IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

Present:

Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.232 OF 2014 WITH CIVIL PETITIONS FOR LEAVE TO APPEAL NO.2680 OF 2014 & 602 OF 2017.

(From the judgments and orders dated 24.09.2014 and 12.02.2017 passed by the High Court Division in Writ Petitions No.7489 of 2014, 6951 of 2014 & 1948 of 2017)

A.B.M. Altaf Hossain .....**Appellant**
(In C.A. No.232 of 2014)

Mohammad Idrisur Rahman, Advocate .....**Petitioner**
(In C.P. No.2680 of 2014)

Md. Farid Ahmed Shibli .....**Petitioner**
(In C.P. No.602 of 2017)

-Versus-

Government of Bangladesh and others .....**Respondents**
(In all the cases)

For the appellant (In C.A. No.232 of 2014) : Mr. Probir Neogi, senior Advocate with Mr. Momtazuddin Fakir, senior Advocate, Mr. Motahar Hossain, senior Advocate, Mr. M. Sayed Ahmed, senior Advocate, Mr. Mahbub Shafique, Advocate, Ms. Anita Ghazi Rahman, Advocate, Ms. Suvra Chakravorty, Mr. Manzur-Al-Matin, Advocate, Mr. Imranul Kabir, Advocate and Mr. Khandaker Reza-E-Raquib, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the petitioner (In C.P. No.2680 of 2014) : Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the petitioner (In C.P. No.602 of 2017) : Mr. Manzill Murshid, senior Advocate, instructed by Mr. Md. Mahboob Murshed, Advocate-on-Record.

For the respondents (In all the cases) : Mr. A.M. Amin Uddin, Attorney General with Mr. Mohammad Mehedi Hassan Chowdhury, Additional Attorney General, Mr. Md. Mojibur Rahman, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General instructed by Mr. Haridas

Paul, Advocate-on-Record.

Dates of hearing : 12.01.2023,16.02.2023,23.02.2023,09.03.2023,30.03.2023 & 25.05.2023.

Date of judgment : 14.06.2023.

JUDGMENT

Since everyone of us has delivered separate judgments those are produced below. However, a common Court's order has been passed which is stated at the end of the judgments.

Md. Nuruzzaman J. I have had the privilege of going through the Judgment proposed to be delivered by my learned brothers, Obaidul Hassan J., Borhanuddin J., M. Enayetur Rahim J., Md. Ashfaqul Islam J., Md. Abu Zafor Siddique and Jahangir Hossain J.

Concurring with the final decision of the appeal, I would like to express my own views. The facts as has been fully narrated by my learned brothers, I am of the view that further narrating the facts would lead to repeat the same.

The constitutional provisions for appointing the judges of the Supreme Court of Bangladesh at time of the appointment and then non-appointment of the judges concerned as illustrated in the Constitution of Bangladesh are as follows:

> Additional Supreme Court Judges
>
> 98. Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify,

or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period :

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.

Appointment of Judges

95. (1) The Chief Justice shall be appointed by the President and the other Judges shall be appointed by the President after consultation with the Chief Justice.

(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and –

(a) has, for not less than ten years, been an advocate of the Supreme Court ; or

(b) has, for not less than ten years, held judicial office in the territory of Bangladesh ; or

(c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

(3) In this article, "Supreme Court" includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory of Bangladesh.

From the plain reading of the above stated Constitutional framework for appointing judges of the supreme court of Bangladesh the subtle thing that should not be averting gaze is that while appointing Additional Judges under Article 98, there is no constitutional obligation for the President consulting with the Chief Justice of Bangladesh and such consultation is mandatory while

appointing judges under Article 95. Well, there was such a consulting precondition within the purview of Article 98 in the original constitution of 1972 and which was eliminated through 4th amendment of the Constitution. Nevertheless, the Constitution too did not impose that the CJB should not be consulted and as a convention the CJB usually consulted prior to the appointment of such judges. For instance, we can recapitulate the unpleasant incident of 1994 for appointing of some judges without consulting the CJB and after serious repercussions from every corner of the Bench-Bar and citizens, that appointment was finally revoked and till date the same is maintained religiously. Whatever may be the case, the Constitutional scheme is such that the executive organ shall appoint a judge of the Supreme Court after eventual scrutiny of antecedents as well as legal acumen of the person concerned with or without consultation with CJB.

Though it is the President who officially appoints the judges of the Supreme Court, however, in reality it is the advice of the Prime Minister. Because, as per Article 48(3)-

> "(3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister:

> Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

The meaning, understanding and effects of this mandatory consultation process was epically identified in the epoch-making judgment of this Division in the case of Secretary, Ministry of Finance, Government of Bangladesh Vs. Md. Masdar Hossain & others reported in 2000 20 BLD (AD) 104 (popularly known as Masdar Hossain case) as hereunder:

> "...we pause here and reflect on the words "in consultation with the Supreme Court" contained in Article 116. We have no doubt in our mind that the President in Article 116, as Syed Ishtiaq Ahmed rightly points out, in effect means the Prime Minister or the Chief Political Executive of the country, in view of Articles 48(3) and 55(2). The President wields control over the Presiding Officers of subordinate courts in a wide variety of fields. The Prime Minister has therefore become in reality the real wielder of power in this regard. The Prime Minister being a political person on whom is vested the executive power of the Republic needed a check on such a sweeping and absolute power. Dr. Kamal Hossain rightly termed the words "in consultation with the Supreme Court" As a pillar which held up the independence of the judiciary as a basic structure of the Constitution. In order that this pillar may not end up as a bamboo pillar, the word "consultation" has to be given some teeth, or else, as Syed Ishtiaq Ahmed rightly pointed out, Articles 116 and 116A will be only mocking birds."

Though the above observations directly relates to the Articles connected with the judicial officers of the district judiciary, however, the meaning, understanding and effects are absolutely identical with Article 95.

As appointment of judges in the Supreme Court is both a constitutional post and warrant high esteem across the citizens, it is impliedly ordained by the Constitution itself that prior to such appointment all sorts of antecedents of the judge of the Supreme Court on the cards be examined comprehensively. After having such clean chit or certificate of spotless records and fulfilling legal, academic and other mandatory requirements, if a person is appointed as Additional Judge of the Supreme Court, he/she comes within judicial and administrative domain of the Chief Justice for the two (02) years of temporary period.

Now, getting back on the very basic question posted above, my understanding is that the constitution makers included consultation process in the Article 95 and later excluded in the Article 98 to give extraordinary weightage to obligatory consultation procedure while appointing a judge permanently. Because, this time that additional judge effectively served two years on the open Court under oath and within the direct surveillance of the senior judges of the Supreme Court and the Chief Justice himself. He/she had to dispose adequate cases and write judgments and as a convention, the quality and

integrity of those decisions are to be examined by the senior most judges of both the Divisions of the Supreme Court including the CJB. In other words, while appointing permanently, a person having prior clean chit about his/her antecedents, fulfilling constitutional requirements and other jobs as stated above done successfully, then the CJB recommend his/her name to the President for appointing as a Judge of the Supreme Court of Bangladesh.

Well, albeit the CJB's recommendation, the Executive could differ, at least for practical purposes. If there are diverged opinions concerning a person's appointment in the Supreme Court what should the President do? Whose opinion should get preference?

Here comes the idea of primacy of opinion between executive and judiciary in the matters of exclusive judicial arena and presence of a workable mechanism for scientifically rational resolution of difference of opinion. In this context our highest Court in the case of "Bangladesh represented by the Secretary, Ministry of Justice and Parliamentary Affairs and others (In. C. P. Nos. 2221 & 2222 of 2008), Justice Syed Md. Dastagir Hossain and others (In. C. P. Nos. 2046 & 2056 of 2008) vs. MD. IDRISUR RAHMAN, ADVOCATE AND OTHERS (In. C. P. Nos. 2221 of 2008), MD. SHAMSUL HUDA AND OTHERS (In. C. P. Nos. 2222 of 2008), MD. SHAMSUL HUDA, ADDITIONAL JUDGE AND OTHERS (In. C. P. Nos. 2046 of 2008) and MD. IDRISUR RAHMAN, ADVOCATE AND OTHERS (In. C. P. Nos.

2056 of 2008) reported in 29 BLD (AD) 79 popularly known as `10 Judges Case' observed hereunder:

> "It has been asserted by the writ petitioners that there is continuous and unbroken convention of consultation with the Chief Justice of Bangladesh regarding appointment of Judges and that has not been denied by the Government by filing any counter affidavit. It is true that there has been unbroken and continuous convention of consultation excepting a breach in 1994 which was subsequently cured by consulting the Chief Justice and by issuing a fresh letter of appointment of the Judges by cancelling the earlier one which was issued without consulting the Chief Justice of Bangladesh. Therefore, the consultation with the Chief Justice must be effective consultation with its primacy.
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> In the case of S.P. Gupta and others Vs. President of India and others reported in AIR 1982 (SC) 149, the case of Supreme Court Advocates-on-Record Association Vs. Union of India reported in AIR 1994 page 269 and Special Reference No. 1 of 1998 and the case of Al-Jehad Trust Vs. Federation of Pakistan reported in P.L.D. 1996 Vol-1 page 324 the matter of consultation with the Chief Justice in the matter of appointment of Judges to the higher Judiciary was considered and it was held that consultation with the Chief Justice is a pre-requisite and the opinion of the Chief Justice shall have primacy."

One point must be mentioned here that at the time of accruing the cause of action and finally disposal of the `10 Judges Case' there was no incorporation of consultation process neither in Article 98 nor in 95. Nevertheless, with the interpretation of the Constitution the

Apex court decided that mandatory consultation with the CJB having primacy is a basic structure of the Constitution.

In the `10 Judges Case' His Lordship Mr Justice Tafazzul Islam observed that:

> "As it appears in view of the provisions of Article 94(4) of the Constitution and the interpretation of the words "shall be independent" as contained in Article 116A of the Constitution as given in Masdar Hossain's case, 20 BLD(AD) 104 and also the principles laid down in Sankar Chand's case, : MANU/SC/0065/1977 : AIR 1977 S.C. 2328, wherein the Supreme Court of India interpreting Article 50 of Indian Constitution, which is similar to Article 22 of our Constitution, held that a basic pillar of the Constitution cannot be demolished or curtailed or diminished in any manner except by and under the provision of the Constitution and the Appellate Division applied the above view in Anwar Hossain's case, 41 DLR (AD) 165 and that there is also no bar either in Article 95 or Article 98 or any other provision of the Constitution in respect of consultation with the Chief Justice and further the primacy of the opinion of the Chief Justice is in no way in conflict with Article 48(3) of the Constitution and the advice of the Prime Minister is subject to Articles 22 , 94(4) , 95 , 98 , 116 and 116A of the Constitution and accordingly the Prime Minister, on the basis of Articles 48(3) and 55(2) of the Constitution, cannot advice contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary and as such consultation with the Chief Justice with primacy of his opinion is an integral part of independence of judiciary which is ingrained in the

> very concept of the independence of judiciary embedded in the principle of Rule of Law."

This Division further observed that:

> "Therefore it follows that consultation with the Chief Justice with primacy is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of Rule of Law and separation of judiciary from the executive and is not in conflict with Article 48(3) of the Constitution."

In the case of Anwar Hossain Chowdhury and others Vs. Bangladesh reported in 41 DLR (AD) 165, commonly referred as `8th amendment case' it was held that:

> "This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J: said
>
> > `if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the Law and thereby making the Rule of Law meaningful and effective.'
>
> He said that the Judges must uphold the core principle of the Rule of Law which says-`Be you ever so high, the Law is above you.' This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the Rule of Law as a dynamic concept and delivery of social justice to the vulnerable Sections of the Community. It is this principle of independence of the judiciary which must be kept in

> mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others Vs. president of India and others AIR 1982 SC at pate 152)."
>
> Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matter of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt; such a person can hardly be an independent Judge."

These views of the Apex Court of this land were reiterated in the "Masdar Hosen Case", "10 Judges case", "5th Amendment Case", "7th Amendment Case", "13th Amendment Case", "16th Amendment Case" and so on.

Let's travel through the memory lane of the foundation of the constitution of Bangladesh. What our Constitution makers of the Constituent Assembly of 1972 thought concerning the independence of judiciary and separation of it from the executive?

Deputy Leader of the Constituent Assembly and the Acting President of Bangladesh during the liberation war of Bangladesh Syed Nazrul Islam on 19.10.1972 said that:

"মাননীয় স্পীকার সাহেব, গণতন্ত্রের সবচেয়ে বড় কথা হচ্ছে separation of judiciary from the executive, অর্থাৎ আইনের শাসন এমনভাবে প্রবর্তন করতে হবে, যেন আইনবিভাগ পরিপূর্ণভাবে নিরপেক্ষ থাকে এবং মর্যাদা এবং স্বাধীনতার সঙ্গে তার কর্তব্য পালন করতে পারে। এই শাসনতন্ত্রে আমাদের আইনবিভাগকে শুধু আলাদা করাই নয়, তাকে পরিপূর্ণ মর্যাদা দেওয়ার জন্য যে ব্যবস্থা গ্রহণ করা হয়েছে, তাতে আইনের শাসন সম্বন্ধে আমাদের মনে কোন সংশয় থাকা বাঞ্ছনীয় নয়।"

Sirajul Haque, Advocate, Member of the Constituent Assembly on 30.10.1972:

"যে 'জুডিসিয়াল সিস্টেম' আমরা দিয়েছি, আমি গর্বের সঙ্গে বলতে পারি, বন্ধুরাষ্ট্র ভারতবর্ষও এখন পর্যন্ত তা দিতে পারেনি। কেননা, ভারতবর্ষে এখনও 'জুডিসিয়ারিকে সম্পূর্ণ পৃথক করা সম্ভব হয়নি। আর, আমরা চেষ্টা করেছি, আলাদা করার। শুধু হাইকোর্ট নয়, সুপ্রীম কোর্ট নয়- আমাদের নিম্নতম 'জুডিসিয়ারি'কেও 'এক্সিকিউটিভ' থেকে আলাদা করবার জন্য আমাদের সংবিধানে ব্যবস্থা করেছি। সুতরাং অভিযোগ সত্য নয়।"

Chairman of the Draft Constitution Committee and Law Minister Dr Kamal Hossain said on 12.10.1972:

"আইনের শাসন নিশ্চিত করার উদ্দেশ্যে স্বাধীন বিচারবিভাগ প্রতিষ্ঠার ব্যবস্থা করা হয়েছে। বিচারবিভাগের শীর্ষদেশে রয়েছে সুপ্রীম কোর্ট। সুপ্রীম কোর্টের দুইটি বিভাগ থাকবে। হাইকোর্ট বিভাগ এবং আপীল বিভাগ। এই আপীল বিভাগ হবে দেশের চূড়ান্ত আপীলের ক্ষেত্র। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করারও ব্যবস্থা করা হয়েছে।"

And on 30.10.1972:

"বিচারবিভাগ সম্বন্ধে আর একটা কথা বলতে হয়। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার কাজটা সরাসরিভাবে আমরা করে দিয়েছি। প্রশ্ন তোলা হয়েছে যে, আমরা তা করিনি। কিন্তু আমরা প্রথম দিকে মূলনীতির মধ্যে তা করে দিয়েছি। তারপর, আবার যদি একটু কষ্ট করে ১১৪ এবং ১১৫ অনুচ্ছেদ তাঁরা দেখেন, তাহলে বুঝতে পারবেন যে, এটার বিধান করা হয়েছে। দু' জায়গায় করলাম কেন, এ প্রশ্ন উঠতে পারে। ভবিষ্যতে যে আইন করা হবে, তা যেন এই বিধান অনুসারে করা হয়, সেজন্য এই ব্যবস্থা। অধস্তন আদালত এবং ফৌজদারী আদালতের ম্যাজিস্ট্রেটদেরকে আমরা সুপ্রীম কোর্টের আওতায় নিয়ে এসেছি।

> নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার দাবী আমাদের বহুদিন আগের পুরনো দাবী। আমরা অতীতে দেখেছি, নির্বাহী বিভাগের অধীনে বিচারবিভাগ থাকার ফলে কীভাবে তাঁদের প্রভাবিত করা হয়েছে, কীভাবে ভয় দেখানো হয়েছে।
>
> আইয়ুবের আমলে আমার মনে আছে, একজন জেলা-জজ সরকারের বিরুদ্ধে একটা "ইনজাংশন' নিয়েছিলেন। সেজন্য তাঁকে সন্দ্বীপে বদলী করা হয়। কাজেই এ দেশের জাগ্রত জনতা নির্বাহী বিভাগ থেকে বিচারবিভাগের পৃথকীকরণের দাবী তুলেছেন।
>
> কীভাবে অতীতে বিচারবিভাগের স্বাধীনতা খর্ব করা হয়েছে, তার বহু নজীর আছে। সেজন্য আইনজীবী ছাড়াও এ দেশের জনসাধারণ দিনের পর দিন বিচারবিভাগকে নির্বাহী বিভাগ থেকে পৃথক করার দাবী জানিয়ে এসেছেন। আমরাই সে দাবী করেছি এবং এখন যেহেতু সুযোগ পেয়েছি, তাই সে দাবী আমরা মেনে নিয়েছি। দাবী-দাওয়া আমরাই। করতাম। তখন আমরা দাবী-দাওয়া মেনে নেওয়ার সুযোগ পাইনি। এতদিন পরে আমরা এ সব দাবী-দাওয়া পূরণ করার সুযোগ পেয়েছি। আমার মনে হয়, কোন-না-কোন সদস্য এর উপর একটা-না-একটা প্রস্তাব পাস করেছেন। তাই আজকে আমরা মেনে নিলাম যে, নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করা হোক ।"

From these speeches of our Constitutional maker it is unmistakably evident that ensuring the independence of judiciary and making it separate from the executive were two primordial intentions of our Constitution framers. In the aforementioned case laws of our Apex Court such as "Masdar Hosen Case", "10 Judges case", "5th Amendment Case", "7th Amendment Case", "13th Amendment Case", "16th Amendment Case" these primal intentions of our Constitution Makers were pronounced recurrently.

Not only that, through the 15th Amendment of the Constitution in the year of 2011, a separate Article was inserted regarding `Basic Structure' of the Constitution of Bangladesh. It is as follows:

"Basic provisions of the Constitution are not amendable

7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means."

These firm notions of the legislature was further reinforced through inserting another Article which is as follows:

"Offence of abrogation, suspension, etc. of the Constitution

7A. (1) If any person, by show of force or use of force or by any other un-constitutional means-

(a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article ; or

(b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article,

his such act shall be sedition and such person shall be guilty of sedition.

(2) If any person-

(a) abets or instigates any act mentioned in clause (1) ; or

(b) approves, condones, supports or ratifies such act,

his such act shall also be the same offence.

(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."

These two Articles read with the Article 7 give us this certain impression that `basic structures' of the Constitution are not only unbendable but also any attempt for deviating from such provisions is a seditious offence.

As consultation with the CJB with primacy is basic structure as per decision of the Apex Court, that automatically made an entry within the purview of Article 7A read with Article 7B and 7, as laws declared by the Appellate Division is binding under Article 111 of the Constitution.

One thing that agitated our judicial mind is that the State did not even challenge the decision of the Apex Court relating to the mandatory consultation process with primacy rather executed the same by taking both legislative actions by making necessary rules viz.

