IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,

Chief Justice

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

CIVIL APPEAL NO. 15 OF 2022

With Civil Petition for Leave to Appeal No.1732 of 2022.

(From the judgment and order dated 10.11.2016 passed by the Appellate Division in C.P. No.1181/2014 & Order dated 24.05.2022 passed by the High Court Division in Writ Petition No.3697 of 2022)

Durnity Daman Commission, represented by its Secretary. : Appellant. (In C.A. 15/2022)

Sariif Uddin Petitioner (In C.P. 1732/2022)

=Versus=

Md. Ahsan Ali and others Respondents. (In C.A. 15/2022)

Durnity Daman Commission, represented by its Secretary and others : Appellant. (In C.P. 1732/2022)

For the Appellant (In C.A. 15/2022) : Mr. Md. Khurshid Alam Khan, Senior Advocate, instructed by Mrs.Sufia Khatun, Advocate-on-Record.

For the petitioner (In C.P. 1732/2022) : Mr. Salauddin Dolon, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For the Respondent No.1 (In C.A. 15/2022) : Mr.Madhumaloti Chowdhury Barua, Advocate-on-Record.

For the Respondent No.3 (In C.A. 15/2022) : Mr.Sheikh Mohammad Morshed, Additional Attorney General (With Mr. Sayem Mohammad Murad, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, & Ms. Farzana Rahman Shampa, Assistant Attorney General (appeared with the leave of the Court).

Respondent No.2 (In C.A. 15/2022) : Mr.Sheikh Mohammad Morshed, Additional Attorney General

(With Mr. Sayem Mohammad Murad, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, & Ms. Farzana Rahman Shampa, Assistant Attorney General (appeared with the leave of the Court)

For Respondent No.1: (C.P.No.1732/2022 — Not represented.

Date of hearing : 02.03.2023.

Date of judgment : 16.03.2023.

JUDGMENT

Hasan Foez Siddique, C. J: The respondent No.1 in Civil Appeal No.15 of 2022 filed Writ Petition No.1424 of 2011 in the High Court Division, challenging the provision of the Rule 54(2) of the Anti Corruption Commission (Employees) Service Rules, 2008 (hereinafter referred to as "Service Rules") as well as the order of termination of the respondent No.1 from his service, obtained Rule. The High Court Division, by the impugned judgment and order dated 27.10.2011, set aside the provision of Rule 54(2) of the Service Rules upon making the aforesaid Rule absolute.

In the order of termination of the writ petitioner-respondent No.1 issued by the Anti Corruption Commission communicated under Memo No. Dudak/9-2009/Ga-1/Sangstapon/2999 dated 10.02.2011 it was stated as follows:

"দুর্নীতি দমন কমিশন

প্রধান কার্যালয়

ঢাকা।

স্মারক নং-দুদক/৯-২০০৯/গ-১/সংস্হাপন/২৯৯৯ তারিখঃ ১০ ফেব্রুয়ারী ২০১১ খ্রিঃ

যেহেতু সম্প্রতি আপনি জনাব মোঃ আহসান আলী, উপ-পরিচালক, দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকা অশিষ্ট/চাকুরী শৃংখলা পরিপন্থী ব্যবহার এবং ঔদ্ধত্তপূর্ণ আচরণ তদুপরি অসংলগ্ন বাক্য ব্যবহারের মাধ্যমে দুর্নীতি দমন কমিশন ও কমিশনের উর্ধ্বতন কর্মকর্তা সম্পর্কে অসত্য ও বানোয়াট বক্তব্য দিয়ে কমিশনের স্বাভাবিক কার্যক্রমে বিশৃংখলা সৃষ্টির চেষ্টা করেছেন;

যেহেতু আপনি চাকুরী শৃংখলা পরিপন্থী কার্যকলাপের মাধ্যমে কমিশনের চেয়ারম্যান, সচিব বরাবরে সরাসরি বিভিন্ন/মিথ্যা দরখাস্ত দিয়ে কমিশনের কর্মকর্তা/কর্মচারীদের স্বাভাবিক কার্যক্রম বিঘ্নিত করছেন এবং কোন কোন কর্মকর্তাকে হেয় ও লাঞ্চিত করছেন;

যেহেতু শৃংখলা ভঙ্গজনিত অপরাধ সংগঠনের কারনে আপনার বিরুদ্ধে বিভাগীয় মামলায় ১৯৯১ সালে চার বছর পদোন্নতি স্হগিত /বন্ধের আদেশ কর্তৃপক্ষ কর্তৃক অনুমোদিত হয়;

যেহেতু আপনার বিরুদ্ধে চাকুরী শৃংখলা পরিপন্থী কর্মকান্ডের জন্য অতীতে চাকুরী বিধিমতে আপনাকে শাস্ড়ি প্রদান করা হয়েছে এবং একই কারনে বর্তমানেও আপনার বিরুদ্ধে একটি বিভাগীয় মামলা চলমান থাকা সত্বেও আপনি চাকুরী শৃংখলা পরিপন্থী কার্যকলাপ অব্যাহত রেখেছেন;

যেহেতু আপনার এহেন কার্যক্রমে কমিশনের ভাবমূর্তি বিনষ্ট হওয়ার এবং কমিশনের স্বাভাবিক কার্যক্রম বাধাগ্রস্ড় হওয়ার সম্ভাবনা বিদ্যমান এবং যেহেতু কমিশনের অন্য কোন কর্মকর্তা/ কর্মচারীকে এহেন শৃংখলা পরিপন্থী কার্যক্রম উৎসাহিত করতে পারে;

সেহেতু দুর্নীতি দমন কমিশন এর স্বাভাবিক কার্যক্রম অব্যাহত ও সুনাম অক্ষুন্ন রাখার স্বার্থে দুর্নীতি দমন কমিশন (কর্মচারী) চাকুরী বিধিমালা ২০০৮ এর বিধি ৫৪(২) মতে আপনি মোঃ আহসান আলী, উপ-পরিচালক, দুর্নীতি দমন কমিশন, প্রধান কার্যালয়, ঢাকাকে নব্বই

দিনের বেতন নগদ পরিশোধের আদেশসহ দুর্নীতি দমন কমিশন এর চাকুরী হতে অপসারন করা হলো।

উল্লেখিত নব্বই দিনের বেতন নগদে দুর্নীতি দমন কমিশন, প্রধান কার্যালয়ের হিসাব শাখা হতে গ্রহনের জন্য আপনাকে নির্দেশ দেয়া হলো।

স্বাঃ অপাঠ্য
গোলাম রহমান
চেয়ারম্যান।"

The respondent No.1 challenged the vires of the provision of Rule 54(2) of the Services Rules as well as the order of termination.

