IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 10928 OF 2019

In the matter of:

Application under article 102 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:

Human Rights and Peace for Bangladesh (HRPB) represented by its Secretary-in-Charge, Advocate Md. Sarwar Ahad Chowdhury, Hall No. 2, Supreme Court Bar Association Bhaban, Dhaka, Bangladesh and others

… Petitioners

-Versus-

Bangladesh represented by the Cabinet Secretary, Cabinet Division, Bangladesh Secretariat, Police Station- Ramna, Dhaka, Bangladesh and others.

… Respondents

Mr. Manzill Murshid, Senior Advocate
…For the petitioners

Mr. Arobinda Kumar Roy, D.A.G with
Mr. A.K.M. Alamgir Parvez Bhuiyan, A.A.G,
Mr. Mohammad Abbas Uddin, A.A.G and
Mr. Shamsun nahar (Laizu), A.A.G
…For the respondent no. 4
Mr. Md. Khurshid Alam Khan, Senior Advocate
…For the respondent no. 8

Heard on 24.08.2022.
Judgment on 25.08.2022.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Kazi Md. Ejarul Haque Akondo

Md. Mozibur Rahman Miah, J.

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule *Nisi* was issued in the following terms:

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why section 41(1) of সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) published in the Official Gazette on 14.11.2018 and made effective on 01.10.2019 by virtue of S.R.O No. 305-Ain/2019 dated 25.09.2019 should not be declared to be void and ultra vires Articles 26, 27 and 31 of the Constitution of the People's Republic of Bangladesh and/or such other or further order or orders passed as to this Court may seem fit and proper."*

The precise facts so have been figured in the writ petition are:

The petitioners are the members of an organization named, "Human Rights and Peace for Bangladesh" (HRPB) whose objects is to uphold, promote and defend human rights of the citizen of this country and to work for the poor people by providing legal support to them *vis-à-vis* to build up awareness amongst them about their rights etc. All the petitioners are practising lawyers of the Supreme Court of Bangladesh meaning they are officers of this Hon'ble court being conscious citizens of the country working to establish the rule of law in the country. The petitioners have filed this writ petition invoking Article 102 of the Constitution as public

interest litigation (PIL) challenging the vires of the provisions of section 41(1) of সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) since it involves public concern and public interests as well. It has been stated that, the national Parliament (জাতীয় সংসদ) passed সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) giving it effect from 01.10.2019 by virtue of S.R.O No. 305-Ain/2019 dated 25.09.2019. In the said legislature, a discriminatory provision has been embodied in section 41(1) of the Act No. 57 of 2018 which runs as under:

> "৪১। **ফৌজদারি অপরাধে অভিযুক্ত কর্মচারীর ক্ষেত্রে ব্যবস্থাদি**।-(১) কোনো সরকারি কর্মচারীর দায়িত্ব পালনের সহিত সম্পর্কিত অভিযোগে দায়েরকৃত ফৌজদারি মামলায় আদালত কর্তৃক অভিযোগপত্র গৃহীত হইবার পূর্বে, তাহাকে গ্রেফতার করিতে হইলে, সরকার বা নিয়োগকারী কর্তৃপক্ষের পূর্বানুমতি গ্রহণ করিতে হইবে।"

By incorporating the said provision, government servants have been intentionally separated from common citizens and even different segment of professional groups in the event, they got involved in a criminal case while discharging their official duties. The said provision has many serious consequences ***firstly*****,** it has given privileged treatment to government servants as a whole and as such, it is discriminatory affecting the provision of equality before law. ***Secondly***, it has undermined and diminished the authority of the court of laws and hence, it has affected the independence of Judiciary and ***thirdly***, the said provision has also provided protection/safeguard to corrupt officials which essentially calls for interference by this Hon'ble court for the sake of rule of law and proper administration of justice.

It has further been stated that, the Contempt of Court Act, 2013 having been passed with some discriminatory provision giving the journalist and the bureaucrats' special privileges and it was then challenged and eventually this Hon'ble court declared the same as illegal and void. Thereafter, this Hon'ble court further declared section 32ka of the Anti-Corruption Commission (Amendment) Act, 2013 illegal and void where a section of government officials were given protection involving criminal cases filed for committing corruption. Having failed to get privileged/special treatment in the above two legislations, further attempt has been made by the vested quarters to get special treatment in criminal cases, to protect some corrupt government officials from cases of corruption and thus inserting such kind of discriminatory provision in সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) is void and *ultra vires* Articles 26, 27 and 31 of the Constitution and section 41(1) incorporated in সরকারি চাকরি আইন, ২০১৮ be struck down.