Rule 8A of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (সার্ভিস গঠন, সার্ভিস পদে নিয়োগ এবং সাময়িক বরখাস্তকরণ ও অপসারণ) বিধিমালা, ২০০৭"; Rule 11 of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (কর্মস্থল নির্ধারণ, পদোন্নতি, ছুটিমঞ্জুরী, নিয়ন্ত্রণ, শৃঙ্খলা-বিধান এবং চাকুরীর অন্যান্য শর্তাবলী) বিধিমালা, ২০০৭" and Rule 29 of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (শৃঙ্খলা) বিধিমালা, ২০১৭" and took executive steps in accordance through passing orders. In the said rules of the Judicial Service, the effect of consultation with primacy of the Supreme Court has accommodated in unambiguous terms and identical languages. For proper appreciation of the matters of consultation and primacy exact version of "বাংলাদেশ জুডিসিয়াল সার্ভিস (শৃঙ্খলা) বিধিমালা, ২০১৭ এর বিধি-২৯" is shown hereunder-

"২৯. সুপ্রীম কোর্টের পরামর্শের কার্যকরতা

(১) উপযুক্ত কর্তৃপক্ষ সুপ্রীমকোর্টের পরামর্শ অনুসারে এই বিধিমালায় নির্ধারিত সময়ের মধ্যে প্রয়োজনীয় সকল পদক্ষেপ গ্রহন করিবে।

(২) উপ-বিধি (১) এ বর্ণিত উপযুক্ত কর্তৃপক্ষের প্রস্তাব ও সুপ্রীম কোর্টের পরামর্শ অভিন্ন না হইলে সেইক্ষেত্রে সুপ্রীম কোর্টের পরামর্শ প্রাধান্য পাইবে।"

Well, subsequent to such clear-cut and patent verdict and accomplishment by the Government i.e. the executive making necessary rules on "consultation with primacy" and after the enactment of the Fifteenth Amendment of the Constitution in 2011, is there any scope at all to leave the matter of antecedent or conduct of a Judge of the High Court Division in the hands of the executives or to make their (executives) opinion dominant over the opinion of the CJB? The answer is a big no.

Now, let's recapitulate the Apex Court's ruling on mandatory consultation with the CJB with primacy in the `10 Judges Case'. After examining the provisions of the Constitution along with a virtual travel through the mind of best legal faculties of the subcontinent this Division reached in a decision that consultation with the CJB coupled with primacy over the opinion of the executive while appointing a judge in the Supreme Court, is a basic structure of the Constitution. However, the very next moment they invented a strange device that is a dichotomized consultation process. The nature of this bifurcated consultation process is such that it was divided in twofold stages:

1) Judicial acumen and
2) Antecedents.

Concerning judicial acumen of a potential Judge of the Supreme Court, CJB's opinion shall get primacy and the matters of antecedents of such person executive shall say the final words. Well, if that is the theory, then let's visualize a scenario where CJB recommends a person for appointment, but executive denied, then how it will be resolved? There is no answer to this question in the said bifurcated consultation process as formulated by the Division. It's a supreme judicial impasse and obvious result of such stand-off is that it is the executive that have the final words and getting primacy over the opinion of the CJB, in harsh reality.

It is absolutely undisputed that the CJB recommended both of the appellant and the petitioner for being appointed as judge of the Supreme Court after completion of two years tenure as Additional Judge. What we have seen in the two matters in question is that the executive disagreed with the CJB's recommendation and finally both of them were dropped from the list of appointments concerned without knowing their faults. As there were no explanation of such non-appointments, the persons were not able to defend themselves, in addition, there were no such grievance mitigating mechanisms they could resort. Even the CJB were in darkness regarding the causes of the negation of his recommendations. These are absolute embarrassments for the post of CJB too. These are the outcome of the bifurcated consultation process.

In the logical fields Hegelian Dialectics is commonly accepted as a best practice in resolving theoretical arguments. “Hegel’s dialectics” refers to the special dialectical method of argument employed by the 19th Century German philosopher, G.W.F. Hegel. In a few words it is an interpretive method in which the contradiction between a proposition (thesis) and its opposition (antithesis) is resolved at a higher level of truth (synthesis).

Like other “dialectical” methods, relies on a contradictory process between opposing sides. Whereas Plato’s “opposing sides” were people (Socrates and his interlocutors), however, what the “opposing sides” are in Hegel’s work depends on the subject matter he discusses. In his work on logic, for instance, the “opposing sides” are different definitions of logical concepts that are opposed to one another. In the *Phenomenology of Spirit*, which presents Hegel’s epistemology or philosophy of knowledge, the “opposing sides” are different definitions of consciousness and of the object that consciousness is aware of or claims to know. As in Plato’s dialogues, a contradictory process between “opposing sides” in Hegel’s dialectics leads to a linear evolution or development from less sophisticated definitions or views to more sophisticated ones later. The dialectical process thus constitutes Hegel’s method for arguing against the earlier, less sophisticated definitions or views and for the more sophisticated ones later. Hegel regarded this dialectical method or “speculative mode of cognition” as the hallmark of his philosophy.

If we take the CJB's affirmative opinion as `Thesis' and the executive's negative wish as `Anti-thesis', then there must be a `Synthesis' for resolving such a supreme dilemma. Otherwise, that won't be a logical as well as scientific resolution of dispute. And such a framework for these types of scientifically rational resolution of difference of opinion is a sine qua non for a democratic, civilized and modern welfare state.

As the subdivided consultation process lacks a 'Synthesis', it became a half-baked one and anything half-baked is not good for health, for taste as well.

Well, apart from epistemological aspect, 'Synthesis' is necessary for some practical purposes too. For example, some objectionable or unethical information regarding a potential judge could be received to the end of the executive that were unnoticed by the head of the judiciary during his/her tenure as an additional judge.

For better understanding we can study such a 'Synthesis' mechanism devised by one of our neighboring country India's Supreme Court. When there arise such type of divergence of opinion between judiciary and executive regarding the appointment of a judge in the High Courts and Supreme Court of India, then the executive send back the recommendation with written explanation along with other materials including various intelligence wings reports. Then the matter is reconsidered by the judiciary. After such consideration, if the judiciary reiterate the recommendation, then it is mandatory for the

executive. In this way, not only the imperative of having a 'Synthesis' is being fulfilled but also the primacy of the judiciary is upheld. We can run through some of such "Reiterated Resolutions" uploaded in the official web site of the Supreme Court of India in this web address: https://main.sci.gov.in/collegium-resolutions.

It is to be noticed from the collegiums regulations found in the above mentioned wed address that the `Classified Intel Reports' were provide to the judiciary in writing and excerpts from thereto were disclosed publicly by the Apex Court Body for clarifications. The Apex Court Body duly reconsidered the executive's view based on Intel Reports, re-discussed with the concerned body or person and then reiterated its recommendation to the executive.

A logical and befitting 'Synthesis' could be as such:

If there is a disagreement between the judiciary and executive, the reasons of such incongruity along with all the connected papers or audio-visual substances be referred to the CJB immediately. After getting such intimations from the executive, the CJB along with two senior most judge of this Division shall enquire into the matters giving parties concerned an opportunity for self defence and form an opinion which shall be mandatory for the executive.

One thing must be borne in mind and act of functionaries of the country is that in a state of written constitution, neither the Government nor the Legislature or the Judiciary are Sovereign, it is only the Constitution that is Sovereign and Supreme. Because,

constitution is the highest formal expression of the people. Article 7 of the Constitution ordains as follows:

> "Supremacy of the Constitution
> 7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

We too have a written Constitution. Our Legislature cannot legislate in contravention of the provisions of the Constitution. Government too cannot act violating the Constitution.

Now consider another aspect of these cases which is related with Article 48(3). As we pointed earlier that though the President officially appoints the Judges of the Supreme Court, as per constitutional binding regarding the appointment of Judges of Supreme Court, the President acts only in accordance with the advice of the Prime Minister. We already graphically illustrated that in our Constitutional framework Constitution only is sovereign entity not the executive or legislature or judiciary; independence of judiciary and separation of judiciary from executive and concerning the appointment of Supreme Court Judges mandatory consultation with the CJB with primacy are basic structures of our Constitution and the basic structures shall not

be amendable by way of insertion, modification, substitution, repeal or by any other means.

In the `10 Judges case' this Division firmly decided that:

> "Therefore the expression "independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or Article 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore, consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the constitution."

And in the operative part of the judgment of "10 Judges Case" it was held that:

> "3. Independence of judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner. There

is no provision in the Constitution either authorising the President or for that matter the Prime Minister in view of Article 48(3) of the Constitution to curtail or diminish such independence.

4. Consultation with the Chief Justice with primacy of his opinion in the matter of appointment of Judges and the administration of judiciary is an essential part of independence of judiciary ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is in no way in conflict with Article 48(3).”

There raised a question regarding Mr A.B.M. Altaf Hossain by the learned Attorney General as to that before elevation to the Supreme Court his aggregated tenure as a practicing Advocate in the Supreme Court was less than 10 years in actual fact, though his date of enrolment as an Advocate of the Supreme Court was beyond that period. This question visualizes that before elevating him the executive did not bother to probe his antecedents though the related documents concerning his tenure as a practicing Advocate in the Supreme Court were in the public domain. It indicates that he was appointed at the whim of the executive without prior verifying his credentials.

Appointment as a Judge in the Supreme Court is not a `hire and fire’ type of job. It is one of the topmost appointments of the Country from the normative view point as well as from public confidence and requires citizen’s esteem. Therefore, vast legal experiences with

appropriate academic requirements are *sine qua non* for this post. This should not be taken as an entry post in the Supreme Court. The entry post in our judicial system is the post of Assistant Judge and membership in District Bar Association. As per service Rules a person can apply for such posts up to 30 years of age and in some instance that could be 32 years and on an average 1 - 1.5+ years needed for such a person to be appointed as a judicial officer by the Bangladesh Judicial Service Commission. After overcoming many service related barriers for usually 15-20 years (with some exceptional cases with less service tenure) that person could become a District and Sessions Judge. High Court Division of the Supreme Court usually hears appeal, revision etc from the judgments and orders of the District and Sessions Judges, that is, Judges of the High Court Division not only judges the District and Sessions Judges but also have superintendence and control over all courts and tribunals subordinate to it as per Article 109 of the Constitution. And while Judges from the Bangladesh Judicial Service are elevated to the Supreme Court they are to be District Judges invariably, at least in practice, though as per Article 95(2)(b) Members of District Judiciary shall not be qualified for appointment as a Judge unless he/she has, for not less than ten years, held judicial office in the territory of Bangladesh.

On the other hand, in our legal system a person can be enrolled as an Advocate of the High Court Division of the Supreme Court well before aged 30 years. The appellant herein was enrolled in the High

Court Division at the age of almost 26. There are lots of instances where advocates were enrolled at the High Court Division even earlier ages than the appellant.

In such circumstances, I'm quite unable to understand how the requirement of 10 years' practice under Article 95(2)(a) of the Constitution suffice with simplicities the period of enrolment for 10 years instead of actual continuous or aggregate experience at the Bar. It mandatorily be continuous or aggregate experience without fail.

Moreover, our Constitution did not ordain that it should be 10 years rather qualified with `not less than ten years'. Thus, our Constitution makers bestowed a higher degree of discretion upon the 'Judge Makers' of our legal system and that responsibility have to be discharged with utmost sincerity and responding the call of the conscience.

The works of the judges are the art of judging a case impartially, writing judgments and orders thereon and presiding over the court. After 25-30 years of investing in these arts, at the fag end of their career a judicial officer could become a Judge of the Supreme Court. Therefore, while appointing judges having direct lack of the above mentioned arts of judging, there age of actual experience in legal arena, coupled with merit and other extraordinary qualities must be borne in mind of the appointing authorities.

Now, let's consider the case of Mr Md Farid Ahmed Shibly. Being appointed as a Munsif, the name of the then entry post in the

judicial service, in the year of 1983 he got promotions as Sub-Judge (now Joint District Judge), Additional District Judge and District Judge in the year of 1994, 1999 and 2004 respectively. After serving as District and Sessions Judge, Gazipur; Secretary, Bangladesh Judicial Service Commission and Registrar, Supreme Court (now Registrar General) he was elevated as an Additional Judge of the Supreme Court.

His portfolio suggests that prior to elevation his service record was clean and excellent on both counts of on the Bench and administrative affairs.

In our country while a labourer are to be dismissed he has to be served a show cause notice to explain his/her defences under the Labour Laws. However, an Additional judge of the Supreme Court can lost his job without knowing the reasons.

Non-confirmation of an Additional judge of the Supreme Court as permanent Judge is of course stigmatic. Because, such a news of non-confirmation become a national daily newspaper, TV, radio and electronic media headlines. Everyone who read, watch and hear this news want to know why that person was not confirmed, there must be some problem with him etc.

Our Apex Court in many cases decided that when someone striped with jobs he/she must get an opportunity to explain his views before being sacked. Principle of natural justice too requires that if any

decision taken against anyone he/she must know the reasons thereto and have the opportunity in presenting his/her defenses, if any.

The non-confirmation of Mr Md. Farid Ahmed Shibli and Mr. A.B.M. Altaf Hossain as permanent Judge of the Supreme Court is thus a clear violation of Principle of natural justice as well as settled case laws concerned of the Apex Court.

I am greeeing with the opinion of the learned brothers Borhanuddin J., M. Enayetur Rahim J., Md. Ashfaqul Islam J., Md. Abu Zafor Siddique J. and Jahangir Hossain J., to consider the case of the appellant by the appropriate authority.

However, I am of the view that the leave petitioner's case may also be considered by the appropriate authority.

J.

Obaidul Hassan, J. The Civil Appeal and both the Civil Petitions for Leave to Appeal involving similar question of laws and almost identical facts having been heard together are now being disposed of by this common judgment.

Civil Appeal No. 232 OF 2014:

The instant Appeal by leave granting order dated 06.11.2014 passed by this Division in Civil Petition for Leave to Appeal No.2626 of 2014 filed against the judgment and order dated 24.09.2014 passed

by the High Court Division in Writ Petition No.7489 of 2014 summarily rejecting the Writ Petition.

The appellant as petitioner filed the Writ Petition No. 7489 of 2014 challenging non-appointment of the petitioner as Judge of the High Court Division of the Supreme Court of Bangladesh in violation of Article 95 of the Constitution and the principle settled by the Appellate Division of the Supreme Court of Bangladesh in the case of Bangladesh & Ors. vs. Md. Idrisur Rahman, Advocate & Ors. reported in 29 BLD(AD)79 despite of the recommendation of the Hon'ble Chief Justice of Bangladesh without any reason.

The petitioner filed the aforesaid Writ Petition stating, *inter alia,* that he was a practicing Advocate of this Court and was holding requisite qualifications to be appointed as a Judge of the High Court Division of the Supreme Court of Bangladesh. He did his graduation and post-graduation on Law from the University of Rajshahi securing 1st Class in LL.M. He also acquired graduation and post-graduation diploma on Law from the UK. He was called to the Bar as a Barrister by the prestigious Society of Lincoln's Inn, London, U.K. He was enrolled with the Bangladesh Bar Council as an Advocate on 06.12.1998 and was permitted to practice in the High Court Division on 18.06.2000 and the Appellate Division on 18.05.2011. He acted as the Deputy Attorney General for Bangladesh and as Member of the Board of Governors of Bangladesh Open University. Considering his

such qualifications and good antecedents, the President of Bangladesh appointed him as the Additional Judge of the Supreme Court of Bangladesh, High Court Division along with five other Additional Judges under Article 98 of the Constitution, vide notification No.10.00.0000.128.011.010.2012-816 dated 13.06.2012. Accordingly, he took oath of office on 14.06.2012 and had been functioning as Judge since then until his name was dropped by the impugned action. During this period, he delivered numerous judgments which have been highly acclaimed by the Bar and the Bench. Before expiry of two years' tenure of Additional Judge, the petitioner along with five other Additional Judges, submitted ten judgments authored by each of them as required by the Honourable Chief Justice of Bangladesh and the said judgments were distributed among the senior most Judges of the Appellate Division for their opinion. On being satisfied with the performance and integrity and all other aspects of all the six Additional Judges including the petitioner the Honourable Chief Justice recommended all of them for appointment as permanent Judges of the High Court Division under Article 95 of the Constitution and such fact of recommendation by the Chief Justice had been widely published in the daily newspapers. However, the name of the petitioner was dropped from the list of permanent Judges, although other five Additional Judges were duly appointed by the President, vide Gazette Notification No.10.00.0000.128.011.010.2012-472 dated 09.06.2014. Thereafter, the petitioner tried his best to know the reasons,

but could not know anything, though, pursuant to the said appointment notification, his colleague Additional Judges had been sworn in as permanent Judges by the Honourable Chief Justice and have been functioning as such in the High Court Division. The executive most arbitrarily dropped the name of the petitioner from the list of six Additional Judges even after recommendation by the Honourable Chief Justice and the said impugned order affected the very independence of the Judiciary, which is one of the basic structures of the Constitution as well as the same has labelled a stigma with the integrity and quality of the petitioner. In such a situation, the writ petitioner moved before the High Court Division.

Upon hearing the Writ Petition, the High Court Division rejected the same summarily by judgment and order dated 24.9.2014.

Against the judgment and order dated 24.09.2014 passed by the High Court Division the writ petitioner filed the Civil Petition for Leave to Appeal No.2626 of 2014 and after hearing the parties this Division granted leave by an order dated 06.11.2014 and hence the instant Civil Appeal.

Civil Petition for Leave to Appeal No. 602 OF 2017:

The Civil Petition for Leave to Appeal is directed against the judgment and order dated 12.02.2017 passed by the High Court Division in Writ Petition No. 1948 of 2017.

The case of the petitioner in Civil Petition for Leave to Appeal No. 602 of 2017 is that the petitioner is a law abiding citizen and permanent resident of Bangladesh. He had obtained B.S.C. Degree from Sunamgonj College under the University of Chittagong in the year 1977. He had obtained LL.B. Degree from the University of Dhaka in 1981. Subsequently, he was appointed as Munsif by the Government of Bangladesh vide Memo dated 5th July, 1983 and his service was confirmed as of his joining date on 17.07.1983. Thereafter, he was promoted to the post of Sub-Judge from the post of Assistant Judge on 31.05.1994 and then he was appointed as the Assistant Sessions Judge. Later on, he was promoted to the post of Additional District & Sessions Judge and subsequently he was appointed as the Additional Registrar, Appellate Division, Supreme Court of Bangladesh vide Memo dated 15.01.2002. Thereafter he was promoted to the post of District Judge and posted *in situ*. On 15th May, 2008, the petitioner was appointed as the District & Sessions Judge, Gazipur. Subsequently, the petitioner was transferred to and posted on deputation as the Secretary, Bangladesh Judicial Service Commission Secretariat vide Memo dated 05.07.09. Thereafter the petitioner was appointed as the Registrar, Supreme Court of Bangladesh and served there until his elevation as an Additional Judge of the Supreme Court. The petitioner has performed many important responsibilities at different positions throughout his long career. Having been satisfied with his academic and professional performance, the Honourable

President of the People's Republic of Bangladesh after consultation with the Honorable Chief Justice of Bangladesh appointed him as an Additional Judge of the High Court Division of Supreme Court of Bangladesh along with 9 (nine) other Additional Judges under Article 98 of the Constitution of the People's Republic of Bangladesh for a period of two years vide notification dated 9th February, 2015 and he was sworn in by the Honourable Chief Justice of Bangladesh on 12.02.2015 as an Additional Judge of the Supreme Court of Bangladesh. After appointment as Additional Judge, he rendered his service most honestly, sincerely and diligently to the full satisfaction of the Chief Justice of Bangladesh and others. The petitioner delivered many substantial judgments in previous two years, which was appreciated by many. During his tenure as an Additional Judge none raised any objection to his integrity and merit whatsoever. As an Additional Judge the petitioner performed his function as a second judge in the Division Benches of High Court Division. He, as a second judge, contributed in different jurisdictions and also to the legal arena in the Country. He had never compromised justice and always upheld unimpeachable integrity. Having been satisfied on the performance and all other requisite qualifications, the Chief Justice of Bangladesh recommended the name of the petitioner as well as those of the eight others to the Honourable President for appointment as the Judges of the High Court Division after forming opinion on their suitability, integrity and merit. The Hon'ble President, however, appointed eight

others under Article 95 of the Constitution except the petitioner without communicating any reason to the Chief Justice. The appointment of the eight Judges had been published vide Notification dated 7th February, 2017. A news item was published on 9th February, 2017 in the daily newspaper titled 'Jugantor' in respect of confirmation of appointment of eight Additional Judges in the High Court Division. The said news item also reported that the Honourable Chief Justice of Bangladesh recommended the name of the petitioner along with eight others Additional Judge to the Honourable President for appointment as a Judge of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution. Despite such recommendation of the Chief Justice, the Government has not the petitioner as Judge of the High Court Division. Finding no other efficacious remedy the petitioner filed the Writ Petition No. 1948 of 2017. The petitioner by filing the Writ Petition No. 1948 of 2017 before the High Court Division has called in question the legality and constitutionality of dropping him from the list of the Additional Judges to be appointed permanently as Judges of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution and the principle settled by this Division in the case of Bangladesh Vs. Idrisur Rahman 29 BLD (AD) 79 despite the recommendation of the Honourable Chief Justice of Bangladesh without any reason.

