IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION.

PRESENT:

Mr. Justice A.B.M. Khairul Haque, Chief Justice

Mr. Justice Md. Muzammel Hossain

Mr. Justice Surendra Kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Madam Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Muhammad Imman Ali

CIVIL PETITION FOR LEAVE TO APPEAL NOS.640 AND 641 OF 2011.

(From the judgment and order dated 8.3.2011 passed by the High Court Division in Writ Petition Nos.1890 and 1892 of 2011.)

Professor Muhammad Yunus: Petitioner.
(In C.P. No.640 of 2011)

Rahima Begum and others: Petitioners.
(In C.P. No.641 of 2011)

=Versus=

Bangladesh, represented by the Secretary, Bank and Financial Institutions Division, Ministry of Finance, Bangladesh Secretariat, Ramna, Dhaka and others: Respondents.
(In both the cases)

For the Petitioner: (In C.P.No.640 of 2011)	Dr. Kamal Hossain, Senior Advocate, (with Mr. Mahmudul Islam, Mr. Rokan Uddin Mahmud, Senior Advocate.
For the Petitioners: (In C.P.No.641 of 2011)	Ms. Sara Hossain, Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For Respondent No.1: (In both the cases)	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For Respondent No.2: (In both the cases)	Mr. Tawfique Nawaj, Senior Advocate, instructed by Mr. Md. Aftab Hossain, Advocate-on-Record.
For Respondent No.3: (In both the cases)	Mr. Ajmalul Hossain, QC, Senior Advocate, instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.
Fore Respondent Nos.4-11: (In both the cases)	Not Represented.

Date of hearing : 3rd, 4th and 5th May, 2011.

J U D G M E N T

S.K. Sinha, J: Though these petitions arise out of two separate judgments, the writ petitions out of which these petitions arise have been instituted challenging the self-same orders over the same subject matter and the questions involve in these petitions being identical, these petitions are disposed of analogously.

Before entering into the merit of the matter we would like to dispose of the application filed by Prof. Muhammad Yunus (petitioner) in Civil Petition No.640 of 2011 for recalling the unsigned order dated 5th April, 2011. The leave petitions upon hearing the parties at length were dismissed in open Court on 5th April, 2011. Soon thereafter, the petitioner filed an application for rehearing of the matters after recalling the unsigned orders on the ground that all the learned counsel for the petitioner could not complete their submissions and therefore, for ends of justice the learned counsel may be afforded opportunity to make further submissions. The Supreme Court of Bangladesh (Appellate Division) Rules, 1988 does not provide any

provision for rehearing of a matter which has been dismissed upon hearing the parties on merit other than hearing of a review petition under Order XXVI Part IV. What is more, the prayer for rehearing is not in conformity with Order XXVI Rule XI of Rules of 1988. As such, this petition is misconceived one. However, on consideration of the fact that three senior most learned counsel expressed their desire to make further submissions, we treat this case as an exceptional one and recall the unsigned orders in exercise of inherent powers of this Division.

Short facts relevant for the disposal of these petitions are succinctly narrated thus:

Grameen Bank Ordinance, 1983 (Ordinance No.XLVI/83), was promulgated on 4th September, 1983 with a view to establishing a Grameen Bank for providing credit facilities and other services to landless persons in rural areas and other matters connected there with. Section 14 authorizes the Government to appoint a Managing Director of the Bank. Accordingly Prof. Muhammad Yunus was appointed by

Notification dated 13th September, 1983 as its Managing Director on the terms and conditions regulated by the Implementation Division's O.M. No.MF./ID/V/N(A)-16/78/1199 dated 11th September, 1980.

The Ordinance was amended on 31st July, 1990, and by this amendment the Board of Directors (the Board) has been given the power to appoint the Managing Director "with prior approval of the Bangladesh Bank". In pursuance thereof as per proposal of the Bank by letter under memo dated 14th August, 1990 Prof. Muhammad Yunus was reappointed on certain terms and conditions, and one of which was to frame Regulations. Accordingly the Bank promulgated "Mvgxb e¨vsK PvKix wewagvjv" which was published in the Official Gazette on 1st March, 1993.

Bangladesh Bank Inspection Division-2 inspected the affairs of the Grameen Bank and in its report submitted on 31st December, 1999 it was pointed out in paragraph 20.4 that Prof. Muhammad Yunus and Mr. Md. Khaled Shams had been performing as Managing Director and Deputy Managing Director respectively who had

attained the age of superannuation as they had exceeded the age of 60(sixty) years as per Regulations and that they had been performing their responsibilities as per decision of the Board for indefinite period. This probably prompted the Bank to promulgate another Regulations regulating the terms and conditions for the appointment of Managing Director, which was published in the Official Gazette on 19th November, 2001. Under such circumstances, the Bangladesh Bank by its letter under memo dated 27th February, 2011 annexure-M to Writ Petition No.1890 of 2011, wrote to the respondent No.3 intimating that despite exceeding the retirement age of 60 years, Prof. Muhammad Yunus had been continuing as Managing Director of the Bank as per decision of the Board without approval of the Bangladesh Bank in accordance with section 14(1) of the Ordinance, that his continuation in such office was not legal and that he was not legally holding the office of Managing Director. On 2nd March, 2011 the Bangladesh Bank intimated the Chairman of the Grameen Bank that the continuation of Prof. Muhammad Yunus as the Managing

Director was violation of section 14(1) of the Ordinance.

