IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 1434 of 1988

IN THE MATTER OF:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-And-

IN THE MATTER OF :

Swairachar O Sampradaiyikata Protirodh Committee and others

……Petitioners

-Versus-

The Government of Bangladesh and others.

…….Respondents

Mr. Subrata Chowdhury, Senior Advocate with
Mr. J.H. Afric, Advocates

…….for the petitioners

Mr. Mahbubey Alam, Attorney General with
Mr. Murad Reza, Additional Attorney General

……..for the respondent no.2

Heard on : 29.02.2016
Judgment on : 28.03.2016

Present:

Ms. Justice Naima Haider
&
Mr. Justice Quazi Reza-ul-Hoque
&
Mr. Justice Md. Ashraful Kamal

Naima Haider, J;

Given the issue involved in the instant writ petition, a Larger Bench was constituted to hear and dispose of the instant writ petition. This writ petition invites us to deal with the constitutionality of the amendments made to the Constitution through Section 2 of the Constitution (Eighth Amendment) Act 1988 [incorporating Article 2A to

the Constitution] and Section 7 of the Constitution (Eighth Amendment) Act 1988 making amendment to Article 100 of the Constitution by way of substitution through a new Article. Rule Nisi was issued in the following terms:

Let a Rule Nisi was issued calling upon the respondents to show cause as to why the insertion of Article 2A in the Constitution of Bangladesh by section 2 of the Constitution Eighth Amendment Act, 1988, Act no. XXX of 1988 should not be declared to have been made unconstitutional, ultra vires the Constitution and without lawful authority and of no legal effect and/or why such other or further order or orders, as this Court may deem fit and proper.

The issues before this Division are whether (i) constitutional amendment through which High Court Division of the Supreme Court was decentralized and (ii) constitutional amendment through which "Islam" was made the State Religion could be construed to be constitutional and valid.

The learned Counsel for the petitioners takes us through the provisions of the Constitution and vehemently argues that the impugned amendments affect basic structure of our Constitution and therefore, there is no scope but to declare the said impugned amendments as unconstitutional. The learned Counsel emphasize that under no circumstances, the basic structure of the Constitution can be amended. He also argues that the impugned amendments have the effect of nullifying different constitutional provisions; in this regard, he points out

that any amendment to the Constitution which results in contradiction with the Constitution as a whole or any part thereof is liable to be struck down as being unconstitutional.

In this writ petition, two constitutional provisions are under challenge. The first is Article 100 of the Constitution, as amended through Section 5 of the Constitution (Eight Amendment) Act 1988 and the second is Article 2A as inserted though Section 2 of the Constitution (Eight Amendment) Act 1988.

The first issue relates to constitutionality of amended Article 100 of the Constitution through Section 5 of the Constitution (Eight Amendment) Act 1988. Through this amendment, among others, Permanent Benches of this Division was created. The said amendment to Article 100 of the Constitution was challenged and the Hon'ble Appellate Division in the celebrated case of ***Anwar Hossain Chowdhury and others V Bangladesh*** *[41 DLR (AD) 165]* resolved the issue. His Lordship, Justice Bodrul Haider Chowdhury (as his Lordship then was) pronounced the leading Judgment on behalf of the majority and held that Article 100 as amended was unconstitutional. His Lordship in summing up held:

> ***"297 (To sum up):***
>
> *(1) The amended Article 100 is ultra vires because it has destroyed the essential limb of the judiciary, namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division in the name of Permanent Benches conferring*

full jurisdiction, powers and functions of the High Court Division;

(2) Amended Article 100 is illegal because there is no provision of transfer of cases from one Permanent Bench to another Bench which is an essential requisite for dispensation of justice (see AIR 1979 SC 478);

(3) The absence of such provision of Transfer shows that territorial, exclusive courts, independent of each other, have been created dismantling the High Court Division which in the Constitution is contemplated as an integral part of the Supreme Court;

(4) Transfer of judges by a deeming provision is violative of Article 147;

(5)…

(6)…

(7)…

(8)…

(9)…

The first issue before us, being the constitutionality of amended Article 100 has already been settled by the Hon'ble Appellate Division. Though Judgment of Hon'ble Appellate Division is binding on us, we have perused the said Judgment and agree fully with the majority view. We also find no reason to add our own view to the extensive Judgment passed.