Upon hearing the High Court Division disposed of the Writ Petition No. 1948 of 2017 with some observations by judgment and order dated 12.02.2017 and hence the Civil Petition for Leave to Appeal No. 602 of 2017.

Mr. Probir Neogi along with Mr. Momtazuddin Fakir, Mr. Motahar Hossain, Mr. M. Sayed Ahmed all senior Advocates and Mr. Mahbub Shafique, Ms. Anita Ghazi Rahman, Ms. Suvra Chakravorty, Mr. Manzur-Al-Matin, Mr. Imranul Kabir and Mr. Khandaker Reza-E-Raquib, all Advocates appearing for the appellant in Civil Appeal No. 232 of 2014 contended that the appellant had been denied confirmation in clear and flagrant violation of the provisions of the Constitution and law declared by the Appellate Division inasmuch as there is an expressed provision in Article 95(1) of the Constitution that the Judges of the Supreme Court of Bangladesh shall be appointed by the Hon'ble President of the People's Republic of Bangladesh after consultation with the Hon'ble Chief Justice and the Chief Justice having recommended the appellant as Judge of the High Court Division for confirmation and appointment under Article 95, the dropping of the name of the appellant without any cogent reason is totally unconstitutional. The learned Counsels for the appellant contended next that by the illegal action of the executive the independence of the judiciary has been diminished and since the independence of the Judiciary is a basic structure of our Constitution and under Article 7B of the Constitution it cannot be amended by the

parliament and there being no provision in the Constitution authorizing the President under Article 48(3) to curtail or diminish the independence of judiciary, non-appointment of the appellant ignoring the recommendation/opinion of the Chief Justice was an act of flagrant violation of the basic structure of the Constitution. The learned Counsels for the appellant argued next that no question has ever been raised against the antecedents of the appellant rather having found the performance of appellant satisfactory as an Additional Judge, the Chief Justice has recommended the appellant for confirmation/appointment under Article 95 of the Constitution inasmuch as the consultation process being initiated by the executive whose opinion in the matter of antecedents being already there and the Chief Justice in the process of consultation had the benefit of examining the opinion of the executive and since the Chief Justice recommended the appellant for appointment disregarding/overruling such opinion, there is no scope on the part of the executive to drop the name of the appellant from the list of the Judges to be appointed under Article 95. Thus, the action of the executive denying confirmation/appointment of the appellant is wholly unconstitutional, arbitrary and naked interference in the affairs of the judiciary inasmuch as an act done without any lawful authority. The learned Counsels for the appellant submitted further that under Article 95(1) of the Constitution since the judges of the Supreme Court shall be appointed by the President after consultation with the Chief Justice,

the recommendation of the Chief Justice shall get primacy over the opinion of the executive in the matter of appointment of Judges, therefore, the executive was under serious constitutional obligation not to drop the name of the appellant but to confirm him pursuant to the recommendation of the Chief Justice who is the best person to judge and assess the ability and competence of the appellant and the appellant has maintained highest professional standard as an Additional Judge and delivered some brilliant judgments as an author Judge, therefore, the Appeal is liable to be allowed. The learned Counsels submitted next that the executive by not appointing the appellant after recommendation of the Chief Justice has reduced and diminished the power, position and role of the Chief Justice inasmuch as it was an act of undermining the authority of the head of the judiciary as well since in the impugned judgment of the High Court Division there is an observation that no way out was given in the Ten Judges' case when the question of difference of opinion between the Chief Justice and the executive would arise, therefore to resolve the said issue and also to find a way out in such situation it is essential to allow the instant Appeal by reviewing the Judgment of the Ten Judges' case. The learned counsels for the appellant fortified their arguments by putting reliance on some case laws decided in the Secretary, Ministry of Finance Vs. Md. Masdar Hossain and others, 52 DLR (AD) 82; S.P. Gupta Vs. Union of India (UOI) and ors, AIR 1982 SC 149; Raghib Rauf Chowdhury Vs. Government of Bangladesh, 69

DLR 317; Bangladesh and others Vs. Idrisur Rahman, Advocate and others, 29 BLD (AD) 97 etc.

Mr. Manzill Murshid, learned senior Advocate appearing for the petitioner in Civil Petition for Leave to Appeal No. 602 of 2017 submitted that the petitioner being a member of Bangladesh Judicial Service served from 17.7.1983 to 10.2.2015 holding different posts and at the fag-end of the service he had been the Registrar of Bangladesh Supreme Court wherefrom he was appointed as an Additional Judge of the High Court Division under Article 98 of the Constitution and took oath on 12th February, 2015. Although all Additional Judges who had been appointed along with the petitioner were confirmed and appointed as Judge of the High Court Division the petitioner was dropped from the list vide notification dated 07.02.2017 of the Ministry of Law, Justice and Parliamentary Affairs. The learned senior Counsel contended next that after issuance of the impugned notification dated 07.02.2017 the petitioner came to know from a news caption of 'The Daily Jugantor' published on 09.02.2017 that the then Chief Justice recommended all Additional Judges including the petitioner for appointment under Article 95 of the Constitution but in violation of the constitutional provisions the executive dropped the petitioner without showing any cogent reason. The learned senior Counsel contended next that according to Article 95(1) of the Constitution, a Judge shall be appointed by the President after consultation with the Chief Justice and in the instant case the Honourable Chief Justice

recommended the name of the petitioner along with eight others but disregarding that recommendation of the Chief Justice, the petitioner alone was dropped out which is a clear violation of the constitutional provision of Article 95. Therefore, the petitioner is entitled to be appointed as a Judge of the High Court Division. The learned senior Counsel submitted next that the process by which the Judges of the Supreme Court are appointed, is the key to both reality and perception of the independence of judiciary and the whole constitutional scheme is to shut the doors of interference against the executive under lock and key and therefore the prudence demands that after shutting the door of interference the key should not be left in possession of the executives. Disregarding the recommendation of the Chief Justice by the executive means snatching the very key of the door of interference by the executive away from the control of the judiciary which is tantamount to a denial of the very concept and basic principle of the independence of judiciary. The learned senior Counsel for the petitioner argued next that according to Article 48(3) of the Constitution in exercise of all functions, save only that of appointing the Prime Minister and the Chief Justice, the President shall act in accordance with the advice of the Prime Minister. Under Article 95 of the Constitution in appointing Judges of both Division of the Supreme Court, the President shall consult the chief Justice and act in accordance with the advice of the Prime minister. In the Ten Judges' case it is held that consultation with the Chief justice and primacy of

the opinion of the Chief Justice is in no way in conflict with Article 48(3) of the Constitution. In view of Articles 48(3) and 55(2) the Prime Minister cannot advice the President anything contrary to the basic principle and structure of the Constitution. The independence of judiciary being the basic principle and structure of our Constitution, consultation with the Chief Justice in the matter of appointment of Judges with its primacy should be considered as an essential part thereof. After the decision of Ten Judges' case Article 95 was amended by way of 15th Amendment in 2011 and it becomes imperative for the executive to consult the Chief Justice in appointing Judge of the High Court Division and in this regard the opinion of the Chief Justice will get primacy. The learned senior Counsel contended next that it is held in the landmark Masder Hossain's case (52 DLR(AD) 82) that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under article 116 the views and opinion of the Supreme Court shall have primacy over those of the executive. The Government did not even challenge the above decision concerning the consultation with primacy. The learned senior Counsel contended further that in the Ten Judges' case (17 BLT(AD) 231) it has been observed that the term 'consultation' was considered in Masdar Hossain's case in the light of Article 116 of the Constitution but nevertheless the same principle all the more applies in the matter of appointment of Judges of the Supreme Court under Articles 98 and 95 of the Constitution because without the

independence of the Supreme Court there cannot be any independence of the subordinate Courts and minus the consultation and primacy the separation of judiciary from the executive will be empty words. The learned senior Counsel contended next that the petitioner came across 32 years holding different posts in the subordinate judiciary during which all matters including antecedents had been subject to scrutiny and supervision of the Supreme Court under Articles 109, 116, 116A of the Constitution. During the petitioner's such long career in the judiciary he did never ever face any proceeding or complaint on matter of discipline or antecedent. There is no statement from the executive that the government ever consulted the Chief Justice on any matter of antecedent of the petitioner. Thus, on any vague plea of antecedent, it would be unjust to deprive the petitioner of his legitimate right or expectation of being appointed under Article 95 of the Constitution. The learned senior Counsel contended further that the petitioner was initially appointed as an Additional Judge under Article 98 of the Constitution and at that time the President on all areas including antecedents and judicial performance consulted the Chief Justice. At that time no adverse report or allegation revealed from the petitioner's service record or conduct as a result he was appointed as an Additional Judge under Article 98 of the Constitution. In such a situation, in the process of appointment under Article 95 of the Constitution the petitioner was not supposed to be subjected again to any further scrutiny what so

ever. The learned senior Counsel further submitted that the petitioner as an Additional Judge under Article 98 had performed all judicial works satisfactorily and since the Honourable Chief Justice had recommended his name along with eight others for appointment under Article 95, he has, therefore, not only a legitimate expectation rather acquired a constitutional right for being confirmed and appointed under Article 95 of the Constitution with effect from 07.02.2017 or 11.02.2017 because of the fact that such convention being followed in this country for more than over last 60 years. The learned senior Counsel, in fine, submitted that for doing complete justice under Article 104 of the Constitution the executive is required to be directed to appoint the petitioner as a Judge of the High Court Division within a specific deadline giving all arrear remunerations, benefits and privileges with service-continuity with effect from 11.02.2017.

Per contra, Mr. A.M. Amin Uddin, Attorney General with Mr. Mohammad Mehedi Hassan Chowdhury, Additional Attorney General, Mr. Md. Mojibur Rahman, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General appearing for the respondents in all the cases strenuously opposed the submissions made on behalf of the appellant and the petitioner. They submitted that in the case of Bangladesh and others Vs. Md. Idrisur Rahman and others reported in 29 BLD (AD) 79 this Court having held that the

opinion of the executive will have dominance in the matter of antecedent of a Judge of the High Court Division and in the instant case considering the antecedent of the appellant the Honourable President of Bangladesh has not appointed him as a permanent Judge of the High Court Division and the same does not require any interference by this Court as well. The learned Attorney General along with Deputy Attorney General and Assistant Attorney General for the respondents contended next that the Honourable President appointed the appellant in the year 2012, the Honourable President having not appointed him as permanent Judge in the year 2014, and in the meantime there has been no change of Government, it cannot be said that the appellant was victim of political reasons and there is nothing to show that for an ulterior reason the appellant has not been appointed as a permanent Judge and as such there is no merit of this Appeal. The learned Attorney General argued next that Article 95(2)(a) of the Constitution requires that to be elevated in the Bench an advocate must have 10 years' practicing experience in the Supreme Court of Bangladesh. By referring Al- Jehad Trust case reported in PLD 1996 SC 324 the learned Attorney General submitted that the requirement of 10 years' practice under Article 193(2)(a) of the Constitution of Pakistan relates to the experience/ practice at the Bar and not simpliciter the period of enrolment. By referring the Mahesh Chandra Gupta's case reported in (2009) 8 SCC 273 the learned Attorney General submitted next that the decision of Indian Supreme

Court passed in the aforesaid case is not applicable in the case in hand. The facts of the instant case is totally distinguishable from the Mahesh Chandra Gupta's case. In the case of Mahesh Chandra Gupta, the petitioner prayed for issuance of *Quo waranto* directing an Additional Judge of Allahabad High Court (Respondent No. 3 of Mahesh Chandra Gupta's case) for showing cause upon what authority the respondent No. 3 was holding his office and to justify the constitutionality of his appointment as a judge of the Allahabad High Court. In the said case the issue was that, if a person after having remained an advocate for some time, ceases to practice and employs himself for earning, and thereafter holds an office of a Member of the Tribunal, the period of his holding the office as a Member of Tribunal cannot be computed or taken into account with the aid of Explanation (aa) to Article 217(2)(b) of the Constitution of India. Applying the principles with regard to entitlement to practice and computability of the period during which respondent No. 3 has worked in ITAT (Income Tax Appellate Tribunal), the Supreme Court of India held that he stood qualified for appointment as a Judge of the Allahabad High Court. Therefore, the decision of Mahesh Chandra Gupta's Case is not applicable in the instant Civil Appeal. The learned Attorney General contended next that from the Annexures- A, A-1 & A-2, it appears that after being enrolled in the High Court Division of the Supreme Court of Bangladesh on 18.06.2000, the appellant stayed in the United Kingdom (UK) at least till 13.10.2005 on which date he was called to

the Bar of England and Wales. Therefore, it is apparent that after the date of enrolment in the High Court Division on 18.06.2000 the appellant stayed in UK for a period of minimum 5(five) years till 13.10.2005. Accordingly, the appellant was elevated in the Bench as an Additional Judge of the Supreme Court of Bangladesh on 13.06.2012 having only 7 (seven) years' of practice in the High Court Division instead of 10 years' practicing experience. Apart from this the appellant did not mention anywhere in the Writ Petition when he returned back in Bangladesh and started practice as an advocate in the Supreme Court of Bangladesh. Last but not least, the learned learned Attorney General argued that according to Article 48(3) of the Constitution the Honourable President is required to act as per advice of the Honourable Prime Minister regarding the appointment of Judges in the High Court Division and the communication between the Honourable Prime Minister and the Honourable President regarding appointment of Judge is privileged one and it cannot be inquired into before any court of law and hence, after consultation with the Honourable Chief Justice as per Article 95 of the Constitution when the Honourable President takes advice from the Honourable Prime Minister and takes decision as per the direction of the Honourable Prime Minister then as per Article 48(3) the whole process of appointing/confirming Judges becomes a privileged one and the same cannot be inquired into before any court of law and as such the

Civil Appeal and other Civil Petitions for leave to Appeal are liable to be dismissed.

At this juncture, let us have a brief overview of the constitutional scheme of our country as regards appointment of Judges of the Supreme Court.

Article 98 of the Constitution empowers the President to appoint Additional Judges to the Supreme Court for a period not exceeding two years. Article 98 provides that-

> "98. Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period:
>
> Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."
>
> Article 95(1) of our original Constitution enshrines that-
>
> "95(1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."

Thus, Article 95(1) of our original Constitution had the provision requiring the President to consult with the Chief Justice in case of

appointment of Judges of the Supreme Court. Later, through the 4th Amendment Article 95(1) was amended omitting the provision of requirement of consultation with the Chief Justice while appointing the Judges of the Supreme Court. Even though through judicial pronouncement in various cases including the case of Bangladesh and others vs. Md. Idrisur Rahman, Advocate & others, reported in 29 BLD(AD) 79 (popularly known as Ten Judges' Case) in view of the longstanding and consistent constitutional convention and practice the requirement of consultation with the Chief Justice was established. Again, with the enactment of 15th Amendment to the Constitution, the provision of Article 95(1) contained in the original Constitution had been restored requiring the President to appoint the Judges of the Supreme Court in consultation with the Chief Justice. It is apparent from the record that the cause of action in the case in hand arose on 09.06.2014 while 15th Amendment was enacted in the year 2011. Therefore, it is settled position of law that in case of appointment of Judges of the Supreme Court by the President the requirement of consultation with the Chief Justice is essential and in the case in hand the provision of consultation with the Chief Justice being essential there is no controversy as regards doing the same. In the above backdrop we do not dilate our discussion on the issue whether the consultation with the Chief Justice is imperative or not.

Under the constitutional scheme of our country the President is the Constitutional head of the State and of the executive government. Article 48 of the Constitution lays down that-

> "48.(2) The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.
> (3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister:
> Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

So, according to Article 48(3) of the constitution, except in the case of appointing the Prime Minister and the Chief Justice, the President, while exercising, all his functions shall act as per the advice of the Prime Minister. According to Article 48(3) of the constitution the question whether any, and if so what, advice has been tendered by the Prime minister to the President shall not be inquired into by any court. In the democratic form of government existing in our country, the President is normally vested with the executive power of the State which, in fact, is to be exercised by the Council of Ministers since the President is to act on the advice of the ministers led by the Prime

Minister. In this regard Article 55(1)(2) of the Constitution is relevant to extract below:

> "55. (1) There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate.
>
> (2) The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister."

Article 52 lays down that the President may be impeached on a charge of violating this Constitution or of grave misconduct, preferred by a notice of motion signed by Majority of the total members of Parliament in the manner prescribed in Article 52. The president is thus duty bound to act in consultation with the Prime Minister. In view of the above discussion it is evident that while appointing the Judge of the Supreme Court under Articles 95(1) and 98 the president is to consult the Prime Minister for his/her advice as well as the Chief Justice. Now an issue arises that which consultation between the two functionaries will get the primacy.

In the case of S.P. Gupta and others vs. President of India and others, reported in AIR1982 SC 149, P.N. Bhagwati, J. observed in the following:

> "29.....If we look at the raison detre of the provision for consultation enacted in cl.(1) of Art. 217, it will be obvious that the opinion given

by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because Ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended and his knowledge and perception of law which the Chief Justice of the High Court would be the proper person to express an opinion, but in regard to the, character and integrity of such person, his antecedents and his social philosophy and value-system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices, he would be able to look objectively at the problem of appointment. There is therefore, a valid and intelligible purpose for which the opinion of each of the three constitutional functionaries is invited before the Central Government can take a decision whether or not to appoint a particular, person as a Judge in a High Court. The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving

primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in cl.(1) of Art.217. When, during debates in the Constituent Assembly, an amendment was moved that the appointment of a Judge of a High Court or the Supreme Court should be made with the concurrence of the Chief Justice of India, Dr. B.R. Ambedkar made the following comment which is very significant:

> "With regard to the question of the concurrence of the Chief Justice, it seems to me that those advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition."

It is, therefore, clear that where there is difference of opinion amongst the constitutional functions regarding the appointment of a Judge to a High Court. The opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of

each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion It should accept in deciding whether to appoint the person as a Judge. Also, where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted. However, again, it is not concurrence, but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The ultimate power of appointment rests with the Central Government and that is in accordance with the constitutional practice prevailing in all democratic countries. Even in the United Kingdom, a country from which we have inherited our system of administration of justice and to which many of our anglophiles turn with reverence for inspiration and guidance, the appointment of High Court Judges is made by or on the advice of the Lord Chancellor, who is a member of the Cabinet while appointments to the Court of appeal and the House of Lords and to the offices of Lord Chief Justice Master of the Rolls and President of the family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Thus, the appointment of a Judge belonging to the higher echelons of judicial service is wholly in the hands of the Executive. So also, in the commonwealth countries like Canada, Australia and New Zealand, the appointment of High Court and Supreme Court Judges is made by the Executive. This is, of course, not an ideal system of appointment of Judges, but the reason

why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people, who are consumers of justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment. The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high Judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while

appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive."