It appears from the aforesaid order that the same was not an order of termination simpliciter but termination with stigma. It has been observed by this Court that the order of termination with stigma should not be legally approved. Termination may be innocuous or may be a camouflage for dismissal. This could be simple. It may not be illegal to give effect to an order of termination. But if a punishment is veiled as termination, that has got to be resisted. Consequently, the High Court Division in the aforesaid writ petition made the Rule absolute and declared the order of termination void. It also set aside the provision of Rule 54(2) of the Service Rules. Against which, the Durnity Daman Commission (the Commission) filed civil petition for leave to appeal in this

Division which was dismissed by an order dated 10.11.2016 in Civil Petition for Leave to Appeal No.1181 of 2014. The Commission, then filed a Review Petition in this Division and obtained leave.

Mr. Md. Khurshid Alam Khan, learned Senior Counsel appearing on behalf of the appellant, submits that the High Court Division erred in law in setting aside the provision of Rule 54(2) of the Service Rules, inasmuch as the said provision has been incorporated with the definite view to control, manage, supervise and to maintain the discipline and order in the service of the Commission and, thus, the same is an administrative manoeuvre and activity of the Commission, which comes within the absolute domain, power function and authority of the Commission and, therefore, cannot be subjected to judicial review. He submits that High Court Division has erroneously set aside the provision of Rule 54(2) of the Service Rules, which is liable to be set aside.

Mr. Sheikh Mohammad Morshed, learned Additional Attorney General appearing for the respondent No.3 in his submission, supported the appellant's contention. He adds that the High Court Division declared the provision of Rule

54(2) of the Service Rules, void (it was written as “set aside”) holding that the said provision is arbitrary, unreasonable and contrary to the provision of audi alteram partem but it failed to draw any definite conclusion as to whether the said provision is inconsistent with the any provision of Constitution or fundamental rights or the parent law. He submits that in almost all the Service Rules of the employees in the subcontinent such termination clause has been provided and such provision may be harsh but harshness cannot be a ground to declare a law ultra vires and void. He further submits that it has been observed in the several cases by the Apex Court that if relief can be provided to an aggrieved person without declaring an enactment void that would be more acceptable. He, lastly, submits that the instant case the High Court Division declared the order of termination void and, thereby, provided relief to the respondent No.1 but it also declared the law itself void thereby deviated from the spirit of the observation made by the Apex Court.

Mr. Salahuddin Dolon, learned Senior Counsel appearing for the petitioner of Civil Petition for Leave to Appeal No.1732 of 2022, submits that the provision of Rule 54(2) of the Service

Rules, is inconsistent with the fundamental rights and the High Court Division rightly held that such provision is unreasonable, arbitrary and violative of the principle of audi alteram partem. He further submits that in different cases the termination clause of Service Rules has been termed as Henry VIII clause and the authority usually excised such unlimited power in a discriminatory manner, the High Court Division rightly declared such provision void.

One Sarif Uddin, petitioner of Civil Petition for Leave to Appeal No.1732 of 2022 has preferred the said civil petition against the order passed by the High Court Division in Writ Petition No.3697 of 2022 in which, it stayed the further proceeding of the said writ petition till disposal of the Civil Appeal No.15 of 2022.

Since the Commission did not get leave against the judgment and order of the High Court Division so far the same relates to the order of termination issued against respondent Md. Ahsan Ali of Civil Appeal No.15 of 2022 and that the learned Advocate for the Commission did not make any submission as to the legality and propriety of the order of termination itself rather the learned Advocate for the Commission as well as the learned Additional Attorney General in

their submissions mainly confined their submissions as to the constitutionality of the provision of Rule 54(2) of the Service Rules, we shall confine ourself in discussing and considering the question as to the constitutionality of the provision of 54(2) of the Service Rules and conclusion arrived at by the High Court Division in that regard only. It is relevant here to quote the provision of Rule 54(2) of the Service Rules, the contents of which are as follows:

> "৫৪। চাকুরী অবসান।-(১) উপযুক্ত কর্তৃপক্ষ কোন কারণ প্রদর্শন না করিয়া এবং এক মাসের নোটিশ প্রদান করিয়া অথবা নোটিশের পরিবর্তে এক মাসের বেতন প্রদান করিয়া কোন শিক্ষানবিসের চাকুরীর অবসান ঘটাইতে পারিবে এবং শিক্ষানবিস তাহার চাকুরী অবসানের কারণে কোন প্রকার ক্ষতিপূরণ পাইবেন না।
>
> (২) এই বিধিমালায় ভিন্নরূপ যাহা কিছুই থাকুক না কেন, উপযুক্ত কর্তৃপক্ষ কোন কারণ না দর্শাইয়া কোন কর্মচারীকে নব্বই দিনের নোটিশ প্রদান করিয়া অথবা নব্বই দিনের বেতন নগদ পরিশোধ করিয়া তাহাকে চাকুরী হইতে অপসারণ করিতে পারিবে।"

Almost all the Service Rules relating to the employees of the Government and autonomous bodies in their respective Service Rules provide the identical termination clause of the employees from their services. There exists a presumption in favour of the constitutionality of an enactment. The burden of proof that the legislation is unconstitutional is upon the person who attacks it. The sole point to be

decided in this case is that such termination clause is ultra vires the Constitution or parent law, pursuant to which, the Rule has been enacted. The High Court Division under the provisions of Article 102 of the Constitution is authorized to declare a law ultra vires the constitution where the same conflicts or is inconsistent with constitutional provisions or fundamental rights as provided in the Constitution or such provision is inconsistent with the parent law which authorizes the concerned authority to enact the Service Rules. The word “ultra-vires” is a Latin Phrase used in law to describe an act which requires legal authority but is done without it. If the subordinate legislation falls outside the purview conferred, it is ultra vires the Constitution. The subordinate or delegated legislation is held to be ultra vires the enabling or parent law when it is found to be in excess of the power conferred by the enabling or parent law. If the delegated legislation is beyond the power conferred on the delegate by the enabling Law, it would be invalid. If the enabling or Parent Act, violates the implied limit of the Constitution, it will be ultra-vires the Constitution.