Having said so, we wish to point out that in the celebrated Anwar Hossain's case, their Lordships pointed out the limitations on constitutional amendments. Broadly speaking, amendment to the Constitution cannot alter its basic structure. Amendments resulting in contradiction would also be impermissible. Any amendment cannot be beyond the amending power given to the Parliament under Article 142 of the Constitution. It also appears from the Judgment that any amendment must be read "as a whole" in light of the Constitution to assess constitutionality. Furthermore, we find it worth noting from the Judgment passed by Shahabuddin Ahmed J (as his Lordship then was) whereby his Lordship relying upon the Judgment of the Indian Supreme Court in the case of ***Kesavananda V State of Kerala*** *[AIR 1973 SC 1461]* concluded that amendment(s) abrogating fundamental rights or altering the basic features of the Constitution are not permissible.

Their Lordship's views in Anwar Hossain's case are relevant for disposal of the second issue before us. We are called upon to address whether Article 2A of the Constitution, introducing Islam as "state religion" is ultra vires to the Constitution.

The concept of "state religion" does create conceptual difficulties in the minds of ordinary persons. How can a State have a religion? That is the most common question. In order to deal with compatibility of state religion, we need to address the following, being whether the concept of state religion is an alien concept, what does state religion imply, how

state religion is introduced in the constitution and lastly whether our Constitution, permits Article 2A to stand, as is.

Broadly speaking, *"State Religion"* is a religion officially endorsed by a sovereign State. Such endorsement is not uncommon. For instance, Bhutan, Cambodia, Myanmar and Sri Lanka constitutionally recognize Buddhism as state religion. Article 9 of Chapter II of the Constitution of Sri Lanka provides: *"The Republic of Sri Lanka declares Buddhism as the state religion and accordingly it shall be the duty of the Head of State and the Head of Government to protect and foster the Buddha Sasana"*. In some countries such as Thailand and Laos, Buddhism is not constitutionally recognized as state religion but Buddhism holds special status. Thus for instance, Article 67 of the Constitution of Thailand provides that the State should support and protect Buddhism.

Likewise, Christianity is constitutionally recognized as state religion in various countries, including Costa Rica, Malta, Monaco, Argentina, Italy, Panama, Peru, Bulgaria, Spain, Finland, Georgia.

Islam is also constitutionally recognized as state religion in different countries, which include Bahrain, Comoros, Egypt, Iran, Pakistan, Jordan, Kuwait, Malaysia, Libya, Maldives, Palestine, Saudi Arabia, Somalia, Yemen, etc.

From the above, what is clear is that the concept of state religion is not something uncommon as different jurisdictions have constitutionally recognized certain religion as state religion.

While constitutions contemplate state religion, there are constitutions which expressly provide that the State shall be secular. Thus for instance, the Constitution of the Fifth French Republic provides that France is an indivisible, secular, democratic and Social Republic. Generally when constitutional provision provides for secularism, the concerned State recognizes and protects the rights of religious freedom in personal life but maintains a defensive attitude against public religiosity. A consequence of this for instance is that French secularism permits the prohibition of displays of religious affiliation in public places, banning of wearing of religious insignia in public schools etc.

France is a strong secular country. There is also "weak secularism". The Constitution of the United States of America contemplates weak secularism. In case of "weak secularism" State maintains *"neutrality"* in matters of religion and does not take account of religious values and beliefs; furthermore, religion of any kind may is not permitted to be publicly funded or supported by any public authority but at the same time, public authorities are not permitted to prohibit, limit, promote or support any religious belief or practice and cannot discriminate against, or favour, any religion.

Regardless of how religion is perceived in any particular constitution, in our view, religious freedom and freedom from religious coercion are universally recognized principles. We are of the view that there can be no free State if freedom of religious beliefs and practice

including the freedom of religious minorities and of dissenters are not guaranteed.