In the case of S.P. Gupta, S.M.F.Ali, J. observed in the following:

> "Independence of judiciary is doubtless a basic structure of the constitution, but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution. While this absolute judicial power has been conceded by the Constitution to the judiciary, a certain amount of executive control has already been vested in the higher judiciary in respect of the subordinate judiciary. This executive power is not absolute and has to be exercised in consultation with the CJI in the case of appointment of Supreme Court Judges, as also in the consultation with the CJI and the Governor of the States concerned in case of the appointment of Chief Justice of the High Courts,–in the case of appointment of High Court Judge, the Chief Justice of the concerned High Court is also to be consulted. The consultation contemplated by the Constitution must be full and effective and by convention the view of the concerned CJ and CJI should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the constitutional authorities. Thus, in fine, the doctrine of separation of power so far as our Constitution is concerned, reveals an artistic, blending and an adroit admixture of judicial and executive functions.
>
> In the American Constitution by virtue of the fact that the entire judicial power is vested in the Supreme Court or

other courts, the appointments have to be made by the Supreme Court, unlike the provisions of Indian Constitution where appointments are to be made by the President in consultation both with judicial and executive authorities as indicated above. Therefore, in expounding the concept of separation, the essential distinctive features which differentiate Indian Constitution from the American Constitution must be kept in mind.

So far as framers of Indian Constitution are concerned, they had deliberately rejected the theory of complete insulation of the judicial system from the executive control. The Indian Constitution has devised a wholesome and effective mechanism for the appointment of judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where the power of the President is abused or misused or violate any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary, is the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive.

The Indian Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method-

(1) by guaranteeing complete safety of tenure to judges except removal in cases of incapacity or misbehaviour which is not only a very complex

and complicated procedure but a difficult and onerous one.

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive.

so far as the subordinate judiciary is concerned the provisions of Arts. 233-236 vest full and complete control over them in the High Court.

In the case of S.P. Gupta, Desai, J. also observed in the following:

"Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. The power of appointment of High Court Judges and the Judges of the Supreme Court vests in the President and the President being a constitutional head he is constitutionally bound to act according to the advice of the Council of Ministers. Arts. 32(3), 133(3), 138, 139, 140, 130, 230, 231, 237, 225, 126, 127(1), 128 confer power on other constitutional institutions such as the executive which when it acts within the limits of power will have a direct impact on the functioning of the judiciary. This conspectus of articles, not meant to be exhaustive, do indicate that Parliament has power to regulate Court's jurisdiction. Undoubtedly judiciary, the third branch of the Government cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt

or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay, pension, privileges and certain basic conditions of service. The judiciary like any other constitutional instrumentality has, however, to act towards attainment of constitutional goals. The independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammeled by external pressures or controls and independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude. It is not as if judicial independence is an absolute things like a brooding omnipresence. One need not too much idolise the independence of judiciary so as to become counter-productive.

While undoubtedly political packing must be abhorred, in putting the independence of judiciary on pedestal one cannot lose sight of the fact that the judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a chance for the better and the promised millennium. An activist role in furtherance of the same is a sine qua non for the judiciary. If value packing connotes appointment of persons otherwise well qualified as required by the constitution but having the additional

qualification of awareness of the high priority task of eradication of poverty removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation, feudal overlordship, coupled with conscious commitment to administering socio-economic justice, establishment of a just social order, an egalitarian society, then not only the value packing is not to be frowned upon nor thwarted by entrenched establishment prone people but it must be advocated with crusader's zeal. And judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoists can enter their caveat to value packing, but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labelled as value packing, it is neither unethical nor unconstitutional nor a weapon to strike at independence of judiciary."

In the Ten Judges' Case this Division passed by the following short order on 2nd March 2009:

"For reasons to be recorded later in details, we hereby pass the following short order: -

1. In the matter of appointment of Judges under Articles 98 and 95 of the Constitution the Convention of consultation having been recognized and acted upon has matured into Constitutional Convention and is now a Constitutional imperative.

2. Such consultation is inherent in our Constitutional scheme and is ingrained in the principle of independence

of judiciary being essentially the basic structure of our Constitution embedded in the principle of Rule of Law.

3. In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.

4. Oath under Articles 98 and 95 of the Constitution are separate and distinct and are required to be administered and made before one enters upon an office and a Judge will be deemed to have entered upon the office immediately after he makes the Oath and not before, in both cases.....”

Recently an Article has been published in a foreign law journal namely, ‘Mazellaws Digest’ titled “Judicial Independence vs. Constitutional Supremacy-A study of Bangladesh's struggle to maintain legal integrity.” Author’s view relevant to the present case is given below:

> “The basic structure doctrine is one which preserves the principles of the Constitution that effectively devises the ways in which the nation is expected to build itself. However, at the end of the day, the basic structure doctrine is one of abstractive value. While it should be recognised that principle of the independence of the judiciary speaks not only to one of the basic structures of the Constitution of Bangladesh, but also to a principle enshrined in many constitutions across the world, it ought to be noted that at

the end of the day the application of the principle is based on abstraction and is a principle that was presumably in the mind of the constituent assembly during the construction of the constitution itself.

If a recommendation regarding the confirmation of a Justice of the Supreme Court (High Court Division) proposed by the Chief Justice of Bangladesh to the President of the People's Republic of Bangladesh is not fully affirmed, there are several things to consider. To address this matter, it is important to analyse the text of the Constitution that delineates these powers to the office of the President.

In Article 51 of the Constitution, the matter is effectively defined. The President is not answerable to the Court in the exercise of his duties. Among his duties, according to Articles(s) 94, 95 and 98, is the duty to confirm the appointment of judges to the High Court Division of the Supreme Court. If we are to follow the letter of the law, the prescription of Article 51 is clear in that the President is not answerable to the Court in the exercise of this duty. However, per Article 48, the President is expected to act in accordance with the advice of the Prime Minister. Additionally, this provision prescribes that this advice is ultimately privileged communication that the Court has no authority to investigate. As such, the President is allowed to act in accordance with his conscience and wisdom to choose to affirm only those they deem fit to execute the duties for which they are appointed. Therefore, by Constitutional authority, it is the prerogative of the President to act as they deem fit in the execution of such duties.

While it has been argued that in disregarding the recommendation of the Chief Justice in appointment of judges, there is the potential for threat to the independence of the judiciary, it is also equally true that the Constitution in its grand wisdom permits this specific effect. It is, however, important to recognise two facts. First, the preservation of judicial independence is a fundamental and basic structure of the Constitution and deserves the utmost reverence. However, the mode that this preservation could take place is ultimately debatable. Second, the letter of the Constitution, which by virtue of Article 7 is supreme to all, is thus superior to any abstract principle. Assuming that the constituent assembly was aware of the principle of judicial independence when articulating the functions of the office of the President and the functionality of the Supreme Court, and the office of the Chief Justice, the letter of the Constitutional text must be assumed to be the intended will of the Constitution. In effect, considering that no part of the Constitution is deemed inferior to any other (a principle opined on by H.M. Seervai in his seminal text on the Constitution of India), it is important to realise that the basic structure doctrine, or the abstraction of the principle of judicial independence, cannot take precedence over the prescribed text enshrined in the Constitution.

To this effect, it is presumed that the constituent assembly, in its wisdom, was cognizant of this basic structure, but still enshrined Article 48, which enshrines that the advice of the Prime Minister on which the President relies in the execution of his duties, including the appointment of judges, is privileged communication, not to be investigated

by any court. Hence, this court, or any other, is unable to challenge any such decision. Considering the text of Article(s) 48 and 52(2), the privilege communication may be investigated only if the parliament deems it to be appropriate.

So, in the event that a recommendation of the appointment of an individual to the Supreme Court (High Court Division) is disregarded, the office of the Chief Justice has no other recourse but to merely seek clarification from the office of the President. In such a case, the office of the President is not bound to respond in detail. Only if the Parliament deems such an investigation to be fit, they may choose to enquire this matter with the office of the President.

In maintaining this course of action, three core benefits are accrued. First, the letter of the Constitution is not undermined by a possible interpretation of a principle that is abstracted on to the Constitution itself. Second, the integrity of the office of the President is preserved, while paying heed to the need for judicial independence. Finally, this returns the ultimate power of arbitration of the matter on to the Parliament, in recognition of parliamentary sovereignty– effectively returning the power of such arbitration to the representation of the collective will of the people of Bangladesh.

Ultimately, this is a compromise. This does still create avenues for judicial independence to be impeded by the whims of the office of the President and potentially, the office of the Prime Minister, who ultimately may have political motivations. However, the Constitution as it stands, is superior to any will or vision any other body

> may strive towards. Hence, any decision on the matter must be in accordance with the existing provisions of the Constitution. Perhaps a revision of the procedures regarding such matters is well due; but at this juncture, the letter of the Constitution must prevail."
>
> [Source: http://www.mazellaws.com/publication/blogs/judicial-independence-vs-constitutional-supremacy-a-study-of-bangladeshs-struggle-to-maintain-legal-integry]

In the case in hand, the claim of the appellant is that even though the Hon'ble Chief Justice recommended the names of six judges including the appellant for appointment as permanent judge only five Judges were appointed by the President dropping the appellant due to oblique purpose. As it has been discussed earlier that the president shall act in consultation with the Prime Minister while discharging his functions. In the instant case the President did not appoint the appellant as the opinion of the executive was not found to be positive. Now a question arises whether the said opinion is ordered to be disclosed. According to proviso to Article 48 of the Constitution anything about the advice rendered by the Prime Minister to the President shall not be enquired into in any court. In fact, it is the maker of constitution who gave such indefeasible protection to the advice of the executive of state. Article 51 provides that the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office.

The learned Counsels on behalf of the appellant referring the Ten Judges' case contends that in that case the Judges were appointed as Additional Judges for two years and thereafter they had not been appointed by the President as permanent Judges, the Appellate Division finally directed to consider the cases of Ten Judges for appointment in terms of guideline as formulated by the said Division. In this regard, it is our considered opinion that the said ten Judges were appointed as Additional Judges for two years in the regime of one political government but at the expiry of two years another government came to the power. So, their non-appointment as permanent judges is undoubtedly motivated by the political reason. But in the case in hand the appellant was appointed as Additional Judge in a regime of a political government and subsequently he has not been appointed as permanent judge in the regime of the same government. Thus, there is no question of political motivation in case of dropping the name of the appellant.

Now adverting to the qualification for appointment as a Judge of the Supreme Court we will look into the constitutional provisions of India, Pakistan *vis-a-vis* Bangladesh.

Article 217(2) of the Indian Constitution is extracted below:

> "(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-
> (a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession."

Likewise, Article 193(2) of the Pakistan Constitution provides that-

"2. A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than forty-five years of age, and-

a. he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or

b. he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan: or

c. he has, for a period of not less than ten years, held a judicial office in Pakistan."

Keeping analogy with the legal system of the sub-continent Article 95(2) of our Constitution enumerates the qualifications of a person to be appointed as a Judge of the Supreme Court. Article 95(2) provides that-

"95. (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and

(a) has, for not less than ten years, been an advocate of the Supreme Court; or

(b) has, for not less than ten years, held Judicial office in the territory of Bangladesh; or

(c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

Thus, according to Article 95 of our Constitution the qualification of an advocate for being appointed as a Judge of the Supreme Court is that he should be citizen of Bangladesh and has been an advocate of the Supreme Court of Bangladesh for at least ten 10 years.

In Al-Jehad Trust case reported in PLD 1996 SC 324, Para-7 the Supreme Court of Pakistan held that-

> "That the requirement of 10 years practice under Article193(2)(a) of the Constitution relates to the experience/ practice at the Bar and not simpliciter the period of enrolment".

Now, let us examine whether the appellant being an advocate has fulfilled the requirement of law as enumerated in Article 95(2) of the Constitution. It appears that in the instant Civil Appeal, the writ petitioner has stated that he was enrolled in the High Court Division of the Supreme Court of Bangladesh on 18.06.2000. It is apparent from Annexure-'A-2' of Writ Petition that the writ petitioner has obtained Bachelor of Laws with Honors from the University of Wolverhampton on 25.06.2004 and from Annexure-'A-l' of Writ Petition, it appears that the writ petitioner has obtained Postgraduate Diploma from the City University, London on 09.09.2005. Again, on plain reading of Annexure-'A', it appears that the petitioner was called to the Bar of England and Wales on 13.10.2005. Therefore, on examination of the Annexures-'A, 'A-1' and'A-2' it appears that after being enrolled in the

High Court Division of the Supreme Court of Bangladesh on 18.06.2000, the writ petitioner stayed in the United Kingdom (UK) until 13.10.2005 on which date the writ petitioner was called to the Bar of England and Wales. Thus, it is evident that after the date of enrolment as an advocate in the High Court Division on 18.06.2000 the writ petitioner stayed in UK for a period of minimum 5(five) years upto13.10.2005. Therefore, the writ petitioner was appointed as an Additional Judge of the Supreme Court of Bangladesh on 13.06.2012 having only 7(Seven) years of practice in the High Court Division which falls short of the necessary requirement for being appointed as a Judge. Apart from this, the writ petitioner did not mention anywhere in the writ petition when he returned back in Bangladesh and started practice as an advocate in the Supreme Court of Bangladesh. Therefore, it is crystal clear that at the time of his appointment as an Additional Judge of the High Court Division on 13.06.2012 the writ petitioner did not have the requisite qualification as per Article 95(2)(a) of the Constitution. In the prevailing situation, the executive was quite in right standing not recommending the appellant for appointment as a permanent Judge.

In the present case Chief Justice of Bangladesh recommended the names of 6 persons out of those, 5 persons have been made confirmed under Article 95 of the Constitution. So it cannot be said that the Executive has ignored the recommendation of the Chief Justice of

Bangladesh violating the observation given in the Ten Judges Case. In the present case the opinion of the Chief Justice of course has been given due importance in case of 5 persons (Judges).

In the case in hand it appears that the basic qualification of having 10 years practice to be appointed as a Judge of the High Court Division was found absent in case of the appellant A.B.M. Altaf Hossain. So the Chief Justice of Bangladesh recommended Mr. A.B.M. Alataf Hossain without being aware regarding this fact. The appellant was appointed as Additional Judge of the Supreme Court by the President of the Republic under the provision of Article 98 of the Constitution. The President need not consult with the Chief Justice in exercising his power under Article 98 of the Constitution thought after the Ten Judges Case it has become a practice to consult the Chief Justice prior appointment of any person as Additional Judge under Article 98 of the Constitution. Thus, it might have been presumed by the Chief Justice that Altaf Hossain the appellant had the requisite qualification of 10 years practice at the time of his appointment under Article 98 of the Constitution. The persons concerned in the government, who are in the helm of the affairs in the process of appointment of Judges of the Supreme Court, should have brought this matter to the notice of the Chief Justice before consultation by the President with him as per provision of Article 95 of the Constitution. However, it cannot be said that primacy of the opinion of the Chief Justice has been totally ignored in the appointment of 5 out of 6

persons under Article 95 of the Constitution. We have already discussed that 5 persons out of 6 were given appointment under Article 95 of the Constitution as their names were recommended by the Chief Justice, and only one person has been dropped by the President after consulting with the Chief Justice and being advised by the Prime Minister. We find no illegality in it.

In this regard we may get strength from the decision given in the case of *Shanti Bhushan and ors. vs. Union of India and ors.,* reported in (*2009) 1 SCC 657* it has been held that-

> "Person, who is not found suitable for being appointed on some post, should not be given extension."

In the case of *Hassan M.S. Azim vs. Bangladesh*, reported in *21 BLC(AD) 201*, this Division concurred with the observation of the High Court Division that the 'President is obliged to act in accordance with the advice of the Prime Minister'. The judgment of this case was pronounced by the High Court Division on 26.10.2010 and the Appellate Division judgment was pronounced on the 5th November, 2015. After pronouncement of the judgment in the Ten Judges' Case as well as after 15th amendment of the Constitution came in existence.

38. We have seen the record of the case in a chamber of one of our brothers. It is clear that the President has appointed 5 Additional Judges as permanent Judge under Article 95 of the Constitution out of 6 Additional Judges at the advice of the Prime Minister.

The observation made by Mr. Justice Md. Abdul Matin in the case of *Bangladesh and others vs. Md. Idrisur Rahman, Advocate and others,* reported in *29 BLD(AD)79* that as follows:

> "157. It is true that "consultation" was considered in the light of Article 116 of the Constitution but nevertheless the same principle all the more applies in the matter of appointment of judges of the Supreme Court under Articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate courts and minus the consultation and primacy the separation of judiciary from the executive will be empty words.
>
> 158.....
>
> 159. This word "independent" also occurs in Article 116A of the Constitution which runs as under:
>
> > "116A. Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions."
>
> 160. The expression "shall be independent" came up for consideration in the aforementioned case of Secretary, Ministry of Finance Vs. Mr. Md. Masdar Hossain and this Court considered both Article 94(4) as well as 116A of the Constitution quoted above and held as under:
>
> > "The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the

> Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly."

161. Therefore the expression "independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the Constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the Constitution.

162-165.....

166. Therefore it follows that consultation with the Chief Justice with primacy is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is not in conflict with Article 48(3) of the Constitution.

> 167. The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and, for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of Government. The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive.

The observation made by his Lordship Mr. Justice Md. Abdul Matin has been reflected in the judgment of *Raghib Rauf Chowdhury vs. Government of Bangladesh and others*, reported in *69 DLR(HCD) 317, Paragraph-46*.

The President of the Republic is elected under the provision of Article 48(1) of the Constitution by the Members of Parliament in accordance with law. As per Article 48(2) of the Constitution the President exercise the powers and perform the duties as per the Constitution. Article 48(2) of the Constitution runs as follows:

> "The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law."

The President exercises his powers at the advice of the Prime Minister which has been mentioned in Article 48(3) of the Constitution. Article 48(3) of the Constitution runs as follows:

> "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of Article 95, the President shall act in accordance with the advice of the Prime Minister."
>
> In the proviso of Article 48(3) it has been mentioned that "provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

Similar provision has been made for the President of India in Article 74 of the Indian Constitution and there is a little bit difference between the provision of Article 48(3) of the Constitution of People's Republic of Bangladesh and Article 74 of the Constitution of India. The provision of Article 74 of the Constitution of India runs as follows:

> "**Council of Ministers to aid and advise President**-(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.
>
> Provided that the President may require the Council of Ministers to reconsider such advice, either generally or

otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

In the Constitution of the Islamic Republic of Pakistan similar provision is available. The contents of Article 48(1) and (4) of the Constitution of the Islamic Republic of Pakistan runs as follows:

"48(1) In the exercise of his functions, the President shall act in accordance with the advice of the Cabinet or the Prime Minster.

Provided that the President may require the Cabinet or, as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2).....

.....

(3) Omitted.

(4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any court, tribunal or other authority."

In all democratic countries where parliamentary democracy is in existence President of the country enjoys some immunity. By the Articles 51(1) and (2) the President of the People's Republic of

Bangladesh has been given immunity. The contents of Article 51(1) and (2) of the Constitution runs as follows:

> "51.(1) Without prejudice to the provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government.
>
> (2) During his term of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court."

If we read together the provision of Article 48 and the provision of Article 51 of the Constitution, we find a clear picture regarding the powers and prerogatives of the President of the Republic. The President shall exercise his functions at the advice of the Prime Minister and the advice whatsoever given or not cannot be questioned as well as the action taken by the President is also immuned from being answerable to any Court. Thus, the writ petition of the appellant is not maintainable. Because in the writ petition the petitioner has challenged the action of the President. The appellant-writ-petitioner filed the writ petition challenging his "non appointment under Article 95 of the Constitution" which is totally barred under the provision of Article 51 of the Constitution.

