others loomed large in this case given the very real potential of exercise of such powers arbitrarily and manifestly unfairly. Sir John Donaldson MR in finding that the Court in these circumstances has jurisdiction to entertain applications for the judicial review of the Panel's decisions considered two opposing views forwarded by Counsel for either side in this regard. Counsel for the Panel submitted that the Queen's courts' historic supervisory jurisdiction does not extend to a body as the Panel given that the Panel's power is not derived from legislation or the exercise of the prerogative. On the other hand, Counsel for *Datafin* submitted this to be a too narrow a view arguing "*that regard has to be had not only to the source of the body's power , but also to whether it operates as an integral part of a system which has a public law character"* (Emphasis added by this Court). Sir John Donaldson MR in these circumstances revisited at length the judgment in *R. v. Criminal Injuries Compensation Board, ex p Lain* reported in *[1967]2 All ER770 at 778,* and in *[1967]2QB 864 at 882* where Lord Parker CJ said that the exact limits of the ancient remedy of Certiorari had never been and ought not to be specifically defined. The true inspiration for intervention in Certiorari for Sir John Donaldson MR, however, is derived from Diplock LJ's observations in *Lain* thus:

> *"The jurisdiction of the High Court as successor of the court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent on the source of the tribunal's authority to decide issues submitted to its determination…*

The earlier history of the writ of certiorari shows that it was issued to courts whose authority was derived from the prerogative, from royal charter, from franchise or custom, as well as from Act of Parliament. Its recent history shows that as new kinds of tribunals have been created, orders of certiorari have been extended to them too and to all persons who under authority of government have exercised quasi-judicial functions. ...

If new tribunals are established by acts of government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based. What are these characteristics? It is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates. It is not even essential that the determination must have the result, for there may be some subsequent condition to be satisfied before the determination can have any effect on such legal rights or liabilities. That subsequent condition may be a later determination by another tribunal (see R. v. Postmaster General, Ex p. Carmichael ([1928]1 KB 291) R. v. Boycott, Ex p. Keasley ([1939]2 All ER 626, [1939]2 KB 651)). Is there any reason in principle why certiorari should not lie in respect of a determination where the subsequent condition which must be satisfied before it can affect any legal rights or liabilities of a person to whom it relates, is the exercise in favour of that person of an executive discretion as distinct from a discretion which is required to be exercised judicially?" (Emphasis added by this Court)

17. Sir John Donaldson's view that in the absence of legislation certain bodies must not continue to be "*cocooned*" from judicial gaze and attention, was carried forward further by Lloyd LJ in *Datafin* when he held that where *"there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility."* This led him to conclusively find against the supposition *"that the source of power is the sole test whether a body is subject to judicial review or not."*

18. In the unreported judgment in *R. vs. The London Metal Exchange ex p. Albatros Warehousing BV of* 30.3.2000, Mr. Justice Richards considered the issue of what constitutes a public function. In doing so, he referred to the *Datafin Case,* as well as the judgment in *R vs. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* reported in *[1993] 1 WLR 909,* and *R v. Lloyd's of London, ex parte Briggs* reported in *[1993] 1 Lloyd's Rep 176*. Mr. Justice Richards in doing so premised his enquiry on the need to make a broad assessment of all circumstances of a case and, in particular, on the extent to which *"the powers can be said to be woven into a system of governmental control"* Referring first to the *Datafin* Judgment Mr. Justice Richards cited the oft-quoted observation of Lloyd LJ thus:

"Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of a private arbitration, then clearly the arbitrator is not subject to judicial review.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law

consequences, then that may be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we were referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other."(Emphasis added by this Court).

19. The decision in *R vs. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* reported in *[1993] 1 WLR 909*, was taken note of in *Albatros Warehousing BV* in the context of Sir Thomas Bingham's observation in *Aga Khan* that the effect of the decision in *Datafin* was *"to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation…"*(Emphasis added by this Court). This concept of the function of the any public body being *"woven into any system of governmental control"* (Emphasis added by this Court) as highlighted by Sir Thomas Bingham in *ex parte Aga Khan* would eventually find further elaboration in *Poplar Housing Association vs. Donoghue* (2006) as will be discussed below.

20. Moving on to the case of *R. vs. Lloyd's of London, ex parte Briggs* reported in *[1993] 1 Lloyd's Rep 176,* Mr. Justice Richards in *Albatros Warehousing BV* noted Leggatt LJ's observation in *Briggs* that in determining whether a particular function is public or private would depend on detecting a public law element in the relationship between a decision-maker and an affected party as places such relationship within the public domain and so renders it amenable to judicial review.