When a particular constitution recognizes a state religion, it becomes important to understand the nature of recognition i.e. whether the recognition is *"recognition without establishment"* or *"recognition with establishment"*. At the same time, the language used in the constitution in recognizing state religion becomes relevant. We feel it necessary to understand how, in certain jurisdictions, Islam was recognized as state religion. The chart below would provide certain clarification:

Country	**Manner of recognition**
Yemen	Article 2 of the Constitution of Yemen provides: *" Islam is the religion of the state, and Arabic is its official language"*
Kingdom of Saudi Arabia	Article 1 provides: *"The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam"*
Qatar	Article 1 of the Constitution of Qatar provides: *"Qatar is an independent sovereign Arab State. Its religion is Islam and Shari'a law shall be the main source of its legislation"*
Oman	Article 2 of the Constitution of Oman provides: *" The religion of the State is Islam and Islamic Sharia is the basis for legislation"*
Pakistan	Article 2 of the Constitution of Pakistan provides: *" Islam shall be the State religion of*

	Pakistan"
Malaysia	Article 11 of the Constitution of Malaysia provides: *" Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation"*
Kuwait	Article 2 of the Constitution of Kuwait provides: *" The religion of State is Islam and Islamic Law shall be the main source of legislation"*

In Tunisia, Islam is not constitutionally endorsed as state religion but Islam has been given special privilege. Regardless of the absence of express endorsement, under Article 88, the President of Tunisia must be a Muslim by faith.

It appears to us that the manner of recognition/endorsement differs from jurisdiction to jurisdiction. For instance in Yemen, Islam is recognized as state religion but in Oman, Islam is not only the state religion but also the basis for legislation. Constitution of Malaysia on the other hand declares Islam as the state religion but at the same time, guarantees free practice of religious values by people of other religion.

Yemen's recognition of Islam as state religion is a recognition without establishment. Recognition with establishment will occur when the State maintains a formal connection with any specific religion which is "established" in the sense of being supported, funded by the State. Thus establishment is possible in different ways with different degree of intensity; particular religion can be adopted as official state religion,

religious laws can become source of laws, religion can be source of inspiration etc.

A strong form of religious establishment may include reservation of senior positions for members of the established religion; for instance, heads of State must be a member of that religion. A *"religious establishment"* can generally be understood to be present in a system where the religious hierarchy has superiority over the civil power, meaning that the religious authorities are dominant over the State and the State is subject to the controlling power of a religious body. Iranian Constitution could be construed as a religious based establishment since the Constitution confer religious authorities guardianship role in the affairs of the state.

Islam as state religion is sometime associated with the State having Islamic identity. Countries such as Afghanistan, Iran, Pakistan, term themselves as "Islamic Republic" and by doing so, the respective States claim Islamic identity. Other Islamic countries recognize Islam as the official religion only but do not claim an Islamic identity for the State. The difference is important because in the latter case, the constitutional scheme can easily permit exercise of fundamental right of religion by non Muslims.

At present, 25 countries claim Islamic credentials. Of these 25 countries, 23 countries constitutionally declare Islam to be the state religion. Constitution of 18 countries provides that Islam ***will be source of law and constitution of 6 countries provide for "repugnancy***

clauses" stipulating that no laws can be passed that contradicts Islam.

In Iran the Constitution provides that the Judges should refrain from executing any laws that violate Islam. *(underlined by us).*

Our Constitution does not provide for any repugnancy clauses within the meaning set out in the aforesaid paragraph. Our Constitution, as on date, does not provide for any provision for enforcement of Islam as a superior religion. The only issue now is whether impugned amendment recognizing Islam as state religion is incompatible with our Constitution.

Through the impugned amendment inserted Article 2A was inserted in the Constitution which provides for *"The state religion"*. Article 2 A reads as follows:

> *"The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion"*

To begin with, Article 2A declares Islam as state religion. But then it imposes an obligation upon the State to ensure *"equal status and equal right in practice"* of all other religion. Thus Article 2A through the use of the word "equal" places Islam at par with all other religion. Moreover, with regard to other religion, the Constitution places a positive obligation upon the State to ensure equal standing, if there is inequality. The wordings of Article 2A of the Constitution, in our view, do not lead to any discrimination between the holders of state religion and other holders of other religious beliefs.

The United Nations acknowledges the notion of state religion but under international mandate, there is an obligation upon the State to ensure that the notion does not result in discrimination of members of other religion. In this regard we wish to refer to the note of UN General Assembly, Human Rights Council (2011), the relevant part of which is set out below:

> *"..While the notion of State religion is not per se prohibited under international human rights law, States have to ensure that this does not lead to a de jure or de facto discrimination of members of other religion or beliefs..."*

Though the Application for Issuance of Supplementary Rule, the petitioners, by annexing certain articles have tried to point out that the impugned amendment is motivated by political considerations and in constitutional amendments cannot be based on political considerations.