For a smooth functioning and to establish a transparent judiciary, one of the organ of the State, the Executive shall come forward to assist the Chief Justice with all sorts of support including the materials, if any, in their hands against any person, who is under consideration to be appointed as Judge of the Supreme Court under Article 95 of the Constitution. At the time of appointment of the Additional Judges under the provision of Article 98 of the Constitution the Chief Justice is not required to be consulted as per Constitution, but practice has been developed to consult with the Chief Justice. The President alone can appoint the Judges of the Supreme Court in accordance with the Constitutional provisions. He is to consult with the Chief Justice and to take advice from the Prime Minister. The persons working with the executive, who are at the helm of affairs of the appointment of the Judges of the Supreme Court and provide assistance to the President in selecting the Judges, they are responsible to take all necessary information including antecedent of the person who are supposed to be appointed to the Supreme Court as per provision of Article 98 of the Constitution. When the question comes to appointment of the Judges under the provision of Article 95 of the Constitution the practice in our country is that the Chief Justice recommends the names of the Additional Judges already appointed and discharging their functions as *puisne* Judges in the High Court Division. Since at the time of initial appointment under the provision of Article 98 of the Constitution the antecedents of the aforesaid

persons presumably have been checked by the executive, usually the Chief Justice does not go to enquire the antecedent of any Judge afresh and of course it is not his function at all. The Chief Justice will see the legal accumen only of the incumbent Additional Judge and make his recommendation on that basis. Common practice is that, after expiry of two years or some more periods the Chief Justice recommends the names of the Additional Judges to the President, considering their performance in the Court, for appointment, under Article 95 of the Constitution.

The intention of the legislature has been expressed in Article 95(2) regarding qualification and disqualification of the person, who are eligible for appointment as a Judge of the Supreme Court. In Article 95(2) of the Constitution runs as follows:

> "95(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and-
> (a) has, for not less than ten years, been an advocate of the Supreme Court; or
> (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or
> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

In the case in hand Article 95(2)(a) of the Constitution is more relevant. It has been mentioned that if any person is not an Advocate of the Supreme Court for 10 years he will be disqualified to become a Judge of the Supreme Court. In our view, this 10 years advocacy

means continuous 10 years legal practice in the Supreme Court or aggregating of 10 years legal practice in the Supreme Court. Since it appears from a simple arithmetic calculation that the appellant did not have 10 years continuous practice in the Supreme Court, which we have discussed earlier, he was not qualified to become a Judge under Article 98 of the Constitution.

The President is the only authority to appoint the Judges of the Supreme Court either under Article 98 or 95 of the Constitution in accordance with the constitutional provision. There is no other authority in the country to appoint Judges of the Supreme Court. In the case in hand as per Article 95 of the Constitution President consulted with the Chief Justice and the recommendation of the Chief Justice has been implemented in major portion except the recommendation for the appellant, thus it can be said that the President did not commit any illegality by not giving appointment to the appellant in the post of permanent Judge of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution of the People's Republic of Bangladesh.

It has been observed in the Ten Judges' Case that the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98 and 116 of the Constitution. The contents of Article 116 of the Constitution runs as follows:

> "The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court."

Supreme Court does not mean the Chief Justice alone. Supreme Court means-the Supreme Court of Bangladesh under Articles 152 and 94 of the Constitution. But in Article 95 the words 'Supreme Court' is absent, the President is only obliged to consult with the Chief Justice not the Supreme Court.

From the above discussions, we would like to observe as under:

(a) The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of consultation to the President.

(b) In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President

is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others.

(c). If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts.

(d). After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate.

(e). If the Chief Justice again (2nd time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice.

(emphasis added)

In the Ten Judges' Case it has been observed that-

"11. As to the legitimate expectation of the Additional Judges it is held that they only have the right to be

considered for appointment under Article 95(1) of the Constitution."

We have discussed earlier that their Lordships in the said case in the form of direction asked the authority to consider the cases of the Ten Judges as per guideline they formulated. But it is clear that this Division did not give any direction to the government to appoint them as Judges of the Supreme Court. Fortunately, after the judgment of the Ten Judges' Case the Judges, who were dropped earlier were given appointment in a regime of political government favourable to them otherwise they would not have been given permanent appointment.

With the above observations, the Civil Appeal No. 232 of 2014 and Civil Petition for Leave to Appeal No. 602 of 2017 are disposed of.

No order in respect of Civil Petition for Leave to Appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

J.

Borhanuddin,J: I have had the privilege of going through the judgment and order proposed to be delivered by my learned brothers Obaidul Hassan, J., M. Enayetur Rahim, J., Md. Ashfaqul Islam, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

Concurring with the ultimate decision of the appeal, I would like to express my brief opinion on the point 'whether dropping the name of the appellant ignoring the opinion/recommendation of the Chief Justice of Bangladesh for confirmation and appointment under Article

95 of the Constitution is without lawful authority and violative of the Constitution.'

Facts in a nutshell are that considering qualification and antecedents, the Hon'ble President of Bangladesh appointed the appellant as Additional Judge of the Supreme Court of Bangladesh, High Court Division alongwith 5 other Additional Judges under Article 98 of the Constitution of Bangladesh vide Notification dated 13.06.2012. The Chief Justice administered them oath of office on 14.06.2012. Before expiry of 2(two) years tenure of the said Additional Judges, the Chief Justice being satisfied with their performance and integrity recommended all of them for appointment as permanent Judge of the High Court Division under Article 95 of the Constitution. Though 5(five) of them were duly appointed as permanent Judge by the President vide Gazette notification dated 09.06.2014 but the name of the appellant was dropped from the list ignoring recommendation of the Chief Justice. As such, the appellant as petitioner invoked the writ jurisdiction under Article 102 of the Constitution on the plea that dropping the name of the appellant for appointment under Article 95 of the Constitution ignoring recommendation of the Chief Justice affected very independence of the judiciary.

Upon hearing learned Advocate for the writ-petitioner, a Division Bench of the High Court Division rejected the writ petition summarily vide order dated 24.09.2014.

Being aggrieved and dissatisfied with the order passed by the High Court Division, the writ-petitioner preferred Civil Petition for Leave to Appeal No.2626 of 2014 invoking Article 103 of the Constitution. After hearing the parties, this Division granted leave vide order dated 06.11.2014.

Consequently, instant civil appeal arose.

For proper appraisal, it is necessary to discuss the relevant Constitutional provisions relating to the appointment of Judges under Article 98 and 95 of the Constitution which are as under:

> ***"98.Additional Supreme Court Judges:*** *Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period :*
>
> > *Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under Article 95 or as an Additional Judge for a further period under this Article."*
>
> *(emphasis supplied)*

-AND-

> ***"95(1). Appointment of Judges:*** *The Chief Justice shall be appointed by the President, and the other Judges shall*

be appointed by the President after consultation with the Chief Justice."

(emphasis supplied)

It is pertinent to mention here that in the unamended Article 95(1) of the Constitution provision of consultation with the Chief Justice of Bangladesh by the President was there but lateron said provision was omitted through Constitutional 4th Amendment Act. Thereafter, by the Constitutional 15th Amendment Act the original provision of Article 95(1) was again restored. Thus, now the provision of consultation with the Chief Justice of Bangladesh by the President in appointing Judge under Article 95(1) is a Constitutional requirement. It is not disputed that the then Chief Justice of Bangladesh has recommended name of the appellant for appointment under Article 95(1) of the Constitution.

Appellant's contention is that dropping of his name ignoring recommendation of the Chief Justice for appointment under Article 95(1) of the Constitution affects the independence of judiciary.

The concept of independence of judiciary is that the Judiciary should be free from other branches of the Government. It should have freedom from fear and favour of the other two organs. The concept has its origin in the doctrine of separation of power. Defining the Independence of Judiciary by emphasizing only the creation of Judiciary as an autonomous institution separate from other branches is not sufficient unless the core idea of judicial independence is

exhibited, which is the independent power of the judges to decide a case before them according to the rule of law uninfluenced by any other factors. Independence of the Judiciary is important for the sole reason of safeguarding the rights and privileges of the people and thereby providing equity and justice to all. The Rule of Law, which explains the supremacy of the Constitution, can only be achieved when there is an independent and impartial judiciary at the top level to ensure proper interpretation and implementation of the Rule of Law. For this reason, it is so important to maintain the Independence of Judiciary and thus protect the democracy and as such the concept of Independence of Judiciary is a basic structure of our Constitution.

In the case of *Anwar Hossain Chowdhury Vs. Government of People's Republic of Bangladesh*, reported in 41 DLR (AD)(1989) 165, this Division observed:

> *"This point may now be considered. Independence of Judiciary is not an abstract concept. Bhagwati, J.: said 'if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limit of the law and thereby making the Rule of Law a meaningful and effective.' He said that the Judges must uphold the core principle of the Rule of Law which says, 'Be you ever so high, the law is above you.' this is the principle of Independence of Judiciary which is vital for the establishment of real participatory democracy, maintenance of the Rule of Law as a dynamic concept and*

delivery of Social Justice to the vulnerable sections of the community. It is this principle of Independence of Judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution. (S.P. Gupta and others vs. President of India and others AIR 1982 SC at page-152).”

Again, in the case of *Secretary, Ministry of Finance vs. Mr. Md. Masdar Hossain and others*, reported in 20 BLD (AD)(2000) 104, this Division held:

“The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116 A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the constitution, but we find no provisions of the constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 113 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly cannot be done indirectly.”

Further, in the case of *Supreme Court Advocate-on-Record Association and another Vs. Union of India (popularly known as Fourth Judges Case)*, reported in (2016) 5 SCC 01, the Supreme Court of India also expressed its view in the following manner:

> *"The Rule of Law is recognized as a basic feature of our Constitution. It is in this context that the aphorism, 'Be you ever so high, the law is above you', is acknowledged and implemented by the Judiciary. If the Rule of Law is a basic feature of our Constitution, so must be the independence of the judiciary since the 'enforcement' of the Rule of Law requires an independent judiciary as its integral and critical component."*

From the above referred cases, it is crystal clear that the Independence of Judiciary is a 'Basic Structure' of our Constitution which cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution.

In the context of the case in hand, it requires to discuss what is the effect of recommendation of the Chief Justice in appointing Judges under Article 95(1) of the Constitution.

In the case of *Supreme Court Advocates-on-Record Association and another vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC 268, the Supreme Court of India observed:

> *"In practice, whenever the Council of Ministers both at central and state level, as the case may be, plays a major role in its self-acclaimed absolute supremacy in selecting and appointing the Judges, paying no attention to the opinion of the CJI, they may desire to appoint only those who share their policy performances or show affiliation to their political philosophy or exhibit affinity to their ideologies. This motivated selection of men and women to*

the judiciary certainly undermines public confidence in the Rule of Law and resultantly the concept of Separation of Judiciary from the Executive as adumbrated under Article 50 and the cherished concept of Independence of Judiciary untouched by the Executive will only be forbidden fruits or a myth rather than a reality. In this situation, the consultation with the CJI will be an informal one for the purpose of satisfying the constitutional requirements. As it has been pointed out in the Gupta's case (AIR 1982 SC 149) that the judiciary may be the weakest among the constitutional functionaries, for the simple reason that it is not possessed of the long sword (that is the power of enforceability of its decisions)or the long purse (that is the financial resources), but if the opinion of executive is to prevail over, the opinion of CJI in matters, concerning judiciary on account of that reason, then the independent judiciary which is a power of strength for all – particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer."

It is significant to mention here that while recommending a candidate for the higher judiciary, the Chief Justice requires to evaluate the calibre and legal ability of the candidate. Regarding professional attainments, legal soundness, ability, skill etc of the candidate be evaluated only by the Chief Justice in the matter of appointment under Article 95 of the Constitution. However, since the judiciary does not have such mechanism to evaluate the antecedent and background of a candidate, the Chief Justice may not express his/her opinion about the conduct, character and antecedent of the

candidate. But the Executive with its sufficient machineries can check the antecedent and background of the candidate and form its opinion on that aspect. If the opinion of the Executive placed before the Chief Justice with all particulars including the conduct, character and antecedent of such candidate, the Chief Justice can evaluate the fitness of the candidate in all aspects. Therefore, in all circumstances, the opinion of the Chief Justice has the right of primacy in appointing the Judges under the provisions of Constitution.

If the opinion of the Executive prevails over the opinion of Chief Justice in matters concerning appointment of Judges, then the Independence of Judiciary which is a basic structure of the Constitution as well as the power of strength for all-particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer.

In the case of *Supreme Court Advocate-on-Record Association and another vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC, 268 the Supreme Court of India held that:

> *"Then the question which comes-up for consideration is, can there be an Independent Judiciary when the power of appointment of Judges vests in the Executive? To say yes, would be illogical. The Independence of Judiciary is inextricable linked and connected with the constitutional process of appointment of Judges of the higher Judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the framers of the Constitution could have*

never intended to give this power to the Executive. Even otherwise the Governments - Central or the State - are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex-Court. The Executive - in one from the other - is the largest single-litigant before the Courts. In this view of the matter the Judiciary being the mediator - between the people and the Executive - the framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the Executive. This Court in S.P. Gupta's case (AIR 1982 SC 149) proceeded on the assumption that the Independence of Judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with the broader facets of the two concepts - 'Independence of Judiciary' and 'Judicial Review' - which are inter-linked."

Finally, the point mentioned above considered in the case of *Supreme Court Advocates-on-Record Association vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC 268 before a Bench of nine Judges in which by majority of seven to two, the Supreme Court of India held:

"When an argument was advanced in Gupta's case (AIR 1982 SC 149) to the effect that where there is difference of opinion amongst the Constitutional functionaries required to be consulted, the opinion of the CJI should have primacy, since he is the head of the Indian Judiciary and paterfamilias of the judicial fraternity, Bhagwati, J. rejected that contention posing a query, as to the principle

on which primacy can be given to the opinion of one constitutional functionary, when Clause-(1) of Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned. The learned Judge by way of an answer to the above query has placed the opinion of the CJI on par with the opinion of the other constitutional functionaries. The above answer, in our view, ignores or overlooks the very fact that the judicial service is not the service in the sense of employment, and is distinct from other services and that "the members of the other services... cannot be placed on par with the members of the judiciary, either constitutionally or functionally". (See All India Judges' Association and others case (1993(4) JT (SC) 618) (supra). There are innumerable impelling factors which motivate, mobilize and import momentum to the concept that the opinion of the CJI given in the process of 'consultation' is entitled to have primacy, they are:

(1) The 'Consultation' with the CJI by the President is relatable to the judiciary and not to any other service.

(2) In the process of various Constitutional appointments 'consultation' is required only to the judicial office in contrast to the other high ranking constitutional offices. The prior 'consultation' envisaged in the first proviso to Article 124(2) and 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

(3) The 'consultation' by the President is a sine-qua-non or a condition precedent to the exercise of

the constitutional power by the President to appoint Judges and this power is inextricably mixed up in the entire process of appointment of Judges as an integrated process. The 'consultation' during the process in which an advice is sought by the President cannot be easily brushed aside as an empty formality or a futile exercise or a mere casual one attached with no sanctity.

----------(5) Article 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the higher echelon of judicial service by the operation of Articles 74 and 163 of the constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6)The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as per the mandatory proviso to Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject matter concerning the

judiciary and in opposition to the context in which 'consultation' is required. After having observed that the 'consultation' must be full and effective by Bhagwati, J. in Gupta's case there is no conceivable reason to hold that such 'consultation' need not be given primacy consideration.----------

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In the same case the Supreme Court of India further observed:

"The majority view in S.P. Gupta (AIR 1982 SC 149) to the effect that the executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by Articles 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the

> *Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India."*

The aforementioned discussions leads to an inescapable conclusion that all the factors mentioned above come together to support the view that the Executive will not be justified in enjoying the supremacy over the opinion of the Chief Justice in the matter of appointing Judges to the superior judiciary. Therefore, to place the opinion of the Chief Justice at per with the other constitutional functionary is not in consonance with the spirit of the Constitution.

It is very important to discuss the matter at this stage that the opinion/recommendation rendered by the Chief Justice in appointing Judges in the higher judiciary under Article 95(1) of the Constitution must be effective, meaningful, purposive, consensus oriented and leaving no room for complaint of arbitrariness or unfair play.

The Supreme Court of Pakistan in the case of *Al- Jehad Trust vs. Federation of Pakistan*, reported in PLD 1996 Supreme Court 324, held:

> *"The words 'after consultation' employed inter alia in Articles 177 and 193 of the Constitution connote that the*

> *consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive."*

The Supreme Court of India in the case of *Special Reference No.1 of 1998*, reported in AIR 1999 Supreme Court 1, observed in the following manner:

> *"The expression 'consultation with the Chief justice of India' in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute 'consultation' within the meaning of the said Articles."*

Based upon above discussions and the referred cases, I am of the view that since the Chief Justice, the head of the judiciary and paterfamilias of the Judicial fraternity, the opinion/recommendation tendered by him in appointing Judges in the higher Judiciary has primacy and as such to uphold the power, position and role of the judiciary i.e. the Independence of Judiciary, the opinion/recommendation so tendered by the Chief Justice in appointing Judges under Article 95(1) of the Constitution is not a mere formalities at all, rather it has a great significance, importance and consequence and at the same time the Chief Justice before giving his

opinion/recommendation to the President should take aid from the other two Senior Judges of the Appellate Division, next to the Chief Justice, so that no room for complaint of arbitrariness or unfair play occurs.

The view taken in the case of *S.P. Gupta and others vs. President of India*, reported in AIR 1982 SC 149, that the opinion of the executive relating to antecedent of the candidate is to prevail over the opinion of the Chief Justice is overruled in the Second Judges Case. The case of Gupta's was decided in the year of 1981 and the Second Judges Case was decided in the year of 1994. Since Gupta's case was an earlier one and the Second Judges Case was later one and by the Second Judges case, the view taken by the Gupta's case was overruled as such, I respectfully unable to concur with the view expressed by one of my brother relying Gupta's case on the point of primacy of the opinion in appointing judges in the higher judiciary.

WHETHER ARTICLE 48(3) OF THE CONSTITUTION IS A BARRIER FOR JUDICIAL REVIEW:

In defence of the impugned order dated 09.06.2014, learned Attorney General submits that barring appointment of the Prime Minister and the Chief Justice, the President is under obligation to act in accordance with the advice of the Prime Minister and contents of the advice cannot be enquired into in any Court. Refereeing the case of *Bangladesh and others vs. Md. Idrisur Rahman and others*, reported in 29 BLD (AD) 79, learned Attorney General submits that the opinion of the

executive shall have dominance in the matter of antecedent of a candidate (Judge) and considering the incident of the appellant the President of Bangladesh did not appoint him as a permanent Judge of the High Court Division. On the query of the Court, learned Attorney General referring Article 48(3) of the Constitution submits that the basis of advice tendered by the Executive to the President cannot be enquired into in any Court.

No documents/papers were placed before us to examine the basis by which the advice was tendered by the executive to drop the name of the appellant ignoring recommendation of the Chief Justice.

Article 48(3) of the Constitution is reproduced below:

> *"In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to Clause(3) of Article 56 and the Chief Justice pursuant to Clause(1) of Article 95, the President shall Act in accordance with the advice of the Prime Minister:*
>
> > *Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any Court."*

Article 74(2) of the Constitution of India is almost similar with the proviso attached to Article 48(3) of our Constitution.

Article 74(2) of the Constitution of India is as follows:

> *"74(2) the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any Court."*

This provision of Article 74(2) of the Indian Constitution has been elaborately discussed in the case of *S.R. Bommai and others vs. Union of India (UOI) and others*, reported in AIR 1994 SC 1918, and their lordships held :

> *"Article 74(2) is not a barrier for judicial review. It only places limitation to examine whether any advice and if so what advice was tendered by the Council of Ministers to the President. Article 74(2) receives only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of Ministers is subject to judicial scrutiny."*

In United States of America the primacy to the executive privilege is given only where the court is satisfied that disclosure of the evidence will expose military secrecy or of the document relating to foreign relations. In other respects the court would reject the assertion of executive privilege. In *United States v. Reynolds 1935 (345) U.S. 1, Environmental Protection Agency v. Patsy T. Mink 410 U.S. 73 (35) L Ed. 2nd 119, Newyork Times v. U.S. (1971) 403 U.S. 713 (Pentagon Papers case) and U.S. v. Richard M. Nixon* (1974) 418 U.S. 683: 41 L. Ed. 2nd 1035 what is known as Watergate Tapes case, the Supreme Court of U.S.A. rejected the claim of the President not to disclose the conversation he had with the officials.