Against such a backdrop, Mr. Manzill Murshid, the learned senior counsel appearing for the petitioners at the very outset draws our attention to Article 7(2) of the Constitution and submits that, the above Article provides, if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void and that very provision has also been reiterated in Article 26(2) of the Constitution to be enforced by this Hon'ble court exercising authority under Article 102 of the Constitution and hence, section 41(1) of সরকারি চাকরি আইন, ২০১৮ (hereinafter referred to as "the Ain") being inconsistent with the fundamental rights set

out in Part III of our Constitution and thus should be declared illegal and void.

The learned counsel goes on to submit that, Article 27 of the Constitution ensures that, all citizens are equal before law and are entitled to equal protection of law meaning all persons should be treated alike and no discrimination shall be made in enjoying privileges to get equal protection of law but insertion of section 41(1) in the Ain also violates the said basic fundamental rights of equality.

The learned counsel further submits that, even Article 31 of the Constitution guarantees every citizen to be treated in accordance with law but by section 41(1) of the Ain some people or persons have been given special treatment and privileges which is against the spirit of the Constitution and hence, section 41(1) of the Ain may be declared void and without lawful authority.

The learned counsel also submits that, by virtue of section 41(1) of the Ain, some corrupt government officials have been given legal shield from being prosecuted in corruption cases which would ultimately frustrate the purpose of enacting Anti-Corruption Commission Act. He further adds that, by that provision investigation supposed to be done against government officials for committing criminal offence described in Penal Code or other laws would seriously be impeded and therefore, the said section may be declared illegal and without lawful authority.

The learned counsel next submits that, section 41(1) of the Ain is arbitrary in nature, discriminatory in character that amounts to denial of rights to equal protection of law and right to be treated in accordance with

law and hence, it is violative to the fundamental rights guaranteed under Articles 26(1)(2), 27 and 31 of the Constitution and therefore, it is liable to declared void and illegal.

The learned counsel also contends that, in সরকারি চাকরি আইন, ২০১৮ there also provides an overriding clause in section 3 whereby it has curtailed the authority and application of the Anti-Corruption Commission Act, 2004, the Prevention of Corruption Act, 1947 as well as other alike legislatures in case of investigation of criminal cases filed against the government servants and hence, it is liable to be declared void and without lawful authority.

However, in support of his such assertion, the learned counsel has placed his reliance in the case of *Human Rights and Peace for Bangladesh and others-Vs-Hon'ble Speaker, Bangladesh Jatiyo Sangsad and others reported in 67 DLR (HCD) 191*.

On the flipside, Mr. Md. Khurshid Alam Khan, the learned senior counsel appearing for respondent no. 8 has literally supported the assertion so advanced by the learned counsel for the petitioners by filing an affidavit-of-facts. It has been stated therein the said affidavit-of-facts that, before inserting section 41(1) in the সরকারি চাকরি আইন, ২০১৮, the Durnity Daman Commission Ain, 2004 has also been amended inserting section 32ka and enacted Durnity Daman Commission (Amended) Ain, 2013 providing special privileges to a certain group of people (Judges, Magistrates and Government Employees) of the country making it mandatory to apply section 197 of the Code of Criminal Procedure in other words, the sanction of the government was made mandatory before initiating cases against

government servants. However, challenging the vires of section 32ka of the Durnity Daman Commission (Amended) Ain, 2013, the present petitioners also filed a Writ Petition being Writ Petition No. 12272 of 2013 before this Hon'ble court and on 25.11.2013 obtained rule in the terms similar to the present one. Eventually, this Hon'ble court after contesting hearing made the rule absolute declaring section 32ka of the Durnity Daman Commission (Amended) Ain, 2013 to be without lawful authority and of no legal effect. And the said judgment was reported in 67 DLR (HCD) 191 though no appeal has been preferred by the government against the said judgment.

Concurring the submission so placed by the learned counsel for the petitioners, Mr. Md. Khurshid Alam Khan, the learned senior counsel appearing for the respondent no. 8 at the very onset submits that, the provision of section 41(1) of সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) has flouted Articles 2, 27, 28, 29(1) and 31 of the Constitution.

The learned counsel further contends that, every person accused of committing the same offence is to be dealt with in the same manner in accordance with law as the status or position of a person does not qualify from exemption from equal treatment as postulated in Article 27 of the Constitution and therefore, incorporating section 41(1) in the সরকারি চাকরি আইন, ২০১৮ clearly violates basic fundamental rights of the citizen of this country which is thus liable to be declared void.