It is a settled principle that where the issue before the High Court Division involves resolution of political question, the High Court Division will not intervene under Article 102 of the Constitution since questions of political wisdom cannot be subject of judicial review. However, we are mindful of the decision of the Indian Supreme Court in ***State of Rajasthan V Union of India*** *AIR [1977 SC 1361]* where their Lordship made a distinction between purely political questions and questions having political complexion. Their Lordships held:

> *"... It is true that if a question brought before the Court is purely a political question, not involving determination of any legal or constitutional right or obligation, the Court would not entertain it,*

since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of Constitutional determination... It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'Judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so... "

The recent decision of the Supreme Court of United Kingdom in R (Miller) V Prime Minister [2020 AC 373] is relevant in the present context. In this case the Supreme Court unanimously held that, executive decisions cannot without any justification prevent the Parliament in carrying out its constitutional role. The advice of the Prime Minister to the Queen, which is an executive act based on political consideration, resulting in the prorogation was outside the powers of the Prime Minister and therefore, illegal; consequentially, the prorogation itself was unlawful. Lady Haled CJ of the Supreme Court of United Kingdom acknowledged that political questions are beyond the scope of review but having said so, observed as follows:

"... although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of the politicians, or arises from a matter of political controversy has never been sufficient reason for the courts to refuse to consider it. Most of the constitutional issues have been concerned with politics in the sense that important decisions made by the executives have a

political hue to them and courts have exercised supervisory jurisdiction... Whether the law recognizes the existence of prerogative power and what its legal limits are, are by definition questions of law which are for the courts to determine. There is no prerogative which the law of the land does not allow: the limits of prerogative power are set by law and are determined by courts... Unlimited power of prorogation is incompatible with the principle of Parliamentary sovereignty. It is a concomitant of that principle that the power cannot be unlimited. The effect of prorogation would be to prevent the operation of ministerial accountability to Parliament during that period. The fact that the minister is politically accountable to the Parliament does not mean that he is therefore immune from legal accountability to courts... A decision to prorogue Parliament (or to advice the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as legislature and as the body responsible for the supervision of the executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course..."

From the aforesaid celebrated judgments, it appears to us that "purely political questions" are outside the scope of judicial review but when political questions have constitutional implications, such questions are most certainly reviewable; the review would be on the issue of constitutional implication and not on politics. In cases of amendment to Constitution, it would not suffice to say "there was politics behind the amendment"; the test would be whether the amendment, based on political consideration (if at all), is compatible with the Constitution.

The Judiciary is not concerned with politics; the Judiciary is "antithesis" to politics. The Judiciary must acknowledge that enactment(s) or amendments may be affected by political considerations; Judiciary must acknowledge that they may not like the enactment or amendment to statute or constitution. This matters little. The function of the Judiciary is to ensure supremacy of the Constitution as contemplated under Article 7 and under no circumstance, should allow the Parliament to pass any law or make any constitutional amendment(s) that is unconstitutional. Thus, whether the impugned amendment was infact tainted with any political consideration is immaterial so far we are concerned. Our concern is limited to review of the constitutionality of the impugned amendment.

Part III of our Constitution deals with fundamental rights and Article 41 of the Constitution provides for *"Freedom of religion"*. Under Article 41 of the Constitution, subject to law, public order and morality, every citizen has the right to profess, practice or propagate any religion and every religious community or denomination has the right to establish, maintain and manage its religious institutions. Furthermore, under Article 40(2) of the Constitution *"No person attending any educational institution shall be required to receive religious instruction, or take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own"*.

The impugned constitutional amendment in our view, does not offend Article 40 of the Constitution. To the contrary, it supplements Article 40 because it places an obligation upon the State to *ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion*.

The fundamental principles of the Constitution are set out in the preamble. The relevant part of the preamble of our Constitution reads as follows:

> *"...Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution..."*

To accommodate the concept of secularism, as contemplated in the preamble to our Constitution, Article 12 had been amended by the Fifteenth Amendment to read as follows:

> *"**Secularism and freedom of religion**:- The principles of secularism shall be realised by the elimination of-*
> *(a) communalism in all its forms*
> *(b) the granting by the State of political status in favour of any religion;*
> *(c) the abuse of religion for political purpose;*
> *(d) any discrimination against or persecution of, persons practicing a particular religion*

In political terms, secularism is a movement towards the separation of religion and Government, often termed the separation of