Identical issue has been discussed and considered by this Court and the apex Courts of the subcontinent. In the case of W.B. SEB Vs. Desh Bandhu Gosh reported in (1985) 3 SCC 116 it was observed that any provision in the regulation enabling the management to terminate the services of a permanent employee by giving three months' notice or pay in lieu thereof, would be bad as violative of Article 14 of the Constitution. Such a regulation was held to be capable of vicious discrimination and was also held to be naked "hire and fire rule". In O.P. Bhandari V. Indian Tourism Development Corporation Ltd. reported in (1986) 4 SCC 337 it was observed that the services of a permanent employee could be terminated by giving him 90 days' notice or pay in lieu thereof, would be violative of Article 14 and 16 of the Constitution. The whole case law as reviewed by the Constitution Bench in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress reported in AIR 1991 SC 101 it was observed by C.J. Sabyasachi Mukharji,

> "We have noted several decisions, numerous as these are, and the diverse facts, as we have found. We have noted that in some case arbitrary action or whimsical action or discriminatory action can flow or follow by

the preponderance of these powers. The fact that the power so entrusted with a high ranking authority or body is not always a safe or sound insurance against misuse. At least, it does not always ensure against erosion of credibility in the exercise of the power in particular contingency. Yet, discipline has to be maintained, efficiency of the institution has to be ensured. It has to be recognized that quick actions are very often necessary in running of an institution or public service or public utility and public concern. It is not always possible to have enquiry because disclosure is difficult, evidence is hesitant and difficult, often impossible. In these circumstances, what should be the approach to the location of power and what should be the content and extent of power, possession and exercise of which is essential for efficient running of the industries or services? It has to be a matter both of balancing and adjustment on which one can wager the salavation of rights and liberties of the employees concerned and the future of the industries or the services involved.

Bearing in mind the aforesaid principles and objects, it appears to us that the power to terminate the employment of permanent employee must be there. Efficiency and expediency and the necessity of running an industry or service make it imperative to have those powers. Power must, therefore, (be) with authorities to take decision quickly, objectively and independently. Power

must be assumed with certain conditions of duty. The preamble, the policy purpose of the enacting provision delimit the occasions or the contingencies for the need for the exercise of the power and these should limit the occasions of exercise of such powers. The manner in which such exercise of power should be made should ensure fairness, avoid arbitrariness and mala fide and create credibility in the decisions arrived at or by exercise of the power. All these are essential to ensure that power is fairly exercised and there is fair play in action. Reasons, good and sound, must control the exercise of power.

Notice of hearing may or may not be given, opportunity in the form of an enquiry may or may not be given, yet arbitrariness and discrimination and acting whimsically must be avoided. These powers must, therefore, be so read that the powers can be exercised on reasons, reasons should be recorded, reasons need not always be communicated, must be by authorities who are competent and are expected to act fairly, objectively and independently. The occasion for the use of power must be clearly circumscribed in the above limits. These must also circumscribe that the need for exercise of those power without holding a detailed or prolonged enquiry is there."

However, majority view of the aforesaid case was that such termination clause is arbitrary, unjust, unfair and unreasonable offending

Article 14, 16(1), 19(1)(ga) and 21 of the Constitution.

In the case of BADC and another Vs. Md. Shamsul Haque Muzumder and others, reported in 60 DLR (AD)152 this Division has observed,

> "In the instant case, the vires of Regulation 55(2) though challenged the High Court Division declined to declare the regulation ultra vires as the High Court Division thought it prudent to dispose of the case otherwise than by striking down the regulation. The approach of the High Court Division is appreciated because when a case can be decided without striking down the law but giving the relief to the petitioners that course is always better than striking down the law."

In the case of Abdul Baque and another Vs. Bangladesh, reported in 68 DLR(AD) 235, this Division has held,

> "Regulation 54(2) of the Bangladesh Sangbad Sangstha Employees Service Regulations, 1995 does not provide for any guideline for exercise of power of termination under this Regulation and, as such, it is prone to and permits the authority its abuse and arbitrary and discriminatory exercise under this Regulation which renders Regulation 54(2) being violative of fundamental right guaranteed by Article 27 of the Constitution."

But it finally did not declare such legislation void or ultra-vires the Constitution.

In the case of Central Inland Water Transport Corporation Ltd. V. Brojo Nath Ganguly and another reported in AIR 1986 SC. 1571 it was observed,

"The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said, 'When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool.' It was further observed that "the Calcutta High Court was, therefore, right in quashing the impugned orders dated February 26, 1983, terminating the services of the contesting respondents and directing the Corporation to reinstate them and to pay them all arrears of salary. The High Court was, however, not right in declaring clause (i) of Rule 9 in its entirety as ultra

vires Art.14 of the Constitution and in striking down as being void the whole of that clause."

Supreme Court of India finally passed the following order, "……the order passed by the Calcutta High Court is modified by substituting for the declaration given by it a declaration that clause (i) of Rule 9 of the "Service, Discipline and Appeal Rules, 1979" of the Central Inland Water Transport Corporation Limited is void under S.23 of the Contract Act, 1872, as being opposed to public policy and is also ultra vires Art. 14 of the Constitution to the extent that it confers upon the Corporation the right to terminate the employment of a permanent employee by giving him three months' notice in writing or by paying him the equivalent of three months' basic pay and dearness allowance in lieu of such notice."