The learned counsel next contends that, if the statute confers absolute and unbridled powers upon the executive to pick and choose for the purpose of giving more beneficial or prejudicial treatment, it shall be

liable to be struck down for being violation of Article 27 of the Constitution.

In this respect, the learned counsel further adds that, section 41(1) of the Ain has also interfered with the independence of the function of the Anti-Corruption Commission and frustrated the object of the Durnity Daman Commission Ain, 2004.

The learned counsel next contends that, Article 28 of the Constitution provides protection against discrimination on the grounds of religion, belief, political opinion, race, occupation, nationality, or civil status, in order to promote equal participation in the society and it is therefore, desirable to prohibit discrimination on those grounds but the impugned legislation has frustrated those basic instincts provided in Article 28 of the Constitution and therefore, inserting section 41(1) in the Ain is discriminatory and created obstacle to track down the corrupt persons.

The learned counsel wrapped up his submission asserting that, the impugned legislation is absolutely colourable one and as such, it is liable to be stuck down for ensuring rule of law, democracy and public interest.

In contrast, Mr. Arobinda Kumar Roy, the learned Deputy Attorney-General appeared for the respondent no. 4 by filing an affidavit-in-opposition opposes the contention so have been taken by the learned counsels for the petitioners and that of the respondent no. 8 and submits that, the instant writ petition has been filed without proper examination of the four corners of the সরকারি চাকরি আইন, ২০১৮ which has been framed replacing six laws namely, Public Service Retirement Act, Services Reorganization Act, Public Service Special Provision Ordinance, 1979,

Punctual Attendance Act, 1982, Dismissal and Conviction Act, 1985, Surplus Government Employees Accommodation Act and all important aspects of those laws were brought together in the Ain keeping in mind that, if any government servant becomes victim of any criminal case while discharging his/her official duties, he/she will get the privilege in case of arrest.

The learned Deputy Attorney-General also contends that, to thwart the implementation of development project or scheme undertaken by the government, if any case is lodged or filed against the responsible government official only in that event, law-enforcing agency have to take prior permission from the government or his/her (government servant) appointing authority in case of arrest before charge-sheet is accepted in a bid to keep the development work of the government to go unimpeded and therefore, section 41(1) of the Ain also qualify in the test of reasonableness.

The learned Deputy Attorney-General by referring to Article 21(2) of the Constitution submits that, while serving the people, if the government servants get arrested without the approval of the government then they will get demoralized resulting in, the spirit of the said constitutional provision will be frustrated and keeping in mind of the said exigency section 41(1) has perfectly been inserted in the Ain and therefore, the instant writ petition is liable to be discharged.

After all in support of his submission, the learned Deputy Attorney-General has placed his reliance in the decision reported in 41 DLR (AD) 30.

The learned Deputy Attorney-General concludes that, the petitioners have no reason to get aggrieved with the insertion of section 41(1) in the Ain and as such, the rule is liable to be discharged.

We have considered the submission so advanced by the learned counsels for the petitioners, respondent no. 8 and that of the learned Deputy Attorney-General appearing for the respondent no. 4 at length.

In order to analyse the provision of section 41(1) of সরকারি চাকরি আইন, ২০১৮, we feel it expedient to reproduce the same which runs as under:

> "৪১। **ফৌজদারি অপরাধে অভিযুক্ত কর্মচারীর ক্ষেত্রে ব্যবস্থাদি**।-(১) কোনো সরকারি কর্মচারীর দায়িত্ব পালনের সহিত সম্পর্কিত অভিযোগে দায়েরকৃত ফৌজদারি মামলায় আদালত কর্তৃক অভিযোগপত্র গৃহীত হইবার পূর্বে, তাহাকে গ্রেফতার করিতে হইলে, সরকার বা নিয়োগকারী কর্তৃপক্ষের পূর্বানুমতি গ্রহণ করিতে হইবে।"

On going through the above provision, we in the first place find that, it has given protection to the government servants (সরকারী কর্মচারী) from being arrested before accepting police report by the Magistrate concerned if he/she is entangled in any criminal case while discharging official duties.

Now if we take a look to the Preamble of the Ain, we find that, amongst several objectives for enacting the Ain, the legislature has also taken resort to the provision of Article 21 of the Constitution.