Church and State. Article 12 of the Constitution is unlike the French Constitution. It deals with "Secularism and freedom of religion"; this means that our Constitution while aiming to ensure secularism acknowledges and respects freedom of religion. Secularism is to be ensured but not at the cost of religion. How "secularism" will be ensured is set out in Articles 12(a)-12(d) of the Constitution. Article 12 of the Constitution provides that secularism shall be realized by elimination of *"granting by the State of political status in favour of any religion"*. Article 12, in our view contemplates impermissibility of "state religion with establishment" as "state religion with establishment" in many cases places the state religion in superior position. Article 12 as drafted, in our view, would impose an obligation upon the State to ensure religious authorities of any particular religion cannot dominate over the State since the basic structure of our Constitution would mandates *Supremacy of State*.

Article 2A of the Constitution, impugned herein, in our view, neither offends the basic principles of the Constitution, as contained in the preamble nor offends any other provision of the Constitution. The conferment of status of *"State Religion"* on its own does not tantamount to an action on the part of State to grant political status in favour of Islam. Article 2A must be read as a whole and once read, it becomes obvious that the insertion of the concept of Islam being the state religion does not, on its own, affect the constitutional rights of others having different religious beliefs. It does not affect the basic structure of the

Constitution and also does not render the Constitution redundant. The impugned amendment also does not offend the concept of secularism, as provided for in the Constitution.

Therefore, it is our considered view that the impugned amendment through Article 2A recognizing Islam as state religion is not ultra vires to the Constitution.

As an attempt to simplify the issue, we have discussed the arguments advanced in our Judgment. We have refrained from setting out specific submissions made by the Counsels for the petitioners and respondents because the constitutionality issue should be dealt with "as a whole".

In light of the aforesaid, we are inclined to discharge the Rule.

Communicate the Judgment and Order at once.

Quazi Reza- ul Hoque, J:

I agree.

Md. Ashraful Kamal, J:

I agree.

বিচারপতি মোঃ আশরাফুল কামাল ঃ

মাননীয় জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার এঁর রায়টি পড়লাম। রায়ের সিদ্ধান্ত তথা রুলটি খারিজের সিদ্ধান্তের সাথে আমি একমত।

তবে জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার রুলটি যে বিচার বিশ্লেষণে খারিজ করেছেন সেটি প্রকৃত ঘটনার সাথে সামঞ্জস্যপূর্ণ নয় বিধায় আমি প্রকৃত ঘটনা বর্ণনাপূর্বক আমার পৃথক রায় ও আদেশ প্রদান করছি।

অত্র রুলটি ইস্যু করা হয়েছিল সংবিধানের (অষ্টম সংশোধনী) আইন, ১৯৮৮ এর ধারা ২ বলে সংবিধানের অনুচ্ছেদ ২ এর পর অনুচ্ছেদ *"২ক। প্রজাতন্ত্রের রাষ্ট্র ধর্ম ইসলাম, তবে হিন্দু, বৌদ্ধ ও খ্রিষ্টানসহ অন্যান্য ধর্ম পালনে রাষ্ট্র সমমর্যাদা ও সমঅধিকার নিশ্চিত করিবেন।"* সংযোজন সংশ্লিষ্টতায়। যেহেতু অত্র রুলটি সংবিধানের (অষ্টম সংশোধনী) আইন এর একটি ধারা সংশ্লিষ্টতায় সেহেতু সংবিধানের (পঞ্চম সংশোধনী) আইন বাতিল করণের, সংবিধানের (সপ্তম সংশোধনী) আইন বাতিল করণের এবং সংবিধানের (অষ্টম সংশোধনী) আইন এর ধারা ৭ এবং ৯ ধারা বাতিল করতঃ সংবিধানের অনুচ্ছেদ ১০০ ও ১০৭ পুনঃবহালের রায়ের আদেশের অংশ গুরুত্বপূর্ণ বিধায় প্রথমে উক্ত রায়ত্রয়ের আদেশের অংশ দেখা জরুরী।