It is well established principle of statutory interpretation that the object or purpose of all constructions and interpretations is to ascertain the intention of the law makers and make it effective. The High Court Division is not at liberty to declare a law void because in its opinion it is opposed to the spirit of the Constitution. There is a distance between violation of the provisions of Constitution and

"the spirit of the Constitution". While testing the constitutional validity of a law the question may arise whether the legislature was competent to enact the law or whether the legislature has transgressed the limits imposed by the Constitution or parent law. In this case such question does not arise. It is to be presumed that the legislature understands and correctly appreciates the need of its own people, necessity of such harsh law for proper administration of a government office and instruments.

The Constitutionality of a provision of a statute on the ground that power is vested in the higher officials and the same is very harsh and the same may be used in abusive manner cannot be called in question.

It appears from the judgment and order that the High Court Division set aside the said provision on the ground that the same was arbitrary and unreasonable and also violative of the provision of *audi alteram partem*. So far the observation as to violation of the provision of *audi alteram partem* is concerned it is to be remembered that where the right to prior notice is likely to obstruct the taking of prompt action such a right can be excluded. The right

to notice is excluded where the nature of the course to be taken, its object and purpose and the scheme of the statutory provisions prove for such exclusion (Union of India V. Tulsiram Patel, AIR 1985 SC 1416). In the case of Baikuntha Nath Das V. Chief District Medical Officer, Baripada and another reported in AIR 1992 SC 1020 it has been observed that the principles of natural justice have no place in the context of an order of compulsory retirement and hence, *audi alteram partem* is not attracted in case of such retirement. Where the holder of an office is subject to termination at pleasure he has no right to be heard before termination. V.R. Krishna Iyer, J. in the case of the Chairman, Board of Mining Examination and others V. Ramjee (1977 AIR SC 965) held that unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon express words of the provision conferring the power. 54(2) of the Service Rules has not provided any provision of issuance of notice before termination of an employee.

In the case of Swadeshi Cotton Mills V. Union of India (1981)1 SCC 664, para 33, it was observed by Justice R.S. Sarkaria that, "The audi alteram partem rule, (…), is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonize the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation". In the same case it was also held that, "The situation that demands immediate action or is preventive or remedial, in those case one cannot wait for the proper application of principles of natural justice."

In the case of Arcot Textitle Mills Ltd Vs. Regl. Provident Fund Commr., (2013) 16 SCC 1, Justice Dipak Mishra observed that, "Principles of natural justice should neither be treated with absolute rigidity nor should they be imprisoned in a straitjacket. The concept of natural justice sometimes requires flexibility in the application of the rule. What is required to be seen is the ultimate weighing on the balance of fairness. The requirements of natural justice depend upon the circumstances of the case. Natural Justice has many facets.

Sometimes, the said doctrine is applied in a broad way, sometimes in a limited or narrow manner."

Almost all the Service Rules not only in Bangladesh, but also around the globe have identical termination clause. Termination clauses are necessary exceptions to the doctrine of *audi alteram partem* or natural justice. Termination clause in service rules is necessary for the purpose of managing and supervising the employees and maintaining discipline and order in the service. To maintain discipline and order in the service, sometimes it might be required to take quick and prompt action and set aside all the formalities. During that period, it is necessary that the rights of general interest are given priority over the individual interest. Hence, in such scenario the mandatory requirements of assigning reasons and providing adequate opportunity of hearing might be relaxed and decision can be taken without following them.

Section 54(2) of the Service Rules might appear to be a harsh provision for the concerned individual, but such a provision is necessary for the greater good and to prevent prospective delinquent behavior of employees which might

compromise discipline and order in the service. Hence, it can be said that the said provision does not violate the doctrine of natural justice or *audi alteram partem*, as the application of such doctrine is excluded in the interest of administrative efficiency and necessity.

It has been submitted that the provision of rule 54(2) should be declared void as it is arbitrary and violates the doctrine of *audi alteram partem* or natural justice. The provision of rule 54(2) of the Service Rules does not violate the principle of *audi alteram partem* or natural justice. Nothing is absolute in law and the doctrine of *audi alteram partem* is not an absolute doctrine to be complied with. This doctrine has got its exceptions.

The efficiency and expediency and the necessity of running an office make it imperative to give the power to the employer to terminate the employment of employees but exercise such power should ensure fairness, avoid arbitrariness and malafide. The Law authorizing the authority to terminate the service of the employees by giving reasonable notice or pay in lieu of notice is constitutionally valid.

Mere harshness or unreasonableness or arbitrariness cannot be a ground to declare a law void or inconsistent with the provision of the Constitution. It has been repeatedly observed by this Apex Court that if an incumbent is entitled to get relief without declaring a law void, the Court will give such relief. Since the order of termination of the respondent No.1 was not an order of termination simpliciter but the same was an order of dismissal in the guise of the order of termination so the same was liable to be declared void and the High Court Division rightly did so. But the High Court Division has failed to draw any conclusion as to whether the instant provision that is Rule 54(2) of the Anti Corruption Commission (Employees) Service Rules, 2008 is inconsistent either with the provision of Article 7(2) of the Constitution or inconsistent with the provisions provided in Chapter 3 of the Constitution or such provision is inconsistent with the parent law.

Considering the aforesaid facts and circumstances, we find the substance in the appeal.

Thus, the appeal is allowed. The judgment and order dated 27.10.2011 passed by the High

Court Division in Writ Petition No.1424 of 2011 is set aside so far it relates to "set aside" the provision of Rule 54(2) of the Service Rules. Since the further proceeding of the Writ Petition No.3697 of 2022 is stayed till disposal of the Civil Appeal No.15 of 2022 and that by the judgment and order said Civil Appeal has been disposed of, the Civil Petition for Leave to Appeal No.1732 of 2022 is redundant.