Prof. Muhammad Yunus challenged these two orders in Writ Petition No.1980 of 2011 in the High Court Division claiming that he was appointed as Managing Director as per resolution of the Board in accordance with section 14(1) of the Ordinance, that the Grameen Bank Ordinance having not conferred any power upon the Bangladesh Bank to dictate or determine the terms and conditions under which the Managing Director would serve Grameen Bank, the impugned orders are unlawful, that the Grameen Bank Service Regulations, 1983 have no manner of application to Prof. Muhammad Yunus, that the Bangladesh Bank has not been invested with any authority to pass any order relieving the Managing Director of the Grameen Bank from service and that the removal was in violation of the principle of natural justice. 9(nine) Directors of Grameen Bank, the petitioners in Civil Petition No.641 of 2011, moved another petition being Writ Petition No.1891 of 2011 in

the High Court Division challenging the aforesaid two letters raising self-same grounds.

The High Court Division upon hearing the parties by two separate judgments dismissed the writ petitions summarily. While dismissing the petition of Prof. Muhammad Yunus, the High Court Division noticed section 14(4) of the Ordinance and the Regulations of 1993, and came to the conclusion that he was performing as an officer of the Bank and therefore, his Service would be regulated by the Regulations of 1993, that after expiry of 60 years he was not legally entitled to continue as Managing Director of the Bank, that the resolution of the Board dated 28th July, 1999 allowing him to continue as Managing Director until the Board decides otherwise without prior approval of the Bangladesh Bank provided in section 14(1) of the Ordinance is illegal, that as Prof. Muhammad Yunus had been holding the office beyond the age of superannuation, the principle of *audi alteram partem* would not be applicable and that the other petitioners had no locus-standi to maintain the writ petition challenging the impugned orders.

We have perused the writ petitions along with annexures, the impugned judgments, the Ordinance and the Service Regulations. We have heard the learned counsel at length for days together. Dr. Kamal Hossain, learned counsel appearing for Prof. Muhammad Yunus argued:

a) the petitioner had effectively been denied access to justice by the summary rejection of the Writ Petition and no affidavit-in-opposition was filed controverting averments made in the writ petition;

b) this Division in exercising appellate jurisdiction should have examined the judgment, and the petitioner should have been given opportunity to point out the errors in the judgment of the High Court Division;

c) a summary rejection by the High Court Division of the writ petition denied the petitioner an opportunity of having an

effective hearing at that level and also deprived the petitioner of having an effective hearing at the appellate level since in the judgment of the High Court Division all relevant materials had not been considered;

d) the grounds taken in the writ petition challenging the legality of the impugned orders are based on issues relating to interpretation of law and where the construction of law is to be considered, a proper adjudication as required by all constitutions can not be done in a vacuum or without consideration of the factual context;

e) the summary rejection of the writ petition in the circumstances is contrary to established norms of constitutional jurisprudence; and

f) the mode of exercise of judicial power by the High Court Division is manifestly

erroneous and amounts to a denial of access to justice to the petitioner.

In support of his contention, the learned counsel has cited the cases of General Medical Council V. Spackman (1943) AC 644-645, Kanda V. Government of Malaya (1962) AC Privy Council, 322,337, Bibi Quamrunnessa V. Bandar Building Co. Ltd. (unreported), Civil Appeal No.190 of 2003, Exen Industries V. CCIE, AIR 1971 SC 1025, Century Spinning V. Ulhasnagar Municipal Council AIR 1971 SC 1021 and Veerappa V. B.P. Dalal AIR 1975 SC .778.

Mr. Mahmudul Islam while endorsing the submissions of Dr. Hossain contended:

a) even if the petitioner had no legal right to continue as Managing Director of the Bank, the principle of natural justice had to be followed before removing him from such office;

b) this being an essential principle when a quasi-judicial body embarks on determining disputes between the parties,

it should not be denied to a person even if he had no legal right;

c) there are inconsistent findings and observations in the judgment of the High Court Division and for correcting gross error committed by it, leave should be granted;

d) in the Regulations of 1993 the expression 'e¨ve¯nvcbv cwiPvjK' and 'Kgx' having been separately defined in clause 2.0 (O) and (P) respectively, there is no scope to apply the Regulations for deciding the terms and conditions of the office of the Managing Director, inasmuch as, Prof. Muhammad Yunus is not an employee but the Managing Director, who has been appointing the workers and officers of the Bank as per Regulations; and

e) the Bangladesh Bank having not raised any objection in the petitioner’s performing as Managing Director since 1999, such

inaction indicates that there is tacit consent by implication to continue such office.

Mr. Rokanuddin Mahmud took us to the resolutions of the Board of Directors dated 28th July, 1999 and 31st December, 1999, the para wise reply of Grameen Bank in pursuance of Bangladesh Bank's letter under memo dated 12th February, 2001, annexure-J, particularly paragraph 50.0 and the representation of the Grameen Bank in pursuance of the report of the Bangladesh Bank, annexure-M to the writ petition, and paragraph 3.0 including annexures-C and D and submitted;

a) the last sentence of annexure-C is not applicable to the petitioner, inasmuch as, the petitioner's terms of service will be regulated as per Regulations of 2001;

b) since Prof. Muhammad Yunus has been holding the office of Managing Director for more than 10 years even after exceeding 60 years of age, his removal from office without proper notice is violative of the principle of

natural justice, particularly when a stigma has been given to him in the impugned orders; and

c) the petitioner having been appointed by the Board in accordance with section 14(1) of the Ordinance and approval having been sought by letter dated 14th August, 1990 and Bangladesh Bank having accorded approval by its letter dated 14th August, 1990, the impugned orders are without jurisdiction.