21. Before proceeding on to the *Donoghue Case*, it shall suffice to note at this juncture that Murray Hunt in a Chapter in the *"The Province of Administrative Law" (ed. Michael Taggart, Hart Publishing, January 1, 1997)* in elaborating on the legal-philosophical premise of a court's jurisdiction over the exercise of non-statutory powers spoke of the redundancy of identification of the source of a body's power in determining its "public" status thus:

"The test for whether a body is "public", and therefore whether administrative law principles presumptively apply to its decision making, should not depend on the fictional attribution of derivative status to the body's powers. The relative factors should include the nature of the interests affected by the body's decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body's jurisdiction, and the nature of the context in which the body operates. Parliament's non involvement or would be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would be source."(Emphasis added by this Court)

22. This Court notes that "*The Province of Administrative Law*", being a compilation of essays, dwells on the phenomenon of the expanding frontier of Administrative Law through judicial activism in various jurisdictions as the UK, and US, Canada, Australia and New Zealand. As one review of this book reads aptly in almost mirroring the observation in *Datafin*:

> *"During the past decade, administrative law has experienced remarkable development. It has consistently been one of the most dynamic and potent areas of legal innovation and of judicial activism. It has expanded its reach into an ever broadening sphere of public and private activities. Largely through the mechanism of judicial review, the judges in several jurisdictions have extended the ambit of the traditional remedies, partly in response to a perceived need to fill an accountability vacuum created by the privatization of public enterprises, the contracting-out of public services, and the deregulation of industry and commerce. The essays in this volume focus upon these and other shifts in administrative law."*

23. As Lloyd LJ in *Datafin* and Murray Hunt as above explored at length the "public" character of a body or authority derived from its institutional power and capacity to affect significantly any individual's rights and interests, thereby, justifying a remedy in Certiorari, the judgment in *Poplar Housing Association vs. Donohue* reported in *(2001) 1 EWCA Cir 595* and *(2002) QB 48* witnessed the Court of Appeal stressing on the administrative structural inter-connectedness of private and public bodies as an additional facet to the test of "public" character, Therefore, in dealing with the term *"public authority"* as arising within Section 6 of the Human Rights Act, 1998, the Court of Appeal in *Donoghue* significantly elaborated on the test of the *"extent of control over the function exercised by another body which is a public authority"* as an important determinant of the act of an ostensible private body assuming public dimensions. In elaborating on that test and carrying the argument in that regard a notch further than *ex parte Aga Khan,* Lord Woolf CJ observed thus:

> *"What can make an act, which would otherwise be private, public, is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public." (Emphasis added by this Court).*

24. This Court notes that a snapshot of what has been achieved by *Datafin, Donoghue* and the other cases cited above in terms of the modus operandi of ascertaining the public denominator of any act comes across in the judgment in *Hampshire County Council v. Beer* (2003) that revisited the ambit of the notion of the public element of a private act and its determinants. Dyson LJ accordingly said:

> *"It is clear from the authorities that there is no simple litmus test of amenability to judicial review. The relevant principles tend to be stated in rather elusive terms. There was a time when courts placed much emphasis on the source, rather than the nature, of the power being exercised by the body making the impugned decision. If the pwer derived from statute or the prerogative, then it was a public body and the decision was amenable to public law challenges. If the source was contractual, then public law had no part to play. The importance of the seminal decision in R v. Panel on Take-overs and Mergers, ex p Datafin Plc [1987] 1 QB 815 was its recognition of the fact that the issue of amenability to judicial review often requires an examination of the nature of the power as well as its source"*

25. Noting further that in *Datafin* Lloyd LJ did not explain what he meant by "*public law functions*", Dyson LJ found the *Datafin* test of *"public element"* to be one "*which can take many forms"* and as being one expressed in very general terms. In that context, taking a cue from Lord Woolf CJ's observations in *ex parte Donoghue* that what could make an act

"which would otherwise be private, public is a feature or a combination of features which impose public character or stamp on the act", Dyson LJ further enunciated the exercise a court must undertake to ascertain the true nature of such feature thus:

> *"It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. There is a growing body of case-law in which the question of amenability to judicial review has been considered. From these cases, it is possible to identify a number of features which point towards the presence or absence of the requisite public law element." (Emphasis added by this Court).*

26. Aside from the fact that the common law pronouncements above considered against our Constitutional context necessarily operate to blur the distinction between the diverse situational approach taken under Article 102 (1) and (2), the otherwise pronounced and distinct impression that this Court is left with from a perusal of the authorities cited above is significantly that the dividing line between "public and private", is, at best, vague. What can, however, be asserted with certainty is that the question of whether an activity has sufficient public clement to it is quite properly a matter of fact and degree ascertainable from a consideration of each given case on its merits. But it is nevertheless indisputably well-established by now, and as held by the Privy Council in *Jeewan Mohit v. The Director of Public Prosecutions of Mauritius* reported in *(2006) UKPC 20* that the principle enunciated in *Datafin* is invariably the effective law, or rather the *"invariable rule"* entrenched in judicial psyche.