C. J.

Md. Nuruzzaman, J

I have had the Privilege to go through the judgment Proposed by mylord Mr. Chief justice Hassan Foez Siddique J and my learned brother Mr. Justice M. Enayeture Rahim, J

Agreeing with the final decision of the appeal, I Concur with the judgment and guidelines as proposed by my brother Mr. Justice M. Enayetur Rahim, in addition to above views I have some Lexical and Constitutional views in deciding the instant appeal.

First of all it is my considered view that the facts of the case as has been discussed by mylord chief Justice is suffice to dispose of the appeal and, as such, again rewriting the same would be nothing but repeat mark unless a

little bit is necessary for the proper discussion and opinion as and where necessary.

The instant appeal had arisen from the Judgment of the High Court Division Passed in writ petition NO. 1424 of 2011 which was filled challenging the provision of the Rule 54(2) of the Anti Corruption commission (Employees) service Rule, 2008 as well as the order of termination as has been passed by the authority.

It would be gracious to quote the provision of Rules 54:-

> "৫৪। চাকুরী অবসান।-(১) উপযুক্ত কর্তৃপক্ষ কোন কারণ প্রদর্শন না করিয়া এবং এক মাসের নোটিশ প্রদান করিয়া অথবা নোটিশের পরিবর্তে এক মাসের বেতন প্রদান করিয়া কোন শিক্ষানবিসের চাকুরীর অবসান ঘটাইতে পারিবে এবং শিক্ষানবিস তাহার চাকুরী অবসানের কারণে কোন প্রকার ক্ষতিপূরণ পাইবেন না।
>
> (২) এই বিধিমালায় ভিন্নরূপ যাহা কিছুই থাকুক না কেন, উপযুক্ত কর্তৃপক্ষ কোন কারণ না দর্শাইয়া কোন কর্মচারীকে নব্বই দিনের নোটিশ প্রদান করিয়া অথবা নব্বই দিনের বেতন নগদ পরিশোধ করিয়া তাহাকে চাকুরী হইতে অপসারণ করিতে পারিবে।" [54. Termination of employment.-(1) The competent authority, without assigning any reason and by giving one month's notice or by paying one month's salary in lieu of notice, can terminate the service of a probationer and the probationer shall not receive any compensation on account of termination of his service.

(2) Notwithstanding anything to the contrary contained in these rules, the competent authority may, without assigning any reason, remove an employee from service by giving ninety days' notice or payment of ninety days' salary in cash.]

It would be further more gracious to quote the Article 27 of the Constitutions:-

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

So, the subordinate legislation cannot get primacy over the constitution.

On careful reading of the above mentioned provisions so far these have an effect on the terminate the service of the probationers, I too concur with the learned Chief Justice’s view that almost all the service Rules relating to the government and autonomous Body’s employees possesses identical provisions for termination of their services. However, regarding the termination of services of the permanent employees, there always contains some sort of safety bulbs or grievance mitigating mechanisms in the respective service Rules, which are significantly absent in the impugned Rule. On the face of the record, it seems contrary to the principle of Audi Alteram Partem.

Some direct consequences of such termination policies under Rule 54(2) are that- as per Rule 51 that permanent employee will not be entitled for

Gratuities, how long his/her service tenure may be. Another fatal outcome is that he/she shall be deprived from getting pension benefits etc as per Rule 53.

Moreover, there contains a separate Chapter 7 in the impugned Rules titling 'General Conduct and Discipline' for initiating departmental proceeding against any employee. It clearly indicates that, provisions under Rule 54 (2) are an extraordinary stipulation. Therefore, which bizarre situation compelled the Appropriate Authority for resorting such a lethal step bypassing the ordinary course of disciplinary action against one of its staffers, must be recorded in writing even within the ambit of Rule 54(2).

In the termination order of the respondent no. 1, dated 10 February, 2011, the primary cause assigned for his termination was that he spoke false and concocted facts about Commission and the "high-ups" (ঊর্ধ্বতন কর্মকর্তা) of the Commission. From the organogram of the ACC it is evident that Commission usually comprised of one Chairman and 02 Commissioners all of whom are from former high officials of the state and no one is from alumnus of the Commission. In any given bureaucracy, the post of the Secretary is the pivotal and in the Commission this position is invariably posted from the superior service cadres of the Government. Most

of the high officials are from outside of the Commission working on deputation basis.

The mandate of the employees of the Commission is investigation of corruption and usually most of the time they inquires against public officials of highest to lowest hierarchy of the Republic. The essence of this discussion is that sometimes it is possible that any official under investigation by the employee of the ACC could be a batch mate or from same service etc of the employee's high-up. Then, there exists, at least, theoretical possibility of being undue influence or pressure. In such situation, the investigator is badly in need of organizational professional safeguards. The position of the Secretary could play the role of such type of safeguard where the employee under duress can take resort. Otherwise, the employees of the ACC should always remain with the vicissitudes of sweet will of their high-up.

From this perspective, my pious wish is that the position of the Secretary of the commission should be appointed from the eligible officers of the Commission by the Government.

Moveso, to strengthen the commission activities one of the commissioner must be appointed from the high official of Anti Corruption Commission.

For this end, establishing a separate cadre service for ACC is a must.

It is better for the ACC to revise the impugned Rules "দুর্নীতি দমন কমিশন (কর্মচারী) চাকুরী বিধিমালা, ২০০৮" for creating a just, fair and healthy atmosphere within the organization. Because, any law legislated is not a sacrament, it could be changed, should be amended for coping it up to the demand of the day and justice.

J.

Obaidul Hassan, J. I have gone through both the judgments and orders proposed to be delivered by the Hon'ble Chief Justice Mr. Justice Hasan Foez Siddique and by Mr. Justice M. Enayetur Rahim.

Agreeing with the ultimate decision of the case, I concur with the observation/guidelines regarding exercise of power given under Rule 54(2) of the Durnity Daman Commission (Karmachari) Chakuri Bidhimala, 2008 as proposed by Mr. Justice M. Enayetur Rahim.

J.

Borhanuddin,J: I have gone through both the judgment and order proposed to be delivered by the Hon'ble Chief Justice Hasan Foez Siddique and by Justice M. Enayetur Rahim.