Ms. Sara Hossain, learned counsel appearing for the petitioners in Civil Petition No.641 of 2011 took us to the various provisions of the Ordinance and submitted:

a) the petitioners who constitute the majority of the Board of Directors being borrowers and share holders of Grameen Bank have their right to challenge the impugned orders, inasmuch as, they improved their own lives and those of their family and children as a result of their involvement with Grameen Bank and thus, they

are certainly aggrieved persons within the meaning of Article 102 of the Constitution;

b) the High Court Division acted illegally in rejecting their petition in-limine, inasmuch as, they filed the writ petition in their personal capacity and even though they have no personal interest in the post of Managing Director, they have the right to prevent the interference in the internal affairs of the Bank;

c) the petitioners as Directors of the Bank filed the writ petition to protect their statutory right under the Grameen Bank Ordinance, it being not a public institution, the majority shares held by private citizens have the right to prevent usurpation of their statutory right with regard to the management and control of the Grameen Bank and to safe-guard their organization;

d) the petitioners have been denied their right of hearing and thus the High Court Division

committed fundamental error in dismissing their writ petition summarily, and

e) Grameen Bank being a specialied Bank, Sui generis in the manner of its establishment and functioning, its operation is different from other Banks-the Board of the Bank, not the Government is the competent decision-making body.

Mr. Mahbubey Alam, learned Attorney General, on the other hand, supported the judgments of the High Court Division. According to the learned Attorney General,

(a) Grameen Bank being a statutory Bank, the petitioner is a public servant within the meaning of Public Servants (Retirement Act) 1974, therefore, the Act of 1974 will be applicable to the case of the petitioner;

(b) since the petitioner has already attained the age of 60 years, he has been holding the office of Managing Director illegally

and therefore, no show cause notice is required to be served upon him; and

(c) Rules of 2001 will not be applicable to the petitioner, which will be applicable for those who will be newly appointed as Managing Director.

Mr. Tawfiq Nawaz while endorsing the submissions of the learned Attorney General added:

(a) the petitioner having attained the age of 60 years before promulgation of Regulations of 2001, does not deserve a show cause notice before taking action against him, and the Regulations of 2001 will not be applicable to him;

(b) section 14(1) of the Ordinance clearly provides for approval of the Bangladesh Bank for appointment of a Managing Director and the petitioner having not challenged section 14, there is no scope to declare the impugned orders illegal

since no prior approval of the Bangladesh has been taken;

(c) the impugned orders are in fact not actions taken by the Bangladesh Bank; rather by these orders an intimation has been given to the Bank that Prof. Muhammad Yunus has been holding the office of Managing Director even after attaining the age of superannuation;

(d) the Grameen Bank being a statutory Bank, it comes within the definition of “statutory public authority” within the meaning of Article 152 of the Constitution and the petitioner having admitted in his affidavit that his profession is service, he is a public servant and therefore, he can not continue as Managing Director of the Bank even after crossing the age of 70 years;

(e) when a public servant attains the age of superannuation, the authority is not

required to issue any show cause notice for his removal other than to intimate him the correct position of his service and the same has been done in case of the petitioner; and

(f) even if it is assumed that no action has been taken against Prof. Muhammad Yunus even after expiry the age of 60 years that does not mean that the provisions of law which are applicable to the Bank and its employees have no force of law.

Upon hearing the parties and on consideration of the materials on record the following points have emerged for our consideration:

a) What is the status of Grameen Bank?

b) What is the status of its Managing Director?

c) What is the tenure of the Managing Director as per existing law?

d) What are the terms and conditions regulating the office of the Managing Director?

e) Whether the Board of Directors of the Bank can allow the Managing Director to continue for indefinite period without approval of the Bangladesh Bank, and

f) Whether the principle of *audi alteram partem* is applicable while removing an officer of a statutory organization who has been holding such office beyond the age of superannuation.

There is no dispute that Grameen Bank has been established by a statute with 60% paid-up share capital subscribed, managed or controlled by the Government and 25% by borrowers. The above ratio of share capital has been reduced to 25% and 75% respectively by an amendment by the Grameen Bank (Amendment) Ordinance, 1986. Be that as it may, this reduction of holding share capital will not make any difference regarding its status and the Government's power in the affairs of this statutory Bank. Section 5(2) of the Ordinance shows that the Board has no power to open regional or other offices without approval of the Bangladesh Bank. Even in case of increase of its

authorized capital, prior approval of the Government is necessary under section 6(3). It is also provided in section 7(2) that the Government may increase the paid up capital of the Bank from time to time in its sole discretion. Section 10(1) provides that the Chairman of the Board will be appointed by the Government, and three persons shall be appointed as Directors of the Bank by the Government under section 9(1)(a). The Managing Director will not be elected but be appointed by the Board with prior approval of the Government under section 14(1). Even the resignation of the Managing Director will not be effective until such resignation is accepted by the Government. These provisions undoubtly spel out that it is a statutory Bank and though the Board of Directors have been authorized to manage its affairs including the power to appoint the Managing Director but the Government and/or Bangladesh Bank is its ultimate controlling authority.

However, there is no dispute that Professor Muhammad Yunus undertook "Rural Economics Programme" at village Jobra being sponsored by the Department of

Economics, University of Chittagong in 1976, when he was a professor of the said University. This project was adopted by the Bangladesh Bank which is evident from the 'Explanation' added at the bottom of the Ordinance. But at the same time, there is no gainsaying the fact that this Grameen Bank could not have been established unless professor Muhammad Yunus came forward with the ideas which he dreamt of providing 'micro credit' facilities to the rural poor while he was a professor of the University and approached the Government to set up Grameen Bank by an Ordinance. In view of the above admitted facts, we find no substance in the submission of the learned counsel that Professor Muhammad Yunus is the founder of the Bank and that Grameen Bank is a Private Bank. It may be said that he is the precursor for the establishment of the Bank and its founder Managing Director.