Judicial review is a basic feature of the Constitution. This Court has constitutional duty and responsibility to exercise judicial review as

centennial que vive. Judicial review is not concerned with the merits of the decision, but with the manner in which the decision was taken.

In the case of *R.K. Jain vs. Union of India (UOI) and others*, reported in AIR 1993 SC 1769, the Supreme Court of India observed:

> *"The Administrative Procedure Act 5, Article 52 was made. There under it was broadly conceded to permit access to official information. Only as stated here in before the President is to withhold top secret documents pursuant to executive order to be classified and stamped as 'highly sensitive matters vital to our national defence and foreign policies'. In other respects under the Freedom of Information Act, documents are accessible to production. In the latest Commentary by McCormick on Evidence, 4th Ed. By John W. Strong in Chapter 12, surveyed the development of law on the executive privilege and stated that at p.155, that once we leave the restricted area of military and diplomatic secrets, a greater role for the judiciary in the determination of governmental claims of privilege becomes not only desirable but necessary – Where these privileges are claimed, it is for the judge to determine whether the interest in governmental secrecy is outweighed in the particular case by the litigant's interest in obtaining the evidence sought. A satisfactory striking of this balance will, on the one hand, require consideration of the interests giving rise to the privilege and an assessment of the extent to which disclosure will realistically impair those interests. On the other hand, factors which will affect the litigant's need will include the significance of the evidence sought for the case, the availability of the desired information from other sources, and in spa instances the nature of the right being asserted in the litigation."*

Based on the decisions above, my considered view is that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but Article 48(3) of the Constitution is no bar to the production of all the materials on which the advice was based.

Accordingly, I am of the view that the writ petition filed by the appellant is very much maintainable.

Another fold of argument advanced by the learned Attorney General that the appellant failed to qualify the criteria for appointment as a Judge as enumerated in Article 95(2)(a) of the Constitution i.e. when appointed as an Additional Judge under Article 98 the appellant was not a practicing Advocate of the Supreme Court for 10(ten) years. In this context I share the views expressed by my brothers Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

I am also share the view of my brothers M. Enayetur Rahim, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J. that the case of the appellant may be considered by the appropriate authority concerned.

With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

Civil Petition for Leave to Appeal No.602 of 2017 is also disposed of in the light of the judgment and order passed in Civil Appeal No.232 of 2014.

No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of sole petitioner.

However, no order as to costs.

J.

M. Enayetur Rahim, J: I have had the opportunity to go through the main judgment proposed to be delivered by my learned brother Obaidul Hasan, J. as well as the individual views/opinions expressed by learned brothers Md. Ashfaqul Islam, J. Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

I am in agreement with the ultimate decision and observations made by my learned brother Obaidul Hasan, J.

However, on some issues I would like to express my own opinions.

On behalf of the respondents, the question of maintainability of the writ petition has never been agitated and leave was not granted on the said issue. However, my learned brother Obaidul Hasan, J has opined that in view of the provision of article 51 of the Constitution the writ petition is not maintainable.

Article 51 of the Constitution is as follows:

> *"51.(1) Without prejudice to the provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government*
> *(2) During his term of office no criminal proceedings whatsoever shall be instituted or continued against the*

President in, and no process for his arrest or imprisonment shall issue from, any court."

Upon meticulous examination of the above provision of the constitution, it is my considered view that article 51(1) consist of two parts. First part is, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office. Second one is, despite the above provision the right of any aggrieved person to take proceedings against the Government has been guaranteed.

Article 51(2) speaks that during the term of office of the president, no criminal proceedings whatsoever shall be instituted or continued against the President, and no process for his arrest or imprisonment shall be issued from any Court.

Article 48(3) of the constitution speaks that President in the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95 shall act inaccordance with the advice of the Prime Minister.

Article 55(4) of the constitution requires that all executive actions of the Government shall be taken in the name of the President.

If we read article 48(3) and 55(4) of the constitution together, then it is abundantly clear that except in two occasions, the decision of the President is nothing but the decision of the executive including the

appointment of Judge(s), Additional Judge(s) of both the Divisions of the Supreme Court.

It is now well settled that judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself and further, that in judicial review, court can examine whether in a given case the authority concerned has acted bonafide, reasonably, just and fairly and also within its jurisdiction.

In the case of **Hyundai Corporation vs. Sumikin Bussan Corporation and others, reported in 54 DLR(AD),88** this Division has observed that:

> *"Transparency in the decision making as well as in the functioning of the public bodies is desired and the judicial power of review is to be exercised to rein in any unbridled executive functioning."*

In the case of **Tata Cellular vs. Union of India, AIR 1966 (SC)11,** wherein the Supreme Court of India has been held to the effect:

> *"The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.*
>
> *. . . . . .*
>
> *. . . . . .*
>
> *Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."*

From the records it reveals that prayers made in the present writ petition by the appellant and writ petition NO.1543 of 2003, heard along with writ petition Nos.3217 & 2975 of 2003 are also most similar and identical.(**Ten Judges' cases**)

This Division in deciding the Civil Petition for leave to appeal Nos.2221 and 2222 of 2008 with Civil Petition for leave to appeal Nos.2046 and 2056 of 2008 **[Bangladesh and others vs. Md. Idrisur Rahman and others, 29 BLD(AD),29]**, which had arisen out of the judgment passed in above mentioned 'Ten judges' cases' has held that judicial review only limited purpose is available in matter of appointment of judges.

It is pertinent to discuses here that the President of our country has been given the power of pardon and reprieves under article 49 of the Constitution of the People's Republic of Bangladesh.

No doubt President's such power of granting pardon is very wide and does not contain any limitation as to the time and occasion on which and the circumstances in which such power could be exercised. The pardoning power granted to the President was historically a sovereign power, politically a residency power and harmonistically an aid of intangible justice. However, the judicial review of the pardoning power is a classic illustration of evolution of law through judicial interpretation. Starting with extreme hesitation to even look into the subject, the trend has now shifted towards a more

balance and middle path approach. In the case of **Chandra Rabha vs. Khagendra Nath, MANU/SC/0190/1960** the Supreme Court of India has clearly made a distinction between judicial and executive power, which according to it operates a different plans, and one does not affect the other.

Article 72 and Article 161 of the constitution of India are similar to article 49 of our Constitution. Article 72 and 161 of the constitution of India have conferred power upon the president of India and the Governor of the States respectively to give pardon or remit sentence of a convict.

In the case of **Maru Ram vs. Union of India reported in AIR(SC),1980, 2147**, it has been held that:

> *"Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will court examine the exercise."*

In the case of **Kehar Singh vs. Union of India reported in Air 1989(SC) 653,** it has been held that:

> *"Upon the consideration to which we had adverted, it appears to us clear that the question as to the area of Presidents power under Art, 72 falls squarely within the judicial domain and can be examined by the Court."*

In the case of **Swaran Singh vs. State of UP, reported in (1998) SCC 75,** it has been held that:

> *"In view of the said aforesaid settled legal proposition, we cannot accept the rigid contention of the learned counsel of the third respondent that this court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrary, malafide or in absolute disregard of the finer canons of the constitutionalism, the byproduct order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."*

In the above case the Supreme Court of India ultimately quashed the order of remission of sentence of convict Shri Doodh Nath, an MLA of Uttar Pradesh, on the ground that governor was not posted with material facts and thereby, he was apparently deprived of the opportunity to exercise the powers in a fair and just manner. And the supreme court of India held that: "the order now impugned fringes on arbitrariness."[Underlines supplied]

In the case of **Shatapal vs. State of Haryana, reported in AIR 2000 (SC) 1702,** similar view has been reiterated. In the said case also the order granting pardon was set aside on the ground that Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome the conviction and sentence passed by the court.

In deciding the merit of the above appeal, the Supreme Court of India categorically held that:

> *"There cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and do not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. <u>But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a malafide one or the Governor has passed the order on some extraneous consideration.</u>"*
> [underlines supplied]

In the **Airport Authority case MANU/SC/0048/1979(1979) IILLJ217SC** the Supreme Court of India has held that:

> *"Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.*
> *It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematize arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the*

> *manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power."*

In view of the above propositions, the court cannot declare judicial hands off. So long as the question arises whether an authority under the constitution has acted with the limit of its power or exceeded it or the power has been exercised without application of mind and mechanically or the order in question is a *mala fide* one or the order has been passed on some extraneous consideration or how far the order is fair and reasonable it can certainly be examined and decided by the court in judicial review. The court cannot be debarred to examine the decision making process and the correctness of the decision itself.

A Division Bench of the High Court Division in the case of **Sarwar Kamal vs. The State, reported in 64 DLR(2012) page-329** has observed:

> "**.....***the action of the president or the Government, as the case may be, must be based on some rational, reasonable, fair and relevant principle which is non discriminatory and it must not be guided by any extraneous or irrelevant considerations. It is well settled that all public power including constitutional power shall never be exercisable arbitrarily or malafide and ordinarily, guideline for fair and equal execution are guarantors of the valid play or power and when the mode of power of*

exercising a valid power is improper or unreasonable, there is an abuse of power". [Underlines supplied]

It is pertinent to mention here that being aggrieved by the aforesaid judgment convict Sarwar Kamal filed criminal petition for leave to appeal No.474 of 2012 before this Division, which was dismissed for default and eventually, application for restoration was rejected.

In view of the above propositions as discussed above, I have no hesitation to hold that the writ petition filed by the present appellant is not barred in view of the provision of article 51 of the Constitution. This article, in my opinion gives the President personal immunity from any kind of civil and criminal proceedings during his term of office. This immunity does not debar any aggrieved person to take any proceedings against the decision taken by the Government in view of provision of the 2nd part of the article 51(1).

Further, if it is hold that the writ petition is not maintainable, then question would be that in what extent Court can make observations and give directions on such writ petition.

Thus, I am in respectful disagreement with the observation of my learned brother Obaidul Hasan, J. that in view of article 51 of the constitution the writ petition is not maintainable.

Article 95(1) of our constitution enshrined that the judges of the both the Division of the Supreme Court shall be appointed by the president after '**consultation**' with the Chief Justice.

However, reality is that no guideline(s) or rule(s) is provided or framed for the President to exercise his power of consultation with the Chief Justice for appointment of the Judges.

In the **'Ten Judges'** case High Court Division dealt with the word '**consultation**' and its scope and purport. The High Court Division observed **[61 DLR, 523]**:

> *"Consult', according to Chambers Dictionary, means to ask advice of : to look up for information or advice: to consider wises, feelings to discuss.* ***In R Pushpam vs State of Madras AIR 1953 Mad 392*** *it was observed "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution; would provide rational, legal constitutional yardstick to measure and ascertain the scope and content of consultation as contemplated by Article 217(1). It must not be forgotten that the consultation is with reference to the subject matter of consultation and therefore relevant facets of the subject matter must be examined, evaluated and opined upon to complete the process of consultation. It is necessary that consultation shall be directed to the essential points and to the core of the subject involved in the discussion. The consultation must be enabling the consulter to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject matter of the consultation."*[underlines supplies]
>
> . . . . . .
>
> In **SP Gupta's case Bhagwati J**, observed as follows:

> *"The question immediately arises what constitutes 'consultation' within the meaning of clause(2) of Article 124, clause(1), Article 217. Fortunately, this question is no longer res integra and it stands concluded by the decision of this Court in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). It is true that the question in Sankalchand Sheth's case (supra) related to scope and meaning of 'consultation' in clause(1) of Article 222, but it was common ground between the parties that 'consultation' for the purpose of clause(2) of Article 124 and clause(1) of Article 217 has the same meaning and content as 'consultation', in clause(1) of Article 222."*
>
> And
>
> *"Krishna Iyer J. speaking on behalf of himself and Fazal Ali J also pointed out that "all the materials in the possession of one who consults must be unreservedly placed before the consultee" and further "a reasonable opportunity for getting information taking other steps and getting prepared for tendering effective and meaningful advice must be given to him" and consultant in turn must take the matter seriously since the subject is of grave importance."*

In ***Al-Jahed Trust* case** the Supreme Court of Pakistan approved the majority views with certain modification of the *Second Judges*' Case. The unanimous views are as follows:

> *"The words "after consultation" employed, inter alia, in Articles 177 and 193 of the Constitution connote that <u>the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play</u>".*

In view of the above propositions **'Consultation'** means **'effective consultation'**. Such consultation of the President with the Chief Justice for the purpose of appointment of Judges in the Supreme Court is not a mere formalities, in other words it's not 'chatting at the tea table'; rather, it has a great sanctification, significance, importance, consequence and far reaching effect.

In the **Ten Judges'** cases this Division categorically held that:

> "*In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.*"

In view of the above, to avoid any controversy in the appointment of judges' it is desirable that at the time of consultation the executive should place all materials relating to the antecedents before the Chief Justice and Chief Justice shall also place necessary opinions as to his satisfaction in the area of legal acumen and suitability for the appointment.

It is expected that in the process of consultation the President and Chief Justice will reach a consensus and outcome of such consensus cannot be frustrated or dismissed on any unreasonable plea or on some extraneous consideration in the grab of exercising the power under article 48(3) of the constitution. If the positive outcome or

consensus of the consultation is negated, then the position and image of both the President and Chief Justice will be undermined.

In the **second Judge's case JS Verma,J.** opined that:

> "*in order to ensure effective consultation between all the constitutional functionaries involved in the process the reasons for disagreement, if any must be disclosed to all others. All consultations with the everyone involved must be in writing and transmitted to all concerned, as a part of the record.*"*[Underlines supplied]*

In view of the above, it will be not a luxurious and unjust expectation that our Constitutional authorities involved in the process of appointment of Judge shall follow the above method, until relevant law or rules have been made.

In this particular case from the records, as we have seen, it reveals that the name of the appellant was recommended by the Chief Justice. However, reasons are not available in the record for not appointing him and under the Constitutional scheme, the Court has no authority to make an inquiry of privilege communication, verbally or written as the case may be, between the Prime Minister and the President.

However, I am agreed with the wish as expressed by my learned brothers Md. Ashfaqul Islam J, Md. Abu Zafor Siddique J, and Jahangir Hossain J, that the case of the appellant be considered by the authority.

J.

Md. Ashfaqul Islam, J: I have had the occasion of going through the Judgments proposed to be delivered by my learned brothers, Obaidul Hassan, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J. Upon a thorough assessment and overall aspects of the issue facing us I am in agreement with the findings and decision of my brother Obaidul Hassan, J and record my reasons as under:

Repetition of fact is not necessary as his lordship has given an elaborate and exhaustive deliberation upon the same. The facts only which are necessary to be discussed in this context, would be addressed.

The cardinal question before us is whether even after the recommendation of the Chief Justice upon effective consultation to appoint a Judge under Article 95(1) of the Constitution the executive is left with the choice to drop any name so recommended by the Chief Justice to be appointed as the Judge of the Supreme Court under Article 95(1) of the Constitution.

Consequently, the provisions of the Constitution governing the appointment of Judges (Article 95), the appointment of Additional Judges of the Supreme Court (Article 98) together with the limitation of the power of the President under Article 48(3) have to be considered as they have significantly focused on the issue.

Inevitably, the interpretation of the above provisions in this context has to be made by taking recourse to the methods which are suggested by the Constitution itself to be followed in so doing. It has

to be noted that the provisions of the Constitution as stated above are the outcome of the positive and cohesive thinking of the framers of the Constitution which they in their wisdom thought it proper to be incorporated in the Constitution in the manner as they exist in the Constitution to meet different situations, exigencies and requirements. Otherwise those provisions would not have been there.

Keeping primarily in mind what I have discussed let me now dwell upon the issue before me. The appointment of the Judges of both the Divisions of the Supreme Court by recommending and selecting names of the eligible persons apparently seems to be noble as it endeavors in the process of appointment to uphold the primacy of the Chief Justice of Bangladesh in the searching who are the best choice to become member of their own fraternity. Pertinently, it has to be mentioned that no implied limitation, can be applied while interpreting a written Constitution like ours when the limitations are clearly spelled out in the provision of the Constitution itself.

A rock solid basis of the Constitution requiring a very intrinsic interpretation is Article 48(3) and its proviso which has to be considered in this regard. Under Article 48(3) excepting the appointment of the Prime Minister and the Chief Justice, the President shall be acting in accordance with the advice of the Prime Minister. So the express Constitutional provision which limits the power of the President under Article 48(3) is unquestionable. Mr. Mahmudul Islam in his book 'Constitutional Law of Bangladesh' stated that-

> "Art. 48(3) provides that the question whether any, and if so what, advice has been tendered by the Prime Minister to

> the President shall not be inquired into by any court as it is politically undesirable to have a disclosure of the advice tendered. Because of this provision there can be no remedy in court if a President chooses to act without or against the advice of the Prime Minister. It is true that the possibility of impeachment for violating the Constitution will act as a deterrent, but "this fear in the world of political intrigues that are incidental to the game of power-politics, is not, after-all such an effective brake upon the designs of an irresponsible President." If the government produces the papers showing the advice tendered, the court may look into such papers and can come to its findings on the basis of such papers." India v. Jyoti Prakash, AIR 1971 SC 1093.

The power of the appointment of the Judges of the Supreme Court lies with the President who exercises the power within the limitations of Article 48(3) of the Constitution. The President appoints additional judges of the Supreme Court and the Judges of the Supreme Court under Articles 98 and 95 of the Constitution respectively. When the President is satisfied that the number of Judges of the Supreme Court should be increased he makes appointment. Before the Fourth Amendment of the Constitution, the Chief Justice was to be consulted while making the appointment of the Judges of the Supreme Court. Though the said provision of Constitution had been amended by the Fourth amendment ignoring consultation with the Chief Justice for the appointment of Judges even then the 'convention' of consulting with the Chief Justice before making any appointment of the Judges of the

Supreme Court had been followed consistently. A deviation that happened in 1994 was cured forthwith reaffirming the convention as it used to be followed before. The fifteenth amendment, however, reproduced the provision of consultation with the Chief Justice in the matter of appointment of the judges of the Supreme Court.

While appreciating the core issue before us regard has to be taken whether Article 95(1) of the Constitution under which judges of the Supreme Court is appointed should be construed giving a strict interpretation employing a sense of rigidity or it should be interpreted and viewed with a liberal and flexible vision by taking into account some other related Constitutional Provisions and also from the perspective of some realities and unimpeachable circumstances.

My approach on the point is somewhat different. I would like to embark upon some express constitutional aspects having an indelible ingrained meaning and status universal in nature, to appreciate the entire issue facing us.

Let me first focus upon the different views taken by the superior Courts of home and abroad on the norms of the interpretation of the Constitutional provisions. It is generally said that the principles relating to interpretation of statutes are applicable in interpreting the provisions of Constitution. In the decision of Commissioner of Tax vs. Gulistan Cinema 28 DLR (AD) 14, Kemaluddin Hossain, J observed:

> "The rule of interpretation of the Constitution is same as the interpretation of a Statute."

In the case of Syed Ghulam Ali Shah V. State 22 DLR (SC) 247 M R Khan, J observed what should be the mode of interpretation of the Constitutional provisions in the following manner,

> "Now it is another well recognized cannon of interpretation that a provision of a Constitution Act should not be construed in a narrow or restricted sense, but widest possible construction should be given to it according to the ordinary meaning of the word used and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in the same."

Same view was taken in Mohammad Nur Hussain -Vs- Province of East Pakistan PLD 1959 (SC) 470.