Agreeing with the ultimate decision of the case, I concur with the observation/guidelines regarding exercise of power given under Rule 54(2) of the Durnity Daman Commission (Karmachari)

Chakuri Bidhimala, 2008 as proposed by Justice M. Enayetur Rahim since the said Rule is contrary to the principle of audi alteram partem.

J.

M. Enayetur Rahim, J: I have had the privilege to go through the judgment rendered by the Hon'ble Chief Justice Hasan Foez Siddique, J.

Agreeing with the ultimate decision, it is deemed necessary to express my views on the issues involved in the instant case.

In this particular case the provision of the Rule 54 (2) Anti-Corruption Commission (Employees) Service Rules, 2008 and the order of termination of the writ petitioner-respondent No.1 has been challenged on the plea that the above Rule is violative of the fundamental rights as guaranteed in Articles 27, 29,31 and 40 of the Constitution and, that by inserting the said Rule, the authority has given unguided an unfettered power to remove an employee without initiating appropriate departmental proceedings as required under Rule 40 of the Rules and also without reasoning which is unwarranted.

In dealing with the particular case, certain salient facts need to be borne in mind, in particular -

i) the writ petitioner, having obtained Master's degree, in the year 1985 had applied for job and through a competitive

examination in the Public Service Commission was selected and joined in the Government Service as an Inspector in the then Bureau of Anti-Corruption, Bangladesh;

ii) the relationship between the appellant (employer) and the respondent (employee) is not master and servant;

iii) during service period of the writ petitioner, the authority having been satisfied with his performance of service, has given him several promotions as well as higher pay scales and he also awarded with appreciation and honorariums;

iv) the authority has taken the impugned action of termination against the writ petitioner, while a departmental proceeding was pending and against which Writ Petition No.9278 of 2010 was also pending before the High Court Division;

v) the writ petitioner made allegations to the higher authority concerned against the investigating officer, who was an army person and had tried to save an accused of a case, who was also an army officer;

vi) bidhi 38-45 of the Durniti Daman Commission (Karmachari) Chakuri Bidhimala, 2008 (herein after referred to as Service Rules) deal with the conduct and discipline of the

employees as well as disciplinary proceeding and punishment; and

vii) it is now well settled that mala fide, unfair, bias, unreasonable action of the administrative authority is without lawful authority and is of no legal effect.

Keeping in mind the above salient features we may look into some cases of our jurisdiction as well as Indian 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 above case this Division relied on 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 quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy: thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.*

The observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention, the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

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."

(Underlines supplied)

In the case of ***Prakash Rotan vs. State of Bihar(2009) 14 SC, 690*** the Supreme Court of India has held that *if there is a power to decide and decide detrimentally to the prejudice of a person, duty to act judicially and fairly is implicit in the exercise of such a power.*

And also held that *if any of the actions or administrative decisions result in civil consequences, the actions or decision could be judicially reviewed or tested on the anvil of principles of norman justice.*

In the case of **Canara Bank and others vs. Debasis Das**, **Manu/SC/0225/2003,** the Supreme Court of India has observed that:

"Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human

values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

The expression "natural justice" and "legal justice" do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.

Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or

personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life." (Underlines supplied)

In the case of ***Engineer Mahmudul Islam vs. Bangladesh, reported in 2000 BLD(AD)92*** this Division has uphold the view of the High Court Division that *the action of the official concerned must not be unfair, unreasonable and discriminatory.*

A mala-fide exercise of discretionary power is bad as it amounts to abuse of discretion and that mala-fide or bad faith vitiates everything and a mala fide act is a nullify.

In case of ***Bihar Vs. P P Sharma,*** reported in ***AIR 1991 SC, 1260*** it has been observed that the determination of the plea of *mala fide* involves two questions namely-

i) whether there is a personal bias or oblique motive; and

ii) whether the administrative action is contrary to it objects, requirements and conditions of a valid exercise of administrative power.

In the Case of ***Ram Chandra Vs. Secretary to the Government of W.B.*** reported in ***AIR 1964 Cal 265*** it has been held that –

"It is commonplace to state that mala fide does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes-

i) that the authority making the impugned order did not apply its mind at all to the matter in question; or

ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order."

In the Case ***Dr. Nurul Islam Vs. Bangladesh,*** *33 DLR (AD)201* section 9(2) of the Public Servants (Retirement) Act, 1974 has not been declared ultra vires the constitution but the impugned order of premature retirement was declared to have made without lawful authority, as finding that the order was vitiated by malice in law.

In the above case **Badrul Haider Chowdhury, J.** has observed –

> *"Neither the Act nor the rules provide any principle or guideline for the exercise of discretion by the Government when it proposes to retire a Government servant under section 9(2). In such case the scope for arbitrary exercise of discretion cannot be ruled out, as has happened in this case. In order to circumvent the previous decision of the High Court Division, the respondents issued the impugned notification which clearly makes out a case of malice in law."*

Unfairness or arbitrariness amounts to an abuse of power, **Lord Scarman** agreeing with the speech of Lord Templeman observed:

> *"...I must make it clear my view that the principle of fairness has an important place in the law of judicial review and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of power conferred by law."*

In a case where unfairness was alleged the House of Lords made the following observations:

> *"The so-called rules of natural justice are not engraved on tables of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demands when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends upon the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which operates."*

[Reference: Constitutional Law of Bangladesh, Third Edition, By Mahmudul Islam]

The views expressed by **Sabyasachi Mukherjee, C.J.** in Case of ***Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and Ors. [MANU/SC/0031/1991]*** have been cited by the Hon'ble Chief Justice. However, all his views have not been supported by other 03(three) Judges of the Bench.

In the said case **B.C. Roy, J.** has observed:

> *"162. Even executive authorities when taking administrative action which involves any deprivation of or restriction on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.*
>
> *163. It is also pertinent to refer in this connection the pronouncement of this court in the case of E.P.Royappa V. State of Tamil Nadu and Anr. MANU/SC/0380/1973: (1974)ILLJ172SC.*
>
> *Equality and arbitrariness are sworn enemies, one belongs to the rule of law in a public while the other to the whim and caprice of*

an absolute monarch. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14, it must be right and just and fair and not arbitrary, fanciful or oppressive.