Admittedly Professor Muhammad Yunus was appointed as Managing Director initially in accordance with the terms and conditions of the Implementation Division's memo dated 11th September, 1980 of the Ministry of

Finance and Planning Division, Government of Bangladesh. He was reappointed on 25th August, 1990 on the following terms and conditions:

a) his service conditions will be regulated as per Regulations to be framed in accordance with section 14(4) of the Ordinance;

b) the Regulations will be effective after publishing them in the Official Gazette;

c) Grameen Bank has been advised to take effective steps in this regard; and

d) if the Regulations are inconsistent with the existing ones prior approval of the Bangladesh Bank will be necessary.

The petitioner did not file the Implementation Divisions memo dated 11th September, 1980, though in his reappointment letter there was clear stipulation that his terms and conditions of service would be regulated as per 'existing terms' until the Regulations are framed in exercise of powers under section 36, i.e. the Implementation Division's memo dated 11th September, 1980. In course of hearing we drew the

attention of Dr. Hossain repeatedly about this letter for appraising us the initial terms and the status of the Managing Director. Dr. Hossain avoided to meet the query saying that Mr. Rokanuddin Mahmud would meet all those queries on facts. When Mr. Rokanuddin Mahmud argued on facts, he was asked to produce this memorandum or at least to intimate us the terms and conditions on which he was appointed as Managing Director. Mr. Mahmud’s response was that he would reply to our query later on but to our utter surprise, Mr. Mahmud concluded his submissions without meeting our query.

The petitioner has come in Court for judicial review of the orders/decisions of the Bangladesh Bank intimating the Chairman of the Board of Directors of the Bank that as Prof. Yunus has been continuing as Managing Director even after surpassing the retirement age of 60 years violating the service Regulations, his continuation as per decision of the Board for indefinite period without approval of the Bangladesh

Bank is not legal and that he has not been legally working as Managing Director of the Bank.

Judicial review is different from an appeal. The Court hearing an appeal will normally have the right to decide the whole case again and, if it wishes, to substitute its own decision for that of the Court below. This is precisely where a judicial review differs from an appeal. The Court conducting a review is concerned to determine the lawfulness, but not the merits of the decision under review. The natural corollary to this is that though the Court could quash the impugned decision, it could not substitute its own decision for that of the concerned Authority, the original decision maker.

The governing principles of judicial review adopted by Lord Diplock in Council of Civil Service Unions V. Minister for the Civil Service (1984) 3 All ER 935 at 949 commands considerable respect.

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development

> has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety".

Lord Diplock, explained the meaning of the expression 'illegality' in determining the lawfulness of the decision as under:

> "By illegality as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

This test is two fold, as the decision maker (a) 'must understand' the relevant law correctly, and (b) 'must give effect to it'. The decision- maker i.e. the Bangladesh Bank must comply with both these conditions.

Failure under either head will presumably be enough to entitle the Court to quash the decision. It is also pointed out by Lord Diplock that it is for the Court to decide whether the decision-maker has indeed complied with these conditions. Now the question is essentially whether the authority entrusted with the decision-making power has the right to decide the case 'wrongly' or whether any error of law automatically takes the decision outside the authority's jurisdiction. This takes us to consider the relevant provisions of law.

Section 14(1) of the Ordinance states that the Managing Director of the Bank shall be appointed by the Board with prior approval of the Bangladesh Bank. Sub-section (4) provides that the Managing Director shall be the whole-time officer and Chief Executive of the Bank and shall serve under the Bank on such terms and conditions as may be prescribed by Regulations. Section 15 also provides that the Managing Director shall perform functions as may be prescribed by the Regulations. The letter of reappointment dated 25th August, 1990, annexure-C, was issued in accordance with

sections 14(4) and 15. It has been specifically mentioned that till such Regulations are framed, the 'existing terms' will hold the field. Existing terms means the terms fixed in his initial appointment letter on 13th September, 1983. It is also seen that the Board made Regulations under the heading "Mvgvb PvKix wewagvjv" which had been published in the Gazette on 1st March, 1993.

Though it has been termed as Service Regulations, it is seen that apart from terms and conditions of service of the workers, staff and officers, this Regulations also provide the powers, the performance of functions and discharge of duties by the employees, staff and officers of the Bank. The inclusion of these provisions sufficiently indicate that the Regulations have been made for 'efficient conduct of the affairs of the Bank' as well. It may be said that it is a complete Code promulgated in accordance with the Ordinance for running the affairs of the Bank and that being the position, it can safely be concluded that this Regulations are applicable to all the employees including the officers of the Bank.

What's more, this Regulations have been promulgated within less than three years of the direction given by the Bangladesh Bank in annexure-C. Besides, in paragraph 2.0 of the re-appointment letter of the petitioner, annexure-D, it was pointed out that he would be treated as a regular 'officer' of the Bank, and in paragraph 3.0 it was clearly mentioned that he would draw monthly '‡eZb' (salary), and would also be provided with pension, gratuity along with other benefits as per prevailing rules. Pension benefits are given to the employees of the Government and other statutory bodies including a bank. Clause 2(P) defines 'Kg©' (worker/employee) means all permanent and temporary officers and employees. Clause 2(X) defines '‡eZb' (salary) means monthly salary received by an employee sanctioned against his post or other equal financial benefits sanctioned. In paragraph 3.0, his monthly salary was fixed which is in accordance with clause 2(P). Clause 49.0 relates to gratuity and clause 51.0 relates to pension etc, which the petitioner is entitled to as per paragraph 9.0 of his appointment

letter. Clause 50.0 states that the retirement age of an employee of the Bank is 60 years. There is, therefore, no dispute that the terms of appointment of Professor Yunus cover the provisions of this Regulations.