27. That matter of "*fact and degree*" being a determinant of the public element of any ostensible private authority's operational ambit has struck a chord with this Court in delving into the facts and issues raised in this Writ Petition. In that regard, this Court has had to examine the extent of the Madrasah Managing Committee Chairman's capacity to affect the rights and interests of the affected Petitioner. Also examined has been such authority's capacity to so act being inextricably enmeshed in a complex regulatory regime that links it to a higher authority that is a creature of statute and resultantly is a repository of statutory powers including that of oversight to the extent of overturning, ratifying or confirming decisions emanating from such Chairman.

28. It is in that sense that the Impugned Order in this Court's view may easily acquire, and as viewed purely from the *Datafin* perspective, a hybrid character in that being issued by the Respondent No. 10 in his capacity as Chairman, Madrasah Managing Committee the Order is clearly meant to operate in the public domain. Furthermore, the Impugned Order's public denomination has to be gauged against the provisions of the *The Madrasah Education Ordinance, 1978 (Ordinance No. IX of 1978)* ("Ordinance") and the বাংলাদেশ মাদরাসা শিক্ষা বোর্ড, ঢাকা (গভর্ণিং বডি ও ম্যানেজিং কমিটি) প্রবিধানমালা, ২০০৯ ("2009 Regulations") and the resultant statutory prescription of the Managing Committee's authority to be exercised under the constant and active oversight of the Committee and the Board. It is not disputed by either party that both the Committee and the Board exercise and discharge statutory authority in the public domain and in their capacities as instrumentalities of the State. By that reason alone clearly, and

applying the *Datafin* test, therefore, the action of the Respondent No. 10 falls equally to be reviewed under Article 102(2) of the Constitution.

29. Turning to the Petitioner's case, it is contended that the Impugned Order was passed illegally and should be declared to have been passed without lawful authority and of no legal effect for a host of reasons. It is argued that the Impugned Order is stated to be final and no approval has been taken from the Board and the Committee has not examined it as required under the law i.e., Rule 12 of the 1979 Rules and Regulation 41(2)(O)(2) of the 2009 Regulations.

30. Rule 12 reads thus:

> *"১২। শাস্তি প্রদানের ক্ষমতাঃ*
> *নিয়োগকারী কর্তৃপক্ষ শাস্তি প্রদানের ক্ষমতাপ্রাপ্ত। তবে শর্ত থাকে যে, বোর্ডের আপীল ও সালিশী কমিটি কর্তৃক পরীক্ষা-নিরীক্ষা ছাড়া এবং বোর্ড কর্তৃক অনুমোদন ছাড়া শিক্ষককে বরখাস্ত বা অপসারণ করা যাবে না।*
> (emphasis added by this Court).

31. Regulation 41(2) (O)(2) reads thus:

> *"৪১। গভর্ণিং বডি বা, ক্ষেত্রমত, ম্যানেজিং কমিটির ক্ষমতা ও দায়িত্ব।-*
> *(১) গভর্ণিং বডি বা, ক্ষেত্রমত, ম্যানেজিং কমিটি সংশ্লিষ্ট মাদরাসা পরিচালনা, আর্থিক ও প্রশাসনিক ব্যবস্থা তদারকীকরণ, লেখাপড়ার মান নিশ্চিতকরণার্থে কার্যকর পদক্ষেপ গ্রহণ, শৃঙ্খলা বজায় রাখা এবং রক্ষণাবেক্ষণ সংক্রান্ত কাজের দায়িত্ব পালন করিবে।*
> *(২) গভনিং বডির বা, ক্ষেত্রমত ম্যানেজিং কমিটির নিম্নরুপ ক্ষমতা থাকিবে, যথাঃ ...*
> *(ঘ) শৃঙ্খলামূলক কার্যাদিঃ...*
> *(২) শিক্ষক-কর্মচারীগণের চাকুরির শর্তাবলী অনুসরণে বিভাগীয় ব্যবস্থা গ্রহণ ও দন্ড অনুমোদন, তবে অপসারণ বা বরখাস্তের বিষয়ে বোর্ডের পূর্বানুমোদন গ্রহণ ব্যতীত উক্তরুপ কোন দন্ড আরোপ করা যাইবে নাঞ।* (Emphasis added by this Court).