.....

169. In the case of S.S. Muley V. J.R.D. Tata and ors. [1979]2 SLR 438 constitutionality came up for consideration and this court held the said regulation 48 to be discriminatory and void as it gives unrestricted and unguided power on the Authority concerned to terminate the services of a permanent employee by issuing a notice or pay in lieu thereof without giving any opportunity of hearing to the employee concerned and thereby violating the principles of natural justice and also Article 14 of the Constitution.

.....

184. ……. No opportunity of a hearing is at all to be afforded to the permanent employee whose service is being terminated in the exercise of this power. It thus violates audi alteram partem rule of natural justice also which is implicit in Article 14. It is not covered by any of the situations which would justify the total exclusion of the audi alteram partem rule. The view that the Board of Directors would not exercise this power arbitrarily or capriciously as it consists of responsible and highly placed persons ignores the fact that however highly placed a person may be he must necessarily posses human frailties and "power tends to corrupt, and absolute power corrupts absolutely."

.....

*197**.....**.** Rule of law posits that the power to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the 'audi alteram partem' rule and as such the order of termination of service of a permanent employee cannot be passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made.*

.....

212. On a proper consideration of the cases cited hereinbefore as well as the observations of Seervai in his book 'Constitutional Law of India' and also the meaning that has been given in the Australian Federal Constitutional Law by Coin Howard, it is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act. This, however, does not under any circumstances mean that where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncancalised, unbridled, unrestricted power to terminate the services of a permanent employee without recording any reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in article 14 of the constitution, cannot be read down to save the said provision from constitutional invalidity by bringing or adding words in the said

legislation such as saying that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to save it from constitutional invalidity. Therefore, on a consideration of the above decisions, it is impossible to hold by reading down the impugned provisions of Regulation 9(b) framed Under Section 53 of the Delhi Road Transport Act, 1950 read with Delhi Road Transport (Amendment)Act, 1971 that the said provision does not confer arbitrary, unguided, unrestricted and uncanalised power without any guidelines on the authority to terminate the services of an employee without conforming to the principles of natural justice and equality as envisaged in Article 14 of the constitution of India." (Underlines supplied).

In the above case **P.B. Sawant,J.** has observed:

224.……. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.

225. The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficiency. To ensure both, the service conditions of those who work for them must be encouraging, certain and secured, and not vague and whimsical. With capricious service conditions, both discipline and devotion are endangered, and efficiency is impaired.

226. The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

227. Both the society and the individual employees, therefore, have an anxious interest in service conditions being well-defined and explicit to the extent possible. The arbitrary rules, such as the one under discussion, which are also sometimes described as Henry VIII Rules, can have no place in any service conditions." (Underlines supplied).

In the said case **K. Ramaswamy J.** disagreeing with the view of Hon'ble Chief Justice, Supreme Court of India on applicability of the *'doctrine of reading down to sustain the affording provisions'* and agreeing with other 02 (two) judges has observed to the effect:

"264. The right to life, a basic human right assured by Article 21 of the Constitution comprehends something more than mere animal existence i.e. dignity of the individual. Field J. in Munn v. Illinois

[1876] 94 US 113 held that by the term "life" as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The deprivation not only of life but of . . . if it a efficacy be not fettered away by judicial decision. In Kharak Singh v. State of U.P. Manu/SC/0085/1962: 1963CriLJ329 this Court approved the definition of life given by Field J. in his dissenting opinion. In Olga Tellis v. Bombay Municipal Corporation [1985] 2 Su. SCR 51 this Court further laid that an equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation…. That, which alone can make it possible to live, leave aside which makes life livable, must be deemed to be an integral component of the right to life….The motive force which propels their desertion of their hearths and homes in the village is the struggle for Survival, that is the struggle for life. So unimpeachable is the nexus between life and the means of livelihood. Right to life does not only mean physical existence but includes basic human dignity.

265. The right to public employment and its concomitant right to livelihood, thus, receive their succour and nourishment under the canopy of the protective umbrella of Article 14,16(1),19(1)g) and 21. Could statutory law arbitrarily take away or abridged or abrogated it? In Board of Trustees, Port of Bombay v. Dilip Kumar MANU/SC/0184/1982: (1983) ILL J1SC AIR 1983 SC 109 this Court held that the expression "life" does not merely connote animal existence or a continued drudgery through life, the expression life has a much wider meaning. Where, therefore, the outcome of a departmental enquiry is likely to affect reputation or livelihood of a

person, some of the finer graces of human civilisation which makes life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedure."

……..

323. ……. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution"-10th Edn., Introduction cx..... It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes "means should discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful," "as followed in this Court in S.G. Jaisinghani v. Union of India. MANU/SC/0361/1967: [1967] 651 ITR34 (SC).

324. In an appropriate case where there is no sufficient evidence available to inflict by way of disciplinary measure, penalty of dismissal or removal from service and to meet such a situation, it is not as if that the authority is lacking any power to make Rules or regulations to give a notice of opportunity with the grounds or the material on records on which it proposed to take action, consider the objections and record reasons on the basis of which it had taken action and communicate the same. However, scanty the material may be, it must form foundation. This minimal procedure should be made part of the procedure lest the exercise of the power is capable of

> *abuse for good as well as for whimsical or capricious purposes for reasons best known to the authority and not germane for the purpose for which the power was conferred. The action based on recording reasoning without communication would always be viewed with suspicion. Therefore, I hold that conferment of power with wide discretion without any guidelines, without any just, fair or reasonable procedure is constitutionally anathema to Article 14,16(1), 19(1)(g) and 21 of the Constitution. Doctrine of reading down cannot be extended to such a situation." [underlines supplied]*

If we consider the above *ratio decidendi/obiter dictum* coupled with the salient facts and circumstances of the present case, in particular that the authority had exercised its power conferred under Rule 54(2) of the Service Rules when a departmental proceeding was pending against the writ petitioner, which was also challenged by the writ petitioner vide writ petition No.9278 of 2010 and the same was pending for hearing and further, that he made complaint before the authority concerned against the investigation officer who was on deputation, then it is very difficult to arrive at a definite conclusion that the authority had taken the impugned decision of termination against the writ petitioner in exercising its discretionary power conferred in rule 54(2) of the Service Rules fairly, justly, reasonably, bona fide and, without any oblique motive. The present appellant contested the Rule without filing affidavit-in-opposition and it failed to produce any scrap of paper before the

Court to show that the decision making process was fair, just, bona fide and not whimsical and also without any oblique motive.