It is argued that in the Regulations the expressions 'Managing Director' and 'Employee' having been separately defined in paragraphs 2(O) and 2(P) respectively, and as the Managing Director being the employer of the employees and officers, he should not be treated in the category of an employee. This submission is devoid of substance because, as mentioned above, Professor Yunus had not been elected Managing Director but appointed Managing Director with the status of a regular officer of the Bank and he had acquiesced to his such status as an officer of the Bank. Further, his power to appoint officers is a part of the functions of his job provided in section 15 read with clause 7.4 of the Regulations which will not make any difference in his status. This power of appointment was also given to other officers of the Bank before

coming into force of the Regulations and powers of those officers had been retained in the proviso to clause 7.4 of the Regulations. This being the position if we accept the submission of the learned counsel, then the Regulations will not be applicable to them as well. Similar job descriptions and functions have also been allocated to branch managers, area managers, programme officers etc. in appendix-3 to the Regulations.

There is no dispute that Professor Muhammad Yunus was reappointed by the Board with prior approval of the Bangladesh Bank on 25th August, 1990. The question then turns to be decided as to the tenure of such appointment. On this point there are inconsistent submissions from the Bar. It is firstly submitted, there is no fixed tenure and on the next breath, it is contended that the Board is the authority to decide the tenure, and at its 52nd meeting it has been decided that Professor Yunus would continue to perform as Managing Director until contrary is decided. Alternatively, it is argued that the terms and

conditions including the tenure will be regulated as per Regulations of 2001 published in the Gazette on 19th November, 2001, annexure-H. We find fallacy in the submissions in view of the fact that the petitioner is not in service of a private Bank; rather, he is in the service of a statutory Bank, established under an Ordinance, being controlled and regulated by the Government and therefore, the Board has no authority to fix his tenure of service for an indefinite period without approval of the Bangladesh Bank.

This resolution, according to the learned counsel, is in accordance with law and the Bangladesh Bank illegally interfered with the internal affairs of the Bank. The tenure including the terms and conditions will be governed by section 14 read with the Regulations made in exercise of powers under section 36. Assuming that the Regulations of 1993 will not be applicable to the petitioner, as argued, then the Implementation Division's memo dated 11th September, 1980 will hold the field since it was clearly pointed out in his reappointment letter that until the

Regulations are framed the ‘existing terms’ would govern his service, and if the Regulations as may be framed conflicts with the existing ones, prior approval of the Bangladesh Bank would be necessary. The Regulations of 2001 were framed long after the expiry of the retirement age of 60 years.

We are of the view that since the petitioner seeks judicial review of the impugned orders of the Bangladesh Bank removing him from the post of Managing Director, he ought to have filed the Implementation Division’s memorandum which is relevant for deciding his status and the terms and conditions of his service.

The said memorandum was issued by the Ministry of Finance fixing the pay scales of the Governor/Deputy Governor of Bangladesh Bank and Managing Directors of the Nationalised Banks and Financial Institutions and providing other related facilities and benefits, the relevant portion is reproduced below:

"GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH
MINISTRY OF FINANCE
IMPLEMENTATION DIVISION

No.MF(ID)V/N(A)-16/78/1199 Dated 11.9.80

OFFICE MEMORANDUM

Sub: Pay scales of the Governor/Dy. Governor of Bangladesh Bank and Managing Directors of the Nationalised Banks & Financial Instts.

The undersigned is directed to say that the Government have been pleased to decide that the posts of Governor/Deputy Governor of Bangladesh Bank and the Managing Directors of Nationalised Banks and Financial Institutions named below will be placed in the New scales of pay and receive other allowances/facilities as shown below ....."

The petitioner had been given the status of the Managing Director of a Nationalised Bank and therefore, the terms and conditions applicable to the Managing Director of a Nationalised Bank would apply to him. These terms and conditions have not been changed by the Bank by the Regulations or by the Board with the approval of the Bangladesh Bank. Therefore, we can safely infer that the petitioner has been performing as Managing Director for a tenure equivalent to those Managing Directors of Nationalised Banks. The

petitioner did not claim that he was not appointed on contract basis as per paragraph 7 of this memorandum, in which case, his service would have been "governed by their own terms of contract". He is a public servant plain and simple, and the age limit for retirement of a public servant will be applicable to him. In his appointment letter it was clearly pointed out that he would be treated as ‡bqvgZ KgKZv (regular officer) and that there would be a continuity of service. A public servant's retirement age has been fixed by statute and after expiry of his age of superannuation, he cannot continue in such office as of right, unless, the tenure of his service is extended by the authority. There is nothing on record to show that his service has been extended by the concerned authority.

There is no explanation as to why the Grameen Bank did not frame separate Regulations determining the terms and conditions of the Managing Director at the time of framing the Regulations of 1993 if they are not applicable to him despite direction given by the Bangladesh Bank. Mr. Tawfiq Nawaz submitted that the

Regulations of 2001 would not be applicable to the petitioner as he had already attained the age of 60 years on 28th June, 2000, long before coming into force of this Regulations on 19th November, 2001 and secondly, these Regulations have been made providing the terms and conditions for those Managing Directors who will be appointed later on. In this connection, the learned counsel has drawn our attention to the preamble. In the preamble it has been stated "MvgvwbK e¨vsK Ordinance No.XLVI, 1983 Gi 14 avivi wewfbœ †gvZv‡eK e¨e¯nvcbv cwiPvjK wb‡qv‡Mi kZvejx msµvšÍ wbg©vY wbgœjwLZ †i¸‡jkb cÖZxZ n‡jv|" (emphasis added)

The preamble of a statute is a prefactory statement at the beginning, following the title and preceding the enacting clause; it explains the policy and purpose, the reasons and motives for, and the objects sought to be accomplished by the enactment of the statute. Preamble has been regarded as of great importance as guides to construction. In the preamble of the Regulations it has been stated in clear terms that those have been framed for regulating the terms of appointment of the Managing Director. While Professor

Yunus was performing as Managing Director these Regulations were framed. In view of the above, we find merit in the contention of Mr. Tawfiq Nawaz.