However, on close scrutiny of Article 21 of the Constitution, we find that, it has been obligated to every citizen and those in the service of the Republic to observe the Constitution and the laws of the country to maintain discipline, to perform public duties and to protect public property *vis-à-vis* endeavour to serve the people. Even in the said provision it does

vest in the Parliament to provide any legal protection to the government servants if they get involved in any criminal cases while performing official duties. So very incorporation of section 41(1) in the Ain is clear infraction of the spirit of the Preamble of the Ain itself. In the same vein, if we compare the Preamble with that of section 41 (1) of সরকারি চাকরি আইন, ২০১৮, we don't find any earthly reason to embody the provision in taking prior permission (পূর্বানুমতি) of the government or the appointing authority of the government servant for arresting him/her before accepting charge-sheet. So it is totally absurd proposition taken by the respondent no. 4 that, in conformity with Article 21(2) of the Constitution section 41(1) has been incorporated in সরকারি চাকরি আইন, ২০১৮.

Further, section 3 of সরকারি চাকরি আইন, ২০১৮ provides overriding effect of the Ain meaning the provision of the Ain will prevail over other laws of the country which will have a very knock-on-effect on various investigating agencies involved in investigating criminal cases including the Anti-Corruption Commission if offence is committed by the government servants. Because, when such agencies or the Anti-Corruption Commission will proceed with investigating criminal cases against government servants, they might need to arrest the accused for the purpose of interrogate him/her but they will have to wait for the permission of the government or the appointing authority of the said official when there has been no such provision for other accused involving same offence.

Then again, apart from government servants, there have been host of professional bodies and private employees performing their respective job in our country and if they demand same privilege as of the government

servants then logically their such demand cannot be brushed aside resulting in an anarchy will be created in the administration of criminal justice let alone our Constitution- the supreme law of the country does not approve such discrimination. However, what argument has been canvassed in this regard by the government is absolutely based on hypothesis far from any legal basis. So, the very incorporation of section 41(1) in the Ain is nothing but to indemnify a handful of government corrupt officials which state must not encourage because our past history dictates, giving indemnity to a certain group of people whatever manner or purpose it be, has brought nothing good to our nation. On top of that, there has been nothing in section 41(1) of the Ain as to what consequence will follow if prior permission is not given by the government or the appointing authority against the delinquent government servant and in such a situation, the criminal case filed against any government servant will keep in limbo and in that score, section 41(1) is incomplete one.

Furthermore, in our country, it is a common practice that investigation of a criminal case takes long time even years together to complete so if that provision remains in place, as it stands, then there will have no ending of investigation of any criminal cases filed against the government servants. However, whatever discussed and observed hereinabove are all relating to consequence if section 41(1) of the Ain is given effect which involved factual aspects.

Now let us examine whether incorporation of section 41(1) in সরকারি চাকরি আইন, ২০১৮ is inconsistence with the fundamental rights as set out in Part III of our Constitution because in the terms of the rule, we find that,

the respondents were asked to answer/explain why section 41(1) of সরকারি চাকরি আইন, ২০১৮ shall not be declared void and *ultra vires* Articles 26, 27 and 31 of the Constitution. For such obvious reason, in this episode, we want to confine our discussion and observation keeping ourselves within the purview of the said terms of the rule.

Mr. Manzill Murshid as well as Mr. Md. Khurshid Alam Khan, the learned senior counsels for the petitioners and respondent no. 8 respectively very candidly contends that, insertion of section 41(1) in সরকারি চাকরি আইন, ২০১৮ clearly violates Article 27, 31 and finally Article 7(2) of our Constitution. In our Constitution, Article 7(2) has been placed in Part I and those of Articles 26, 27 and 31 in Part III. The essence of Article 7(2) as well as Article 26 speaks similar consequence that is to say, if any law enacted goes inconsistent with the Constitution that law becomes void only major exception in the first Part of Article 7(2) which declares supremacy and majesty of our Constitution of the Republic. Whereas Article 26 has given absolute authority upon this court as a guardian of the Constitution to declare any law if found inconsistent with the supreme law void in exercise of power bestowed upon this court in Article 102.

Now it is pertinent to examine whether section 41(1) of সরকারি চাকরি আইন, ২০১৮ is inconsistent with Articles 27 and 31 of the Constitution as per the terms of the rule. Article 27 mandates that all citizens in the country are equal and they are entitled to equal protection of law when Article 31 guarantee to enjoy the protection of law and to be treated in accordance with law. But from the impugned enactment, it clearly depicts those very

basic fundamental rights have been violated and consequence of which application of Article 26 becomes imperative.

Further, as has been observed hereinabove, by incorporating section 41(1) of the Ain a group of people of our country have been given undue privileges and protection from being arrested before accepting charge-sheet but in our ordinary criminal justice system, no such provision is in place for the accused and in that sense, the impugned provision is colourable exercise of power of the executive derived from the Parliament which is also denied of fundamental rights guaranteed to the citizens in Articles 27 and 31 of the Constitution.

Most importantly, Article 7B of our Constitution has given safeguard to several Articles that falls different part of our Constitution.