Mr. Mahmudul Islam, Senior Advocate, Supreme Court in his Constitutional Law of Bangladesh while giving his deliberation on liberal interpretation of the Constitution has found, "If two constructions are possible, the court shall adopt that which implements, and discard that which stultifies the apparent intention of the framers of the Constitution. The rule of strict construction applied to penal and fiscal statutes is not applicable in the matter of Constitutional interpretation. Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense".

Likewise Seervai in his 'Constitutional Law of India' on the same point found, "well established rules of interpretation require that the meaning and intention of the framers of a Constitution be it a

parliament or a Constituent Assembly- must be ascertained from the language of that Constitution itself; Seervai further viewed that the golden rule in construing a Constitution conferring the most liberal construction should be put upon the words so that they may have effect in their widest amplitude."

In the famous case of A.K. Gopalan-V- State of Madras AIR 1950 (SC)27, Justice B.K. Mukherjea expressed his view in the manner:

> "The Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting undoubtedly apply which are applicable in construing a statute, but the ultimate result must be determined upon the actual words used not in vaccuo but as occurring in a single complex instrument in which one part may throw light on the other."

In the land mark decision of S.C. Advocate-on-Record Association vs. Union of India reported in AIR 1994 (SC) 268 Supreme Court of India in an unambiguous term interpreted the provision of the Constitution. In that decision it was held that the general Rule governing statutory interpretation that statute should be read as having a fixed meaning, speaking from the date of enactment is not applicable in the case of Constitutional interpretation. It is undoubtedly that terms of the Constitution are to be interpreted by

reference of their meaning when it was framed, but it does not mean that they are to be read as comprehending only such manifestation on the subject matter named as were known to the framer.

In that decision Justice S. Ratnavel Pandian observed:

> "The proposition that the provisions of the Constitution must be confined only to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them would not be tenable and is liable to be rejected for more than one reason-firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time."

Justice Kuldip Singh maintained,

> "It is not enough merely to interpret the Constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. Interpretation of the Constitution is a continual process. The institutions created thereunder, the concepts propounded by the framers and the words, which are

> beads in the Constitutional-rosary, may keep on changing their hue in the process of trial and error, with the passage of time. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions."

Even Justice A.M. Ahmadi who delivered a dissenting judgment in that decision further made it clear,

> "The concern of the judiciary must be to faithfully interpret the Constitutional provisions according to its true scope and intent because that alone can enhance public confidence in the judicial system."

There is an interesting aspect to be noted here which is also relevant in the context. The Constitution of India was published on the 26th day of November 1949 and only a year after of the said publication the famous decision of A.K. Gopalan V. State of Madras AIR (1950) SC 27 was delivered wherein, as I have already discussed, the concept of liberal interpretation of the Constitution was propounded. To my utter surprise I find that even after 44 years of that decision the same concept of liberal interpretation of the Constitution remained unchanged as it could be found in the land mark decision of S.C. Advocate-on-Record V. Government of India AIR(1994) S.C. 268 which I have discussed.

In Ministry of Home Affairs V. Fisher reported in 3 All E.R. (1979) 21 their Lordships of the Privy Council observed,

> "This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law respect must be paid to the language which has been used and to the traditions and usage which have given meaning to that language."

From its' inception the American Supreme Court felt that a Constitution must be given a treatment different from statutes and proceeded on liberal interpretation. In Mc. Culloch v. Maryland it observed, "We must never forget that it is a Constitution we are expounding" and went on to say that a Constitution is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. In the words of famous American legal scholar Roscoe Pound-

> "The Constitution is not a glorified police manual. Constitutional provisions lay down great principles to be applied as starting points for legal and political reasoning in the progress of society. A Constitution may lay down hard and fast rules such as, for example, those fixing the exact terms of office and apportioning duties among public functionaries. But the principles established by the Constitution are not to be interpreted and applied strictly according to the literal meaning of words used by the framers as if they laid down rules. Interpretation of Constitutional principles is a matter of reasoned application of rational precepts to conditions of time and place."

The American Constitution is treated to be the most rigid and inflexible Constitution.

Keeping in the back of mind what I have discussed let me now digress upon the issue before me.

Comprehensive, integrated and holistic approach in propounding the legal principle enunciated in the cases of S.P Gupta and others vs. president of India and others, reported in AIR 1982 SC 149, S.C. Advocates-on-Record V. Union of India AIR 1994 SC 268, Bangladesh and others vs. Md. Idrisur Rahman, Advocate and others 29 BLD AD 79, Al-Jehad Trust Case PLD 1996 SC 324, Ragib Rauf Chowdhury vs. Government of Bangladesh and others 69 DLR 317 and so on are all awe-inspiring well founded concerted decisions having an epitome all its own. All of them preached the primacy of the Chief Justice in the process of appointment of the Judges. Since much elaborations upon all these decisions have already been given by my learned brothers I refrain from repeating those.

In Shanti Bhushan vs. Union of India 2009 1 SCC 657 Respondent was appointed as additional Judge with effect from 03.04.2003. However, in between, seven Additional Judges were appointed as permanent Judges on 27.07.2005 but the incumbent respondent was left out and was given extension as Additional Judge. The Supreme Court of India with disapproval of the aforesaid extension observed:

> "If a person is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on mental and physical capacity, character and integrity or other relevant matter rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge."

It was also observed:

> "As rightly submitted by learned Counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has been stated in S.P. Gupta's case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of. As Justice Pathak J, had succinctly put it there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The concept of plurality and the limited scope of judicial review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already

> expressed their opinion regarding the suitability of the person as an Additional Judge, according to us, the parameters as stated in para 13 have to be considered differently from the parameters of para 12. The primacy in the case of the Chief Justice of India was shifted because of the safeguards of plurality. But that is not the only factor. There are certain other factors which would render the exercise suggested by the petitioners impracticable. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention."

Article 95(1) of the Constitution in clear terms manifested consultation with the Chief Justice before appointment of a judge under that Article. Effective consultation so to say primacy of the Chief Justice's recommendation in the process of appointment has been a well grained and unquestionable requirement but the fact remains what will be the situation if an appointment of a judge is hit by the positive prohibition under Article 95(2) regardless of the detection of the same at any point of time?

Article 95(2) provides:-

> "A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and–
> (a) has, for not less than ten years, been an advocate of the Supreme Court ; or
> (b) ……

> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

My brother Obaidul Hassan, J has given a thought provoking analysis of this issue in minute details and hence I am not required to cross swords on that. Harping on the same tune I would fortify that the aforesaid provision 95(2)(a) of ours, unlike Indian Constitution on the point (Article 217(2)(b)), is rigid and dogmatic.

Indian Constitution in this respect has given a relaxation incorporating Article 217(2) explanation (aa). In 1978 by 44th amendment act this provision was incorporated. It provides:-

> "in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate."

Since no such provisions has been attached in our Constitution in respect of Article 95(2)(a), the same cannot be stretched inducting any analogy enhancing its scope. The case of appellant ABM Altaf Hossain has certainly fall within the mischief of positive prohibition of Article 95(2) of the Constitution as hinted with approval by my brother Obaidul Hassan, J.

At the same time I also record that to uphold the primacy of the Chief Justice any legal lacuna or predicament which might have negate the appointment in any manner should have been brought to

the notice of the Chief Justice at the earliest. Regrettably, that has not been done in the instant case. Recommendation of Chief Justice is certainly prime and sublime but at the same time if there is any inherent defect which has escaped notice of the Chief Justice because of mistake or otherwise the interpretation of the Constitution of ours to that extent is rigid.

Incumbent Appellant ABM Altaf Hossain's case has been assessed and evaluated with all the trappings of interpretation of the Constitution as discussed above and nothing is left unsaid.

Before parting I would record that with the lapse of time if the appellant has acquired qualification to be appointed as a Judge of the Supreme Court that may be considered by the authority favorably.

With the above observations, the Civil Appeal No. 232 of 2014 is hereby disposed of.

Civil petition for leave to appeal No. 602 of 2017 is also disposed of in the light of the observations as stated above. No order in respect of civil petition for leave to appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

J.

Md. Abu Zafor Siddique, J: I have gone through the judgments proposed to be delivered by my learned brothers, Obaidul Hassan, J. and Jahangir Hossain, J. Having gone through the same, I find myself in agreement with the decision and findings arrived at by my learned

brother, Jahangir Hossain, J. It is required to be mentioned that we have come to an unanimous decision of disposing of this appeal with the individual findings and observations of our own. Accordingly, I would like to write the judgment of my own since the points involve in this appeal are on the constitutional question of special importance with regard to the appointment of the Judges under article 95 of the Constitution on the consultation with the Hon'ble Chief Justice.

This civil appeal, by leave, is directed against the judgment and order dated 24.09.2014, passed by the High Court Division in Writ Petition No.7489 of 2014 summarily rejecting the same.

Facts, leading to this civil appeal, in short are as follows:

The appellant obtained L.L.B (Hon's) and L.L.M. Degree with First Class from the University of Rajshahi. He also obtained L.L.B (Hon's) from the University of Wolverhampton, U.K., Post Graduate Diploma in Professional and Legal Skills from Inns of Court School of Law, City University, London and after successful completion of Bar Vocational Course from the same University he was called to the Bar as a Barrister by the Hon'ble Society of Lincoln's Inn, London, UK. He also obtained Diploma in Human Rights with distinction from Humanist and Ethical Association of Bangladesh. He was enrolled with the Bangladesh Bar Council as an Advocate on 06.12.1998 and he was permitted to practice in the High Court Division on 18.06.2000 and thereafter, he was enrolled as an Advocate of the Appellate Division of the Supreme Court on 18.05.2011. He was appointed as a

Deputy Attorney General for Bangladesh on 03.11.2010 and while serving as a Deputy Attorney General, he was appointed as an Additional Judge of the High Court Division of the Supreme Court of Bangladesh along with five other Additional Judges under article 98 of the Constitution vide Notification No.10. 00. 0000. 128. 011. 010. 2012-816 dated 13.06.2012 and accordingly, he was administered oath as such along with other five Judges on 14.06.2012.

It is further stated that as an Additional Judge of the High Court Division, the appellant performed his functions and discharged his duties with utmost sincerity, integrity, honesty and diligence as an oath-abiding Judge. On due consideration and evaluation of the performance rendered by the appellant as an Additional Judge, the Hon'ble Chief Justice recommended the names of all the six Additional Judges including the appellant for appointment as a Judge of the High Court Division of the Supreme Court of Bangladesh under article 95 of the Constitution by the Hon'ble President and such fact of recommendation by the Hon'ble Chief Justice has been widely published in the newspapers. However, it is stated that, to the utter surprise and disappointment, he came to know from the Gazette Notification No.10 .00 .0000. 128. 011. 010. 2012-472 dated 09.06.2014 by which the other five Additional Judges with whom he was appointed under article 98 of the Constitution have been appointed by the Hon'ble President under article 95 of the Constitution as Judges of the High Court Division excluding the name of the appellant.

In the circumstances, the appellant had filed the writ petition bringing the allegation of violation of articles 94 and 95 of the Constitution as well as the principle as settled by this Division in the case of **Bangladesh and others Vs. Idrisur Rahman, Advocate and others reported in 29 BLD (AD)79** for not appointing him as a Judge of the High Court Division under article 95 of the Constitution despite the fact that the Hon'ble Chief Justice of Bangladesh who has legal acumen in this field and being empowered under the Constitution has recommended him along with other five *Judge*s to be appointed as a Judge under article 95 of the Constitution.

The High Court Division, upon hearing the parties and on perusal of the writ petition along with all connected papers annexed thereto, rejected the writ petition summarily by the judgment and order dated 24.09.2014.

Being aggrieved by and dissatisfied with the judgment and order dated 24.09.2014 passed in Writ Petition No.7489 of 2014 the writ petitioner-appellant herein filed Civil Petition for Leave to Appeal No.2626 of 2014 before this Division and obtained leave by order dated 06.11.2014 which gave rise to the instant civil appeal.

The points/grounds involved in this appeal on which leave was granted for determination and adjudication of the same run as follows:

I. *Whether Article 95(1) of the Constitution having expressly provided/stipulated that the Judges of the Supreme Court shall be appointed by the President after consultation with the Chief Justice,*

the opinion and recommendation resulting from and being a part of such consultation, the opinion/recommendation of the Chief Justice shall have/get primacy over the views and opinions of the Executive in the matter of the appointment of Judges, and the Chief Justice having recommended the writ-petitioner as Judge for confirmation and appointment under Article 95 of the Constitution, the dropping of the name of the petitioner from the Notification dated 06.06.2014 ignoring the opinion/recommendation of the Chief Justice without assigning any cogent reason is without lawful authority and a violation of the Constitution.

II. *Whether the independence of judiciary as enshrined in our Constitution being a basic structure of our Constitution, which cannot be demolished or curtailed or diminished in any manner, and which basic structure cannot even be amended by the Parliament being beyond its amending power by reason of Article 7B of the Constitution, and there being no provision in the Constitution authorizing the President under Article 48(3) of the Constitution to curtail or diminish the said independence by ignoring the opinion/recommendation of the Chief Justice, non appointment of the writ-petitioner ignoring and bypassing the opinion of the Chief Justice is a violation of the basic structure of the Constitution and as such dropping his name from the Gazette Notification without cogent reason is without lawful authority and unconstitutional.*

III. *Whether the constitutional process being initiated by the executive, whose opinion in the matter of antecedents being already there, and the Chief Justice in the process of consultation having had the benefit of perusing and examining such opinion of the executive, the opinion of the Chief Justice recommending the writ-petitioner for appointment overruling/disregarding such executive opinion, there cannot be any cogent reason for dropping the name of the petitioner from the list of Judge to be appointed under Article 95,*

and as such, the impugned action is without lawful authority and unconstitutional.

IV. *Whether the case in question is not only a matter of an individual petitioner not having been appointed under Article 95 of the Constitution bypassing the recommendation of the Chief Justice, but it also raises the important constitutional question centering around the constitutional pole and exalted position and office of the Chief Justice as head of the judiciary, and meaning of consultation being effective and meaningful, the disregard without cogent reasons of the opinion/recommendation of the Chief Justice is tantamount to not only a violation of the Constitution but also reducing and diminishing the power, position and role of the Chief Justice under the Constitution.*

V. *Whether Ten Judges case as reported in 29 BLD(AD)page 79 having contained anomaly and inconsistency touching upon the obiter dicta and ratio decidendi of the case, and there being an observation in the impugned judgment of the High Court Division that the Judges of the Appellate Division was silent on the question of difference of opinion between the Chief Justice and Executive, thereby leaving no way out to resolve the issue by the High Court Division, in this case particularly having regard to the findings of the Appellate Division in Ten Judges case that the opinion of the executive will have dominance in the matter of antecedent, the findings in Ten Judges case ought to be re-examined and revisited for the sake of clear and unambiguous pronouncement from this Division clarifying the said judgment, law and the Constitution."*

The learned Advocates appearing on behalf of the appellant made submissions based on the grounds as quoted hereinabove on which leave was granted to consider the same.

Referring to the decision in the case of **Bangladesh and others Vs. Md. Idrisur Rahman and others reported in 29 BLD (AD) 79** the learned Attorney General along with the learned Additional Attorney General appearing on behalf of the respondents submit that since, the opinion of the executive will have dominance in the matter of antecedents of a candidate (judge) and since, the antecedent of the appellant was not satisfactory, the Hon'ble President rightly did not appoint the appellant as a permanent judge of the High Court Division under article 95 of the Constitution and as such, the High Court Division rightly rejected the writ petition summarily and the same does not call for any interference by this Division.

Heard the learned Advocates and the learned Attorney General, along with learned Additional Attorney General and perused the writ petition along with the impugned judgment and papers annexed thereto and also the constitutional provisions and the concerned decisions placed by the parties.

Regarding the first point which is for adjudication by us is as to whether the opinion and recommendation of the Chief Justice shall have primacy over the views and opinions of the Executive in the matter of appointment of Judges. In order to appreciate this point, it is apposite to consider the Constitutional provisions relating to consultation such as articles 95(1), 98, 116, 116A and the decisions of Masdar Hossain's case.

Article 95(1) of the Constitution before its amendment in 1975 was as under:

"The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."

After its amendment in 1975, article 95(1) runs as follows:

"The Chief Justice and the other Judges shall be appointed by the President."

Thus it is clear that the expression "after consultation with the Chief Justice" is no more there in article 95(1) of the Constitution.

Again, article 98 of the Constitution before it's amendment in 1975 was as under:-

"*Notwithstanding the provisions of article 94, if the President is satisfied, after consultation with the Chief Justice, that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period;*

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."

After it's amendment in 1975, article 98 of the Constitution is as under:-

"*Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme*

Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period as an Ad hoc Judge and such Judge while so sitting, shall exercise the same jurisdiction, power and functions as a Judge of the Appellate Division;

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."

However the expression "consultation" is still there in article 116 of the Constitution which provides that the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.

The expression 'consultation' has been dealt with and considered in the case of **Secretary, Ministry of Finance Vs. Md. Masdar Hossain reported in 20 BLD(AD)104** wherein it has been held that, "*under article 116 the views and opinion of the Supreme Court on any matter covered by that article shall get primacy over the views and opinion of the executive*."

It is true that 'consultation' was considered in the light of article 116 of the Constitution but, nevertheless the same principle is being applied in the matter of appointment of Judges of the Supreme Court under articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any

independence of the subordinate courts and without consultation and primacy, the separation of judiciary from the executive will be empty words. The principle of consultation with primacy of opinion of the Chief Justice is no longer res-integra and being an integral part of independence of judiciary the same is inherent in the very scheme of the Constitution. There has been unbroken and continuous convention of consultation with the Chief Justice in the matter of appointment of Judges.

In the case of **S.P. Gupta and others Vs. President of India and others reported in AIR 1982(SC)149, Supreme Court Advocates-on-Record Association Vs. Union of India reported in AIR 1994 page 269 and Special Reference No.1 of 1998 and Al-Jehad Trust Vs. Federation of Pakistan reported in PLD 1996 Vol. 1 page 324** it has been settled that, "*consultation with the Chief Justice is a pre-requisite and the opinion of the Chief Justice shall have primacy.*"

From the above, it is clear that consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of judiciary.

In the case of **Bangladesh and others Vs. Md. Idrisur Rahman, Advocates and others reported in 29 BLD(AD)79** it has been held that, "*in the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant.*"

In such view of the matter, I am of the opinion that the Chief Justice and the executive should function together to find out the most suitable candidates available for appointment through a transparent process of the Constitution. The duty of all organs of the state is that the public trust and confidence in the judiciary may not go in vain. We have no doubt that every constitutional functionary and authority involved in the process is as much as we are to find out the true meaning and importance of the scheme envisaged by the relevant constitutional obligations avoiding transgression of the limits of the demarcated power.

Regarding the point as to whether the independence of judiciary as enshrined in our Constitution is a basic structure of the Constitution and whether the same can be amended, curtailed or diminished in view of article 7B of the Constitution, in this respect the Appellate Division in the Ten Judges case held that, "*independence of judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner.*"

However, with regard to the constitutional provisions of article 48(3) and 55(2) of the Constitution, this Division in the case of **Bangladesh and others Vs. Md. Idrisur Rahman, Advocates and others reported in 29 BLD(AD)79** has discussed in details.

So far the point as raised in ground No.V of this appeal the decision of the Ten Judges Case is very clear and unambiguous and as

such, the same guaranteed no interference by this Division in the present case.

However, I would like to conclude with the same remark relying on the findings given by my learned brother Jahangir Hossain, J regarding consideration of the case of the appellant to appoint him as Judge under article 95(1) of the Constitution.

It is evident from the record that dropping the name of the appellant from being appointed as a permanent Judge took place on 09.06.2014. Since we do not find any antecedent against the appellant and since his other qualifications find support the case of the appellant namely A.B.M. Altaf Hossain who may be considered to be appointed under article 95(1) of the Constitution as permanent Judge in the High Court Division in the light of the above observations.