Even if it is assumed that these Regulations are applicable, the petitioner will not derive any benefit from them. The petitioner has not been reappointed after promulgation of the same with prior approval of the Bangladesh Bank. Secondly, clause 4.00 provides that the tenure of the office will not be more than five years, and the Board can reappoint the Managing Director for a fixed term on such new terms as will be decided at the time of reappointment. The tenure of five years expired in November, 2006 from the date of coming into force of these Regulations even if it is taken that the same are applicable to the petitioner. But the petitioner was neither appointed nor reappointed fixing his terms after coming into force of the said Regulations. Learned counsel for the petitioner fails to explain how these Regulations will regulate the terms and conditions of Professor Yunus? In view of the above, there is no doubt that Bangladesh

Bank removed the petitioner in exercise of its power in accordance with law.

It is submitted that the Bangladesh Bank issued the impugned orders without affording Prof. Muhammad Yunus an opportunity of being heard and thus there is procedural impropriety in the impugned orders. This principle of natural justice has been laid down by Courts as being minimum protection of rights of the individual against the arbitrary decision taken by the quasi-judicial and administrative authority when making an order affecting ones rights. There is no dispute that whenever justice fails to achieve solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality. There is also no denial of the fact that the adherence to principle of natural justice is recognized by all civilized States which is of supreme importance when quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving penal consequence is in issue. It is now well recognized that no one should be

condemned unheard and a notice has to be served before any action is taken.

First it has to be decided as to whether he was entitled to a notice when he ceased to hold office on attaining the age of retirement, on the operation of law. He was not terminated from service or retired compulsorily or removed from service for which he was entitled to a show cause notice. He was informed that as he had surpassed the age of superannuation, he had no right to hold the office. This principle would apply only when the action was attended with penal consequences, which constituted punishment. In the facts of the given case it would not attract this principle. It is contended that an express stigma was attached to the order of removal and thus, the orders were violative to the principle of natural justice. As observed, as the petitioner was neither removed nor discharged or retired compulsorily it could have been inferred that the orders constituted no penal consequences so as to attract a notice. There is no aspersion or reflection on the conduct, efficiency or

the like, made in the orders, which would adversely affect his social status and therefore, we find no substance in the contention that a stigma was attached to the impugned orders.

Provisions of Article 135(2) of the Constitution can be invoked by a person who holds any civil post in the service of the Republic but the petitioner being an officer of a statutory Bank did not come in the said category. Article 135(2) provides that no person shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why that action should not be taken. Similar provision is provided in Article 311(2) of the Constitution of India. It has been held in different cases that compulsory retirement of an officer who has completed 25 years of service before superannuation would not attract Article 311(2) even though it is, in fact, ordered on the ground of misconduct, inefficiency or the like because in compulsory retirement, the Government servant does not lose any retirement benefits. Reference in this connection is the cases of

Mati Ram Deka V. NEF Railways, AIR 1964 S.C. 600 and Chief Justice of A.P. V. LVA Dixitulu, AIR 1979 S.C. 193.

We noticed that before the audit objection was raised by the Bangladesh Bank on 31st December, 1999, Prof. Muhammad Yunus had sufficient information that he would not eligible to continue as Managing Director as he would attain the age of superannuation in June 2000, as would be evident from annexure-F, the 52th meeting of the Board held on 28th July, 1999, otherwise there was no reason behind to discuss and adopt a resolution to the effect that while appointing Prof. Muhammad Yunus the Board did not fix the tenure and he would be entitled to continue until otherwise decided. Besides, in his letter dated 15th March, 2010 addressed to the Minister for Finance, which was reproduced in his supplementary affidavit dated 6th March, 2011, he expressed his intention to retire by handing over charge to the second generation. This letter indicated that he was convinced that age is the barrier to continue as Managing Director and accordingly he wanted

to become Chairman of the Bank, and desired an honourable transition of power. Therefore, he had sufficient knowledge that he had ceased to hold the office of Managing Director otherwise there was no reason for him to express his desire to handover the power.

Even if it is assumed that the impugned orders of removal visited professor Yunus with the loss of office, the maxim *audi alteram partem* can not have universal application. Rules of natural justice necessarily vary with the nature of the right and the attendant circumstances. Tucker L.J. said in Russell V. Duke of Norfolk (1949 1 All E R 109) “the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.” It has been argued in Uma Nath Pandey V. State of U.P., AIR 2009 SC 2375 by Dr. Arijit Pasayat,J.

> "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 the 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 facts 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."

After making above observation, the learned Judge travelled the globe to explore the principle and concluded:

> "We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the Courts can, in exercise of their 'discretion' refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed".

In Rajendra Singh V. State of M.P. (1996) 5 SCC 460 it is stated:

> "even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it can not be waived".

There are cases in which it is argued that if this principle is followed it will be rather useless

formality as no fruitful purpose will be served in such cases this principle can not be adhered to. In M.C. Mehta V. Union of India (1999) 6 SCC 237 it was observed:

> "Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed."