32. The Respondent No. 10 through an Application for vacating the Order of stay has stated that the Impugned Order has been acted upon. In other words, the Impugned Order of dismissal is to be treated as final notwithstanding the otherwise mandatory approval of the Board remaining wanting and outstanding. In fact, the approval is assumed to be in existence by the Respondent No. 10 by reference to the earlier Memo dated 27.11.2004 which pertained to the earlier dismissal Order but clearly was overtaken by supervening events, most notably by the Petitioner's reinstatement on 30.7.2009. That supervention, this Court finds, must operate to the total exhaustion of that earlier episode of disciplinary action taken against the Petitioner. In other words, given that there has been a flagrant disregard of the 1997 Rules and the 2009 Regulations in initiating afresh the requisite vetting process and securing final approval by the Board, there is, therefore, clearly no justifiable ground to assume that such approval of 2004 can any longer be in force. The Impugned Order, being so shorn of any legal basis, is, accordingly, not only illegal but also amounts to a colourable and arbitrary exercise of authority.

33. It is at this juncture that the learned Advocate for the Petitioner Mr. Rehan Husain has vigorously argued on the maintainability of this Writ Petition. In taking up the gauntlet thrown down by the learned Advocate for the Respondent No. 10 Md. Idrisur Rahman, Mr. Husain has satisfactorily invoked the very tests of determining the public element of any authority's functions as explored, explained and perfected by the decisions in *Datafin, Donoghue,* and *Aga Khan*. In doing so, Mr. Rehan Husain, keeping squarely within the bounds of the challenge thrown him by Mr. Rahman as to the questions of reviewability of

the Impugned Order and the maintainability of this Writ Petition, has submitted on the 'functional approach' to best determine the amenability to judicial review of the Impugned Order. In that context, Mr. Husain has satisfactorily argued that the Chairman of the Managing Committee of a Non-Governmental Madrasah in discharging his powers and duties engages effectively in regulating the service of teachers. By doing so, the Chairman is seen to wield considerable authority in the education sector. In that regard, the Chairman remains a repository of power that otherwise is the preserve of the State under Article 15(a) and 17 of the Constitution to ensure and provide education. The Respondent No. 10 Chairman, resultantly, finds himself as part of a statutory regulatory regime evidenced in the Ordinance, the 1979 Rules and 2009 Regulations, discharging functions for and on behalf of the State subject to a well-defined hierarchical order of compliance and oversight.

34. *But,* this is also a case, Mr. Rehan Husain stridently argues, that is far more compelling for judicial review than is immediately apparent. Mr. Husain points out significantly further in this regard that the appeal to the public status of the Respondent No. 10 Chairman in the present case is all the more compelling given that in any case under Section 30 of the Ordinance of 1978

> "*Every member of the Board and ... and every person appointed for carrying out the purpose of this Ordinance, shall be deemed to be a public servant within the meaning of section 21 of the Penal Code…"*

35. Moreover, Mr. Husain establishes the derivative public status of the Office of the Chairman, Managing Committee is statutorily defined in Regulation 8 of the 2009 Regulations thus:

> *"৮। ম্যানেজিং কমিটির সভাপতি নির্বাচন।- (১) দাখিল স্তরের প্রত্যেক বেসরকারি মাদরাসার সভাপতি ব্যতীত অন্যান্য সদস্য নির্বাচন সম্পন্ন হইবার অনধিক সাত দিনের মধ্যে শিক্ষা প্রতিষ্ঠান প্রধান সভাপতি নির্বাচনের উদ্দেশ্যে ম্যানেজিং কমিটির উক্তরুপ নির্বাচিত সদস্যগণের একটি সভা আহবান করিবেন।*
>
> *(২) উক্ত ম্যানেজিং কমিটির উপস্থিত সদস্যগণের মধ্য হইতে তাহাদের দ্বারা মনোনীত, ম্যানেজিং কমিটির সভাপতি পদে প্রতিযোগী নহেন, এমন একজন সদস্য সভায় সভাপতিত্ব করিবেন।*
>
> *(৩) উক্ত সভায় উপস্থিত সদস্যগণের সংখ্যাগরিষ্ঠের সমর্থনে কমিটির সদস্যগণের মধ্য হইতে অথবা স্থানীয় শিক্ষানুরাগী ব্যক্তি, খ্যাতিমান সমাজসেবক, জনপ্রতিনিধি বা অবসরপ্রাপ্ত প্রথম শ্রেণীর সরকারি কর্মকর্তাগণের মধ্য হইতে ম্যানেজিং কমিটির একজন সভাপতি হইবে।"*