With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

Civil Petition for Leave to Appeal No.602 of 2017 is hereby disposed of in the light of the observation as stated above. No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of the sole petitioner.

J.

Jahangir Hossain, J: I have gone through the judgment of my learned brother, Obaidul Hassan, J. Though I am in respectful agreement with some of the points arrived at by him, yet having

regard to the important constitutional points involved in the case, I would like to give my own reasons for those points and would also add some of my opinions on a few other points.

The facts of the case have already been narrated in details in the main judgement. Hence, I would not repeat on the same facts. In the instant civil appeal, non-appointment of a Judge of the High Court Division has been challenged and called in question on the ground that the appellant has not been appointed under Article 95 of the constitution of the People's Republic of Bangladesh [hereinafter referred to as the Constitution] despite the consultation and recommendation of the Chief Justice.

The High Court Division summarily rejected the writ petition of the appellant on the ground of **Bangladesh and others-Vs-Idrisur Rahman, widely known as ten Judges' case, reported in 29BLD(AD)79** in which the outcome of the event of the recommendation of Chief Justice conflicting with decision of the Executive was not stated. This means the opinion or recommendation of the Chief Justice has primacy in the matter of appointment of such Judges or not. Apart from this, an additional Judge has a right to a writ of mandamus to secure his appointment as a permanent Judge of the High Court Division of the Supreme Court of Bangladesh.

According to Article 148 (1) of the constitution, a person elected or appointed to any office in 'Third Schedule' shall before entering upon the office make and subscribe an oath or affirmation [in the

article referred to "an oath"] in accordance with that Schedule. The third schedule of the Constitution provides that 'Chief Justice or Judges. An oath [or affirmation] in the following forms shall be administered, in the case of Chief Justice by the President, and in the case of a Judge appointed to a Division by the Chief Justice, which is shown as follows:

> "I, ……, having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law; That I will bear true faith and allegiance to Bangladesh: That I will preserve, protect and defend the Constitution and the laws of Bangladesh: And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

Generally in Bangladesh any oath ceremony occurs in the form of our national language so that every citizen of the country could understand the meaning and spirit of the sacred oath, which is quoted below:

> "৬। **প্রধান বিচারপতি বা বিচারক।**-প্রধান বিচারপতির ক্ষেত্রে রাষ্ট্রপতি কর্তৃক এবং সুপ্রীম কোর্টের কোন বিভাগের কোন বিচারকের ক্ষেত্রে প্রধান বিচারপতি কর্তৃক নিম্নলিখিত ফরমে শপথ (বা ঘোষণা)-পাঠ পরিচালিত হইবেঃ
>
> আমি . . .. , প্রধান বিচারপতি (বা ক্ষেত্রমত সুপ্রীম কোর্টের আপীল/হাইকোর্ট বিভাগের বিচারক) নিযুক্ত হইয়া সশ্রদ্ধচিত্তে শপথ(বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-অনুযায়ী ও বিশ্বস্ততার সহিত আমার পদের কর্তব্য পালন করিবঃ

আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষণ করিব;

আমি বাংলাদেশের সংবিধান ও **আইনের রক্ষণ**, সমর্থন ও নিরাপত্তাবিধান করিব;

এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-অনুযায়ী যথাবিহিত আচরণ করিব।"

. . . . . .

Similar to the oath of Hon'ble President, Hon'ble Prime Minister and other Ministers, need to preserve, protect and defend the Constitution. In addition, Judges also need to preserve, protect and defend the Constitution and **the laws of Bangladesh** by their oath. So, it is very important to bear in mind that the Judges have to do justice but in accordance with law, nothing less, nothing more. Political regimes might change, the Judges might change but the judgment given by a Judge would remain constant.

However, it is needed to be reiterated that in the Article 48(3) and 52(2) of the Constitution has been elaborately discussed in the main judgement of the case wherefrom it reminds to me that in the case of **Raghib Rauf Chowdhury-Vs-Bangladesh, 69 DLR 317** in which it was held that :

> *"46. The eligibility of the Judges has been mentioned in the Article 95(2). In spite of that the petitioner by filing this writ petition wanted to give a guideline how the persons who are in the helm of affairs should act and what should be a criterion for the persons to be recruited in the higher judiciary. Since the opinion of the Chief Justice has been made mandatory for the*

executive, presumably it can be said that the Chief Justice being the head of the judiciary, one of organs of the State will recruit the proper persons in the higher judiciary having proper legal background, i.e. ***sufficient knowledge of law, man of dignity and integrity****. The petitioner's submission is that for the sake of independence of judiciary the recruitment process of the Judges of the higher judiciary must be free from all political influences. It is his apprehension that since vide Article 48(3) of the Constitution there is a provision to take advice from the Prime Minister, the President is bound to listen his/her advice, thus there might be political influence in the process of recruitment of the Judges in the higher judiciary. In this regard Mr. Justice Abdul Matin in the case of* ***Bangladesh-Vs-Md. Idrisur Rahman Advocate reported in 29BLD(AD)79*** *has said that "therefore the expression" independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept[sic] and under the provision of the Constitution.* ***We find no existing provision of the Constitution either in Articles 98 and 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the Constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advise contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary. Therefore, the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98, 116 of the Constitution."***

[underline of mine is given for emphasis]

The aforesaid view of the case has been approved by the Appellate Division in Civil Petition No.2805 of 2017 by order dated 06.12.2020 dismissing the leave petition. Since it is approved by the Apex Court, no question of primacy or supremacy of the two organs of the State makes any confrontation with regard to the appointment of Judges of both the Divisions of the Supreme Court of Bangladesh. Since both the organs are highly correlated there is no scope for any conflict. If there is any difference of opinion, it can be mutually solved quite easily without raising any issue in public. Here it is needed to be said that unless the law is enacted by the Parliament for appointment of Judges in the higher judiciary, the process of initiating the appointment of a Judge under Articles 95 and 98 of the Constitution should be done by direct effectuation. In the history of judiciary of Bangladesh from 1972 till date this conflict was raised numerously. No solution has yet been found.

From the experience, it is often heard that the Chief Justice gave recommendations for the position of the Judges but subsequently he withdrew those recommendations without any reasons to be recorded. It is also evident that there were instances when the Chief Justice gave recommendations for the appointment of Judges which was duly hounored by the appropriate Appointing Authority, however, subsequently no oath had taken place by the same Chief Justice. There is no logical reason for such occurrences to happen. However, selection by the Chief Justice which means recommendation and final decision

by the appropriate Appointing Authority needs to occur directly if there is any adverse antecedent to any candidate. Such matters can be resolved prior to giving any appointment by the appropriate authorities concerned.

During hearing of this appeal, we have perused a file placed by the learned Attorney General in a chamber exclusively wherefrom we did not find any adverse antecedent of the appellant. Rather we found that the appropriate Appointing Authority did not give him appointment as permanent Judge together with five other Judges. As per Article 48(3) of the Constitution, there is no scope to raise any question whether any, and if so, what advice has been tendered by the Hon'ble Prime Minister to the Hon'ble President to be enquired into in any court. Here the empowerment of the court is not enforceable to direct the authority concerned to execute any order of this court. Rather the compassion of the appropriate authority may give rise to the appointment of the appellant. According to the aforementioned discussions and in the light of observations made in the case of **Bangladesh and others-Vs-Md. Idrisur Rahman, Advocate and others reported in 29BLD(AD)79**, the writ of mandamus sought by the appellant can be sustained.

During hearing, the submission of the respondent as to the appellant's eligibility under Article 95(2)(a) of our Constitution has been brought into question. It is doubtful whether the respondents have any legal scope to question the eligibility of the appellant under

Article 95(2)(a) of the Constitution. Inasmuch as there is nothing about this in the respondent's concise statement, however, Order XIX, Rule 3 of the Appellate Division Rules provides that:

> *"3. No party to an appeal shall be entitled to be heard by the court unless he has previously lodged his concise statements."*

From the above Rule, it follows by implication that the grounds not taken/pleaded in the concise statement cannot be agitated in the hearing of the appeal. The concise statement on behalf of respondent No.01 clearly shows that no such ground was taken therein. However, since it is raised by the respondent's submission, let us discuss about the qualification/eligibility for appointment of a Judge in the High Court Division of the Supreme Court throughout the Subcontinent.

Article 193(2) of the Islamic Republic of Pakistan Constitution stipulates that:

"193. (1) A Judge of a High Court shall be appointed by the President after consultation-

(a) .....

(b) .....

(c) .....

(2) A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than [forty-five years] of age, and

(a) he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time

before the commencing day); or

(b) he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan; or

(c) he has, for a period of not less than ten years, held a judicial office in Pakistan.

[*Explanation.*-In computing the period during which a person has been an advocate of a High Court or held judicial office, there shall be included any period during which he has held judicial office after he became an advocate or, as the case may be, the period during which he has been an advocate after having held judicial office.]

(3) ....."

Pakistan is an Islamic country as per their Constitution. Article 193(2) of the Pakistan Constitution discusses that a person should not be appointed as a Judge of the High Court unless he is a citizen of Pakistan, is not less than 45 years of age and he must be an Advocate for a period **aggregating_not less than 10 years**. This means the total period of his practice would be counted or he has for a period of not less than 10 years held a judicial office in Pakistan.

In the Indian Constitution, Article 217(2) the following is extracted below:

"217. (1) .....

Provided that -

(a) .....

(b) .....

(c) .....

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and -

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least **ten years been an advocate** of a High Court[* * *] or of two or more such Courts in succession;

(c) [* * *]

Explanation.-For the purposes of this clause-

(a)

(aa)

(b)

(3) ....."

From the said Article, it is disclosed that the qualification for appointment as a Judge of the High Court should be a citizen of India and at least held a judicial office for a period of 10 years in the territory of India. Or the candidate must have **been an Advocate of a High Court for 10 years** or of two or more such courts in succession. Hence there is no question of aggregation in the Constitution of India.

Article 95(2)(a) of our Constitution provides that *"95(2)(a) a person should not be qualified for appointment as a judge unless he is a*

citizen of Bangladesh and- (a) has, ***for not less than 10 years been an Advocate*** *of the Supreme Court."*

It is cardinal principle of interpretation that the words of a statute must not be overruled by the Judges, but reform of the law must be left in the hand of the Parliament. Application of this principle can be used in the interpretation of Constitution since Constitution is the highest law of the country and the words used in the constitution can never be changed or altered.

Definition in section 3(2a) of the General Clauses Act, 1897 has to be applied for the reason that Article 152(2) of the Constitution provides–

> "(2) The General Clauses Act, 1897 shall apply in relation to-
>
> (a) this Constitution as it applies in relation to an Act of Parliament;"

Section 3(2a) of the General Clauses Act, 1897 contemplates-

> "(2a) "Advocate" means a person enrolled as such under the Bangladesh Legal Practitioners and Bar Council Order, 1972 (P.O. No.46 of 1972)"

Definition of "Advocate"-

> Article 2(a) of The Bangladesh Legal Practitioners and Bar Council Order, 1972 [P.O. No.46 of 1972] defines-
>
> "2.(a) "advocate" means an advocate entered in the roll under the provisions of this Order;"

"Roll" of the Advocate is defined-

> "2.(h) "roll" means the roll of advocates prepared and maintained by the Bar Council;"

To construe the word "Advocate" employed in Article 95(2)(a) of the Constitution.

> The words in Article 95(2)(a) of the Constitution are- "**been an Advocate**".

The word "practicing" has not been mentioned anywhere in this Article. According to accepted principles and rules of interpretation, it cannot be presumed that the word "Advocate" as used in the Constitution meant "Practicing Advocate." To read the word "practicing" before the word "Advocate" in Article 95(2)(a) would mean adding something to the Constitution that is not already there and would amount to replacing the wisdom of the Constitution's framers, who were elected leaders of our War of Liberation in our nation with our own wisdom. This is completely unacceptable.

This argument finds support from the case of **Mahesh Chandra Gupta-Vs-Union of India, (2009) 8 SCC 273**, the Indian Supreme Court shown as follows-

> "38. Whether "actual practise" as against "right to practice" is the "practice" is the prerequisite constitutional requirement of the eligibility criteria under Article 217(2)(b) is the question which we are required to answer in this case.
>
> **50. Before concluding on this point, we may state that the word "standing" connotes the years in which a person is entitled to practise and not the actual years put in by a person in practice. [See Halsbury's Laws of England, 4th Edn. Reissue, Vol.3(1), Paras 351 and 394 of the Chapter under the heading "Barristers"]. Under Section 220(3)(a) of the Government of India Act, 1935, qualifications were**

prescribed for appointment as a Judge of a High Court. A barrister of at least ten years' standing was qualified to be appointed as a Judge of the High Court. As stated above, the word "standing" connotes the years in which a person is entitled to practise, not the actual years put in by that person in practise.

52. The said expression was placed in the Constitution at a time when the practice of advocates was governed by the Indian Bar Councils Act, 1926. Section 2(4)(a) of that Act defined an "advocate" to mean "an advocate entered in the roll of advocates of a High Court under the provisions of this Act. Section 8 provided that:

> "8. Enrolment of advocate.-(1). No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act."

66. Thus, it becomes clear from the legal history of the 1879 Act, the 1926 Act and the 1961 Act that they all deal with a person's right to practise or entitlement to practise. The 1961 Act only seeks to create a common Bar consisting of one class of members, namely, advocates. Therefore, in our view, the said expression "an advocate of a High Court" as understood, both, pre and post 1961, referred to person(s) right to practise. Therefore, actual practise cannot be read into the qualification provision, namely, Article 217(2)(b). The legal implication of the 1961 Act is that any person whose name is enrolled on the State Bar Council would be regarded as "an advocate of the High Court". The substance of Article 217(2)(b) is that it prescribes an eligibility criteria

based on "right to practise" and not actual practice."

Relying on **Mahesh Chandra Gupta-Vs-Union of India, (2009) 8 SCC 273**, the Delhi High Court in DK Sharma-Vs-Union of India, shown as follows-

> "9. The Supreme Court elaborately dealt with the aforesaid contention and has held that "entitlement to practice" is sufficient to meet the requirements of Article 217(2)(b). The Supreme Court has made specific reference to the difference in language of clauses 1 and 2 to Article 217. It has been held that Article 217(1) has a clause relating to "suitability" or "merits", whereas Article 217(2) has a clause relating to "eligibility requirements or qualification" and does not deal with "suitability" or "merits". The provisions of the Advocates Act, 1952, etc, entitle a person to practise in any High Court and for purpose mere enrolment is sufficient."

The respondent's reliance in this regard on Al-Jehad Trust-Vs-Federation of Pakistan, PLD 1996 SC 324 is untenable. As Article 193(2)(a) of Pakistan's Constitution, 1973 in employing the word "aggregating" by implication connotes the actual length of practice which is not in our Constitution and Indian Constitution.

The appellant's permission to practice in the Supreme Court was not suspended or kept in abeyance during that time, which is sometimes done under the provisions of Articles 3, 2(g) of The Bangladesh Legal Practitioners and Bar Council Order, so to subtract the time spent to be a Barrister from the period from permission to

practice in the High Court Division on 18.06.2000 to appointment as an Additional Judge on 13.06.2012 is utterly misguided.

Unexpectedly, the respondent claimed that it was unclear whether the Chief Justice had issued any recommendation. This submission is to be rejected outright because there is no such contention in the concise statement, it appears from the leave granting order that the learned Attorney General[late] did not make any submission questioning the recommendation, and there was a specific averment regarding the recommendation in paragraphs 8, 9 and 10 of the writ petition [pp.36-40], and it has already been submitted for the appellant that the same person recommending the appellant presided over the Court while granting leave.

Furthermore, the learned Additional Attorney General argued emphatically and frequently that the judges engaged in the matter of the 10 Judges' Case received widespread press coverage for the Chief Justice's recommendations, despite the fact that they were not named as permanent judges. According to the writ petitioner's Annexure-F series (pp. 81–85), it is clear that the Hon'ble Chief Justice offered recommendations about the appellant and five other Additional Judges in this matter as well. Last but not least, the Chief Justice who recommended the appellant sat over the Bench granted leave in this instance. Therefore, it is clear that a suggestion was made. If such were the case, leave could not be given.

The outcome of the current appeal will have a significant impact on the rule of law and the independence of the judiciary, which are the two fundamental structural pillars of our Constitution and our constitutional system, respectively. In light of this, the appellant respectfully argued that this appeal merits being allowed to achieve the greater goal of ensuring rule of law and independence of judiciary.

In the case of **Bangladesh and others-Vs-Idrisur Rahman, 29 BLD (AD) 79** widely known as ten Judges' Case, where it was held that:-

> *"The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive."*

The appellant obtained first class in the examination of Masters' of Law from the University of Rajshahi and was admitted to the bar on December 6, 1998, was given permission to practice law in the High Court Division on June 18, 2000, and was admitted to the Supreme Court of Bangladesh's Appellate Division on May 18, 2011. It is also clear from the record that on April 20, 2009, the appellant was appointed as Bangladesh's Assistant Attorney General during the current government regime. On 3 November 2010, he was promoted to the position of Deputy Attorney General for Bangladesh as a result of his improved performance as an Assistant Attorney General. He was raised to the High Court Division as an Additional Judge together

with 5 others by a notification dated 13.06.2012, and he took the oath of office on 14.06.2012, while holding the position of Deputy Attorney General. During the Regime of present Government, no question of any eligibility or on the period of practice was raised. According to the documents submitted before the Court that the appellant believes in the spirit of the war of liberation.

The above disclosure finds exact support from the case of **Raghib Rauf Chowdhury-Vs-Bangladesh, reported in 69 DLR,317** where it was held in Paras: 54 and 54(a) that:-

> *"In view of the deliberation made herein above and to respond to the public aspiration the existing selection process could be made more effective, improved, transparent and realistic by taking the following matters into account as 'eligibility criteria', if considered appropriate and rational by the Honourable Chief Justice before he moves on to recommend a person or the pool of persons for appointment as Judge or Judges of the High Court Division, having regards to the provisions envisaged in Article 95(2) of our Constitution:*
>
> (a) a person, a citizen of Bangladesh having sincere allegiance to the fundamental principles of the State Policy, i.e., nationalism, socialism, democracy and secularism as mentioned in Article 8 of the Constitution and also the spirit of the war of liberation through which the nation achieved its independence in 1971. A person should not be recommended for appointment if his antecedent does not appear balanced with the above principles and

the spirit;"

It is evident that non-appointment of the appellant as permanent Judge took place on 09.06.2014. In the meantime, long time he passed with the agony of question of eligibility as a Judge. And his other qualifications find support from the case of **Raghib Rauf Chowdhury-Vs-Bangladesh**. Under such circumstances, the appropriate appointing Authority may reconsider the case of the appellant, A.B.M.Altaf Hossain to be appointed as permanent Judge in the High Court Division in the light of above observations.

With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

Civil Petition for Leave to Appeal No.602 of 2017 is hereby disposed of on the ground that the petitioner has become under the age of 67 set out in our Constitution.

No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of the sole petitioner.

J.

COURT'S ORDER

We, therefore, sum up as under:

(a) The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of consultation to the President.

(b) In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others.

(c). If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts.

(d). After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate.

(e). If the Chief Justice again (2nd time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice.

With the above observations, the Civil Appeal No. 232 of 2014 and Civil Petition for Leave to Appeal No. 602 of 2017 are disposed of.

The Writ Petition No. 7489 of 2014 filed by the appellant A.B.M.Altaf Hossain and Writ Petition No. 1948 of 2017 filed by the petitioner Md. Farid Ahmed Shibli were maintainable (by majority view).

The concerned authority may consider the case of the appellant A.B.M. Altaf Hossain.

No order in respect of Civil Petition for Leave to Appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

J.

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The 14th day of June, 2023

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