If we go through Article 7B of the Constitution in particular, last part thereof, we find a phrase "**by any other means**" and by inserting section 41 (1) in the Ain, the legislature has in a very subtle manner made Articles 7(2) and 26 of our Constitution inefficacious by providing shield to a particular section of people from being arrested by law-enforcing agencies as well as the Anti-Corruption Commission leaving it to the sweet will of the government or appointing authority which Constitution does not approve.

In this regard, both the learned counsels for the petitioners and that of the respondent no. 8 very robustly contends that, since similar provision had earlier been incorporated in the Anti-Corruption Commission Act and in that very Act, similar provision had been inserted and the same was declared void by judgment dated 30.01.2014 and no appeal has been

preferred thereagainst so the said judgment has got the binding effect to all organ of the state having no scope to incorporate similar provision in সরকারি চাকরি আইন, ২০১৮ which we find to be correct proposition.

Be that as it may, we have given our anxious thought to the submission advanced by the learned Deputy Attorney-General and examined the affidavit-in-opposition so filed by him for respondent no. 4 as well. We are really upset to find that, not a single assertion has been made neither in the submission nor avers in the affidavit-in-opposition adverting to constitutional provision basing on which the rule was issued. Because in the rule, the respondents were specially asked to explain their stance as to why section 41(1) of সরকারি চাকরি আইন, ২০১৮ should not be declared void and *ultra vires* Articles 26, 27 and 31 of the Constitution. In spite of such clear terms of the rule specifying three Articles *prima facie* finding the impugned legislature inconsistent with those Articles but to our utter dismay, we don't find any submission or assertion on the Part of respondent no. 4 in regard to those constitutional provision which is the pivotal issue in adjudicating the rule. Rather, what has been described in the affidavit-in-opposition and reiterated in the submission by the Deputy Attorney General involves factual aspect which can never be outweighed the constitutional compulsion in making the alleged legislation valid. In any event, from the trend of the submission placed by the learned Deputy Attorney-General, we get an impression that by way of impugned legislature, the government officials have been given certain protection while discharging their official duties from undue harassment in criminal prosecution but in our existing Administration of Criminal Justice, police

have been empowered to arrest an accused without warrant if the accused commits cognizable offence, so incorporation of section 41(1) in সরকারি চাকরি আইন, ২০১৮ on the face of it is flagrant violation of Article 27 and 31 of our Constitution not to speak inconsistent thereof.

The learned Deputy Attorney-General also puts forward an assertion that, the petitioners have got no *locus standi* to file the instant writ petition though without assigning any reason whatsoever. That assertion bears no material substance in view of testing it in a slew of PILs already initiated by the petitioners including Constitution 16th Amendment case by the High Court Division (8 ALR (HCD) 161) and then Appellate Division reported in 10 ALR (AD) 1 and that of the case reported 67 DLR (HCD) 171 to name a few.

The learned Deputy Attorney-General has also placed his reliance in the decision reported in 41 DLR (AD) 30 (Sheikh Abdus Sabur -Vs- Returning Officer, District Education Officer-in-charge, Gopalganj and others) and read out paragraph no. 29 thereof. We very utmost importance have gone through that paragraph but it is totally incomprehensible how the observation can be made applicable in the facts and circumstances of the case in hand when the validity of no legislation was called in question in the cited decision even then it may at best serve as *obiter* though the appeal was dismissed (in the cited decision) and thus the said decision is totally inapplicable in the instant case.

On the contrary, the *ratio* so settled in the decision reported in 67 DLR (HCD) 191 (*Human Rights and Peace for Bangladesh and others-Vs-Hon'ble Speaker, Bangladesh Jatiyo Sangsad and others*) as cited by the

learned counsels for the petitioners and relied upon by the learned counsel for the respondent no. 8 have got every nexus and squarely applicable here.

All in all, we find ample substance in the submission so placed by the learned counsel for the petitioners and that of the respondent no. 8 and thus the rule succeeds.

In the result, the rule is made absolute however without any order as to costs.

It is hereby declared that section 41(1) সরকারি চাকরি আইন, ২০১৮ (Act No. 57 of 2018) published in the Official Gazette on 14.11.2018 and made effective on 01.10.2019 by virtue of S.R.O No. 305-Ain/2019 dated 25.09.2019 (Annexure-'A' to the writ petition) void and *ultra vires* Articles 26, 27 and 31 of the Constitution of the People's Republic of Bangladesh.

Let a copy of this judgment be communicated to all the respondents forthwith.

Kazi Md. Ejarul Haque Akondo, J.

I agree.