Lord Woolf in Lloyd V. Mc Mohan (1987) 1 All ER 1118 has also not disfavoured refusal of discretion in certain cases of breach of natural justice. One argument has been made in Mc Carthy V. Grant, 1959 NZLE

1014 "it is sufficient for the applicant to show that there is 'real-likelihood-not certainly-of prejudice". Wade, Administrative Law, 5th Edn. Page 526-530 it has been stated that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. We found that Prof. Muhammad Yunus was not condemned unheard. He had sufficient notice that he was holding the office of Managing Director of Grameen Bank without sanction of law as he had attained the age of superannuation in June, 2000, 10 years prior to the making of the impugned orders. Therefore, we find no merit in the contention of the learned counsel.

In General Medical Council case (1943 AC 644), the question involved was "if any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the

register". Section 29 of the Medical Act, 1858 empowers the medical council to convict for felony or misdemeanour with a criminal conviction. In case of infamous conduct which is not connected with a criminal conviction, the decision of the council, if adverse to the practitioner, must be arrived at "after due inquiry". The question is whether the council in that case can be regarded having reached its adverse decision "after due inquiry" when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged. In the facts of the given case Lord Wright following the case of Rex V. Local Government Board (1914) 1KB 160 argued on consideration of an observation made in that case "contrary to natural justice" as an expression "sadly lacking in precision". "So it may be, and perhaps, it is not desirable to attempt to force it into any procrustean bed, but the statements which I have quoted may, at least, be taken to emphasize the essential requirements that the tribunal should be impartial and that the medical

practitioner who is impugned should be given a full and fair opportunity of being heard".

In Kanda V. Government of Federation of Malaya, 1962(AC) 322, two men were charged in the Supreme Court at Penag with uttering forged lottery tickets. The prosecution failed? Police officers as witnesses gave false evidence in trial. The two accused men including inspector Kanda were acquitted. The commissioner of police ordered an inquiry to be held. It reported that false evidence had been fabricated for use at the trial. Article 135(2) of the Constitution of Federation of Malaya provides "No member of such a service as aforesaid (the police service is one of these) shall be dismissed or reduce in rank without being given a reasonable opportunity of being heard". Inspector Kanda was dismissed on 7th July, 1958. In the context of the matter, it was observed "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made

affecting him: and then he must be given a fair opportunity to correct or contradict them. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other".

In Century Spinning and Manufacturing Company Case AIR 1971 SC (1021), the company set up a factory within the limits of Bombay Industrial area. On the representation of the company the Government of Bombay published a notification including the company's area in which the industrial area was set up proclaiming that the industrial area to be excluded from municipal jurisdiction and on the representation of the municipality, the Government withdrew the said notification on condition that the municipality would exempt existing factories from payment of octroi for 7 years. The municipality thereafter ignoring the advise of the government informed that it would consider on merits any representation of a tax prayer for exemption from payment of octroi. Thereafter the Municipality sought to levy octroi duty and to recover octroi duty

from the company. In the context of the matter, the Supreme Court observed "the High Court may, in exercise of its discretion, decline to excise its extra-ordinary jurisdiction under Article 226 of the Constitution. But the discretion is judicial: if the petitioner makes a claim which is frivolous, vexatious, or prima facie unjust, or may not appropriately be tried in a petition invoking extra-ordinary jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits. Apparently the petition filed by the Company did not raise any complicated questions of fact for determination, and the claim could not be characterised as frivolous, vexatious or unjust. The High Court has given no reasons for dismissing the petition in limine, and on a consideration of the averments in the petition and the materials placed before the Court we are satisfied that the Company was entitled to have its grievance against

the action of the Municipality, which was prima-facie unjust, tried".

In Veerapa Rachappa Saboji, (AIR 1975 SC 773), the Supreme Court observed "we do not think the High Court Division was right in rejecting the petition of the appellant in limine. The grounds of challenge taken by the appellant in the petition could not be said to be frivolous so as to merit summary rejection. They did require consideration, and particularly the first ground raised an issue of some importance depending on the true construction of Rule 4(2)(iv) of the Bombay Judicial Service Recruitment Rules, 1956. The High Court ought, therefore, to have admitted the petition and issued a rule so that the grounds of challenge set out in the petition could be examined on merits. No disputed questions of fact appeared to arise in the petition and in any event until a return was filed by the respondents, it could not be said whether the controversy between the parties would involve any disputed questions of fact. There was, therefore, no point in refusing to entertain the petition on merits

and referring the appellant to a suit. We must in the circumstances, set aside the order of summary rejection passed by the High Court and remand the petition to the High Court with a direction to admit it and to issue a rule to the respondents".

We do not dispute the statement of law argued in the cases referred to by Dr. Hossain. These cases are quite distinguishable and not applicable in this case. No case can be an authority on facts. We find no substance in the submission that the High Court Division acted illegally in dismissing the petitions, inasmuch as, the petitions do not involve issues relating to interpretation and construction of law.

Now the question is after expressing the desire to retire about one year before making of the impugned orders, the petitioner can challenge the impugned orders? When he has been convinced that he has no legal sanction of law to hold on the office, he has no right to challenge the order of removal. In course of hearing learned counsel also indicated that there is still scope for honourable transition of power if the

petitioner is appointed as chairman of the Bank by the Government considering his social status and contribution towards the Bank, and this can be possible if this Division makes observation in this regard. It is the discretionary power of the Government to appoint the Chairman under the Ordinance and it is not within our jurisdiction. Since the impugned orders were made on 27th February, 2011 after about one year of writing of the above letter, the issuance of prior notice, in our view, will be an unnecessary exercise. Therefore, the submission that the Prof. Muhammad Yunus was removed without affording any opportunity of being heard is contrary to the materials on record, specially when, in the eye of law, he was not ‘removed’ rather, he ceased to hold his office of Managing Director of Grameen Bank by operation of law, on his attaining the age of his superannuation. On these facts, it cannot be said that he was dealt with unfairly.