In view of the above, the High Court Division did not commit any error or illegality in declaring the impugned decision of termination of the writ petitioner-respondent in exercising discretionary power as conferred in rule 54(2) of the Service Rules without lawful authority and is of no legal effect.

However, there is no scope to dis-agree with the well settled proposition of law as laid down in the cases of **Dr. Narul Islam Vs. Bangladesh, 33 DLR(AD)201; BADC and another vs. Md. Shamsul Hoque Majumder and others, 60 DLR (AD)152 and Abdul Hoque and another vs. Bangladesh, 68 DLR(AD)235** that mere harshness or unreasonableness or arbitrariness cannot be a ground to declare a law void or inconsistent with the provision of the constitution and, that if an incumbent is entitled to get relief without declaring a law void, the Court will give such relief.

Vis-a-vis it should be borne in mind that the right to life includes right to livelihood and the said right of livelihood cannot be hanged on the fancies of the authority as the income is the foundation of many fundamental rights.

It has already been discussed that exercise of discretionary power by the authority must be guided

by the relevant law/rules or some principle to avoid arbitrariness, unfairness and unreasonableness. As such it is expected that the authority concerned, i.e. the Anti-Corruption Commission should follow the following observations/guidelines in order to exercise power given under Rule 54(2) of the Service Rules-

i. *the Durnity Daman Commission (Karmachari) Chakuri Bidhimala, 2008 has prescribed the procedure to initiate departmental proceeding against an employee for the offence committed by him including misconduct affording all opportunities of Principle of Natural Justice and ensuring all rights to defend his case hence, it should not apply the provisions of Rule 54 (2) of the Durnity Daman Commission (Karmachari)Chakuri Bidhimala,, 2008 at first to get rid an employee unless situation demands so;*

ii. *the provisions of Termination Simplicitor should not be used in a fanciful manner when there is other way out;*

iii. *since bidhi 54 (2) of the Durnity Daman Commission (Karmachari)Chakuri Bidhimala, 2008 has given unfettered and unguided power to the Anti-Corruption Commission authority to get rid of any employee who is causing displeasure to them without assigning any reason which is opposed to the **'Principle of Natural Justice"** and of **'audi alteram partem'** therefore, it is expected that the authority must exercise the power under Rule-54 (2) the Service Rules of 2008 with utmost care and caution;*

iv. *since bidhi 54 (2) of the Durnity Daman Commission (Karmachari)Chakuri Bidhimala, 2008 creates a sense of insecurity in the minds of the employees to perform their duties with honesty and courage therefore, under rule 54 (2) of the Service Rules of 2008 the employer must exercise the power only in special cases where it is necessary and other employees also find the decision of the authority as rational;*

v. *an employee of Anti-Corruption Commission usually works with serious cases of corruption and misappropriation of power and position committed by the most powerful stake holders of the country including the most powerful businessman, politicians of the country and the bureaucrats of the Governments, the authority while exercising the power of 'Termination' must remain careful that nobody is victimized at the behest of high ups;*

vi. *the service of an employee of a Statutory Corporation, Public Body, National Enterprise etc. is not like that of a master and servant rather their tenure of service and other terms and condition are based on the relevant Statute and the Service Regulations, Thus extra ordinary power to terminate any employees with three months' notice or pay in lieu of who has served a long time is always discouraged;.*

vii. *case of every employee is required to be dealt with on merit by the concerned authority before they decide to terminate him from his job. Since the law empowers the authorities with such extra ordinary weapon, it should be used only in an extra ordinary situation and as a last resort, on consideration of individual merit of each and every case and not otherwise;*

viii. an employee should not be terminated by using Rule 54 (2) as a tool in the garb of a constructive dismissal;

ix. without assigning any reason as envisaged in Rule 54 (2) does not mean without having any reasons. Reason or reasons must be recorded in the note sheet before the Authorities take its decision to terminate an employee;

x. selection for Termination under Rule 54 (2) shall be made fairly and justly, without any pick and choose, without any bias, without any discrimination under the mandate of the Constitution of the People's Republic of Bangladesh. The parameters of such termination has to be set in accordance with the equality provision of the Constitution;

xi. the authority must act rationally in its decision making process within the concept of Wednesbury Reasonableness;

xii. no employee should be terminated from his service against whom any departmental proceeding has already been initiated and pending with specific charges; in that situation, the authority must conclude the proceeding and punish the accused if he is found guilty. Not in any other manner.

It is also expected that all the Government, Semi-government, Autonomous bodie(s), Corporation(s), Statutory bodie(s), institution(s) should follow the above observations/guidelines in taking action of termination against its employee whatever discretionary power has been conferrer given in the relevant law/Rules.

With the above considerations, discussions, observations and findings, I am agreeing with the judgment proposed to be delivered by the Hon'ble Chief Justice.

J.

Courts Order

The appeal is allowed. The judgment and order dated 27.10.2011 passed by the High Court Division in Writ Petition No.1424 of 2011 is set aside so far it relates to "set aside" the provision of Rule 54(2) of the Service Rules. Since the further proceeding of the Writ Petition No.3697 of 2022 is stayed till disposal of the Civil Appeal No.15 of 2022 and that by the judgment and order said Civil Appeal has been disposed of, the Civil Petition for Leave to Appeal No.1732 of 2022 is redundant.

C. J.

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The 16th March, 2023

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