36. Based on the discussion above, this Court finds that it is indeed reposed with the authority under Article 102 in general of the Constitution, in the facts and circumstances of this case, to consider and dispose of the Rule Nisi. In this regard, this Court holds that the Impugned Order being issued by the Respondent No. 10, Chairman, Managing Committee of the Madrasah does indeed operate in the public domain **both in the derivative and the functional sense** to affect the rights and interests of the Petitioner through unlawful intervention without legal sanction and results in a scenario that is clearly envisaged in both Article 102(1) and Article 102(2) of the Constitution making the Petitioner's grievances in this Writ Petition amenable to judicial review by invocation of the said Article.

37. Upon a substantive consideration of the Rule delving into the merit of this case it is evident that the Impugned Order presupposes a decision of the Committee concerning the dismissal of the Petitioner and predicated on which the Impugned Order appears to have been issued. No documents on record are, however, found attesting to such a decision being made

by such Committee or indeed significantly of the final endorsement of that Committee's decision by the Board itself.

38. A perusal of the 1997 Rules with the 2009 Regulations in particular reveals that such process of disciplinary action resulting in a dismissal of any functionary of a Madrasah like the Petitioner without exception in law requires active investigatory intervention by the Committee and can only be validly imposed and effected upon a prior express approval of the Board. Evidently such mandatory compliance measures have completely been skipped over in the Petitioner's case.

39. The facts as presented to this Court are indicative of the Petitioner's long-standing yet troubled relationship with the Madrasah for many years now. An initial phase of discord between the two parties, it is noted, came to be investigated and deliberated upon extensively with the active participation of the Petitioner and in due course came to a close with a decision of the Board of 2004 in sanctioning the dismissal of the Petitioner.

40. Between that Order of 2004 and the Impugned Order of 2011, the facts on record bear testimony to certain supervening developments primarily in the form of criminal proceedings instituted against the Petitioner, his eventual exoneration and acquittal from the charges brought there under and, significantly, his negotiated reinstatement back into the same Madrasah on the basis of such exoneration and acquittal upon the approval of the Managing Committee in 2009.

41. There is very little on record to explain to this Court as to how all this come to pass. The reinstatement of 2009 represents the beginning of a new chapter in the Petitioner's relationship with the Madrasah which appears to have progressed concurrently in 2010 and 2011 with the Madrasah in general and the Managing Committee in particular seeking the initiation of disciplinary measures against the Petitioner. Yet here again, documents on record chiefly in the form of a notice to show cause and the Petitioner's written response are in substantiation of an initiation of process of inquiry into certain allegations but are not further accompanied by any information or substantiating documents of a duly instituted and continued process of determination based on the principle of natural justice or indeed due subscription to the provisions of the Ordinance and the Rules in allowing that process to reach its natural legal conclusion with the active involvement of the Committee and finally the Board as the ultimate arbiter. It is, therefore, this Court's finding that the Impugned Order in the manner in which it has been issued and formulated is marred by arbitrariness seriously and irreparably prejudicing the Petitioner's legitimate interests.

42. The law, this Court finds, reflected in the Ordinance as well as the 1979 Rules, and 2009 Regulations itself prescribes an investigation of the circumstances concerning both the Petitioner's reinstatement in 2009 as well as the issuance of the Impugned Order by the specifically assigned statutory authority being the Committee and the Board. It is, therefore, deemed prudent at this stage not to encroach on the jurisdiction of such statutory authority in this regard and consequentially to refer this matter to the Board with a direction to revisit the facts that have been a matter of some concern to this Court and arrive at a final decision in supersession of the Impugned Order of 2011.

43. Given the facts above, this Court is now inclined to dispose of the Rule with a specific direction upon the Chairman and Registrar of the Bangladesh Madrasah Education Board, the Respondent Nos. 3 and 4 respectively, to fully acquaint themselves with the facts and

circumstances of the second round of appointment and termination of the Petitioner as sought to be effected by the Impugned Order and duly arrive at a final decision on the Petitioner's fate within a period of 3(three) months from the date of receipt of a certified copy of this Judgment and order. Until such time, and in the interest of justice, it stands to reason to direct all the Respondents to allow the Petitioner to continue to discharge his function as a Superintendent of the Madrasah without let or hindrance.

44. In the result, the Rule is disposed of with the directions above.

45. There is no Order as to costs.

46. Communicate this Judgment and Order forthwith.