Next point is whether the High Court Division acted illegally in dismissing the writ petitions summarily and thereby denied the petitioner access to

justice. The main thrust of Dr. Hossain is that the High Court Division ought to have admitted the petitions and should have decided the matters on the basis of the affidavit-in-opposition. This lead us to decide whether the admission of a writ petition, irrespective of its merit, is a sine-qua-non. The power of the High Court Division to issue writ under Article 102 can be exercised for the enforcement of fundamental rights, as well as, of non-fundamental legal rights where the action taken is procedurally ultra vires or where the authority being under an obligation to act judicially, or even quasi judicially, passes an order which is in violation of the principle of natural justice, for safeguarding such fundamental rights of the aggrieved person. When all the facts are on record and the law is clear on the subject, the exercise of jurisdiction in such a case is uncalled for.

Similarly, in cases where the question of law or constitutionality urged can be determined only upon investigation into disputed questions of fact, for which there are no materials on the record, or where

the facts stated in the petition do not ex facie support the petitioner’s case, but not otherwise or where the petitioner seeks to secure unjust gain, or where the quasi-judicial authority acted without or in excess of jurisdiction or in contravention of the principle of natural justice, the exercise of power may be refused. We have observed above, there was no infraction of any right of the petitioner as he was holding and continuing in the office of Managing Director of a statutory bank without any legal sanction. Or in the alternative, he has no legal authority to hold the office of Managing Director as he has no legal basis to continue in such office after attaining the age of superannuation. In the absence of violation of any mandatory provision of law, the Court will not come in aid to the petitioner as he is a disqualified person to continue in the office of Managing Director.

Prof. Muhammad Yunus is a nobel laureate. He is a respectable person not only in Bangladesh but all over the world. He was initially appointed as Managing

Director of Grameen Bank by the Government and subsequently the Board reappointed him with prior approval of the Bangladesh Bank. Under such circumstances, the observations of the High Court Division that "a 'squatter' or a 'trespasser' or a 'usurper' can not maintain a writ petition under Article 102" are totally uncalled for in this case and the petitioner was illegally compared with litigants like "squatter, trespasser, usurper". Prof. Muhammad Yunus is neither a 'squatter' nor a 'trespasser' or a 'usurper' of Grameen Bank in any sense. Rather he is the person on whose ideas and innovative projects for extending collateral free small loans to the rural people, the Bank has been established and it has achieved the prestigious nobel prize as a recognition of its phenomenal success. Therefore, the unnecessary observations as quoted above are totally derogatory which are hereby expunged. It is hoped that the High Court Division should be cautious in future in making any unhealthy observation against any litigant who has

come to Court for justice and not for seeking derogatory remarks instead.

It is to be remembered that Judges administer justice. In order to do justice, the first and foremost expectation from them is to be just. This expectation itself is the fountain source of all that can be put in the realm of canons of judicial ethics. A Judge can not have any pre-disposed state of mind. His judgment would not be actuated by concerns of private interests or considerations. He has to be decisive. His every action and every word–spoken or written, must show and reflect correctly that he holds the office as a public trust and he is determined to strive continuously to enhance and maintain the people’s confidence in the judicial system. Learning, personality, manners and stature in the judicial functioning matter. A Judge is as much respected as he respects the law, justice, equity and good conscience, and above all serves and seen to serve the cause of justice. It is desirable that the High Court Division should not use such unsophisticated words against a respectable person like Prof. Muhammad

Yunus. The language of the Court should be dignified and the findings should confine to the issues involved in the matter.

Like a Judge, a lawyer is a functionary of the judicial system with powers and duties as important as those of Judges. Lawyers are an important limb in the administration of justice. Their duty to the cause of justice is even superior. Their first obligation is to assist the Courts to the best of their ability so that justice can be done, so much so that only the legal profession is deservingly called a learned profession. It has high standards to keep abreast. That is why the profession commands respect. A lawyer’s advanced education, training, knowledge and skill in the field of law, apart from his duty to the client, are the attributes to his tradition in the practice of law. Instances are not rare to find where lawyers in their over-zealousness to protect the interest of their clients have chosen to go over-board to the extent of submitting misleading facts and law. In the words of Justice Sir Maurice Gwyer, “Every member of the Bar is

a trustee for the honour and prestige of the profession as a whole.” He said, every member of the Bar must bear in mind that it is expected of him that “never by any act or word of his will he show himself unworthy of the great tradition which he has inherited.”

We would like to observe that the writ petition filed by 9(nine) Directors is not maintainable on two grounds firstly, they are not 'aggrieved persons' within the meaning of Article 102 of the Constitution and secondly, since the aggrieved person Prof. Muhammad Yunus having challenged the impugned orders himself, they have no locus-standi to challenge the same orders by a separate petition for, if such process is allowed multiplicity of proceedings would crop up and there would be likelihood of conflicting decisions over the same subject matter, in which event, instead of doing justice, the ends of justice would be defeated. The High Court Division declared the Regulations of 2001 being inconsistent with section 14 of the Ordinance invalid. True, a Subordinate law can not supersede the parent law but since no rule was issued in these matters, the High Court Division is not justified in declaring Regulations of 2001 invalid.

Though we do not approve of all the findings and observations of the High Court Division, we fully agree

with its ultimate decision that there are no merits in the writ petitions. Thus, these petitions merit no consideration which are dismissed with the above observations.

The parties would bear their respective costs.

C.J.

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The 5th May, 2011
Mohammad Sajjad Khan

APPROVED FOR REPORTING