বাংলাদেশের বিচার বিভাগের ইতিহাসে এযাবৎকালের সর্বশ্রেষ্ঠ রায় হলো সংবিধানের (পঞ্চম সংশোধনী) নামে খ্যাত বাংলাদেশ ইটালিয়ান মার্বেল ওয়ার্কস লিমিটেড বনাম বাংলাদেশ ও অন্যান্য (বিএলটি বিশেষ সংখ্যা ২০০৬) মোকদ্দমার রায়। এটি শুধু বাংলাদেশেরই শ্রেষ্ঠ রায় নয় এটি পৃথিবীরও অন্যতম একটি শ্রেষ্ঠ রায় বটে। সংবিধান সমুন্নত রাখতে এমন সাহসী রায় পৃথিবীতে বিরল। উক্ত মোকদ্দমার রায়ে মাননীয় বিচারপতি এ,বি,এম, খায়রুল হক এবং মাননীয় বিচারপতি এ,টি,এম, ফজলে কবির সংবিধানের (পঞ্চম সংশোধনী) আইনটি মূল সংবিধানের পরিপন্থী বিধায় সম্পূর্ণরূপে বাতিল করেছিলেন। নিম্নে রায়ের আদেশের অংশ অবিকল অনুলিখন হলোঃ

"PART XXXVI

Summary

To summarise, we hold :

1. Bangladesh is a Sovereign Democratic Republic, governed by the Government of laws and not of men.

2. The Constitution of Bangladesh being the embodiment of the will of the Sovereign People of the Republic of Bangladesh, is the supreme law and all other laws, actions and proceedings, must conform to it and any law or action or proceeding, in whatever form and manner, if made in violation of the Constitution, is void and non est.

3. The Legislature, the Executive and the Judiciary are the three pillars of the Republic, created by the Constitution, as such, are bound by its provisions. The Legislature makes the law, the Executive runs the government in accordance with law and the Judiciary ensures the enforcement of the provisions of the Constitution.

4. All Functionaries of the Republic and all services of the Republic, namely, Civil Service, Defence Services and all other services owe its existence to the Constitution and must obey its edicts.

5. State of emergency can only be declared by the President of the Republic on the advice of the Prime Minister, in case of imminent danger to the security or economic life of the Republic.

6. The Constitution stipulates a democratic Republic, run by the elected representatives of the people of Bangladesh but any attempt by any person or group of persons, how

high so ever, to usurp an elected government, shall render themselves liable for high treason.

7. A proclamation can only be issued to declare an existing law under the Constitution, but not for promulgating a new law or offence or for any other purpose.

8. There is no such law in Bangladesh as Martial Law and no such authority as Martial Law Authority, as such, if any person declares Martial Law, he will be liable for high treason against the Republic. Obedience to superior orders is itself no defence.

9. The taking over of the powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15th August, 1975, by Khandaker Mushtaque Ahmed, an usurper, placing Bangladesh under Martial Law and his assumption of the office of the President of Bangladesh, were in clear violation of the Constitution, as such, illegal, without lawful authority and without jurisdiction.

10. The nomination of Mr. Justice Abusadat Mohammad Sayem, as the President of Bangladesh, on November, 6, 1975, and his taking over of the Office of President of Bangladesh and his assumption of the powers of the Chief Martial Law Administrator and his appointment of the Deputy Chief Martial Law Administrators by the Proclamation issued on November 8, 1975, were all in violation of the Constitution.

11. The handing over of the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., PSC., by the aforesaid Justice Abusadat Mohammad

Sayem, by the Third Proclamation issued on November 29, 1976, enabling the said Major General Ziaur Rahman, to exercise all the powers of the Chief Martial Law Administrator, was beyond the ambit of the Constitution.

12. The nomination of Major General Ziaur Rahman, B.U., to become the President of Bangladesh by Justice Abusadat Mohammad Sayem, the assumption of office of the President of Bangladesh by Major General Ziaur Rahman, B.U., were without lawful authority and without jurisdiction.

13. The Referendum Order, 1977 (Martial Law Order No. 1 of 1977), published in Bangladesh Gazette On 1st May, 1977, is unknown to the Constitution, being made only to ascertain the confidence of the people of Bangladesh in one person, namely, Major General Ziaur Rahman, B.U.

14. All Proclamations, Martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and non est because:

i) Those were made by persons without lawful authority, as such, without jurisdiction,

ii) The Constitution was made subordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders,

iii) Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also,

iv) From August 15, 1975 to April 7, 1979, Bangladesh was ruled not by the representatives of the people but by the usurpers and dictators, as such, during the said period

the people and their country, the Republic of Bangladesh, lost its sovereign republic character and was under the subjugation of the dictators,

v) From November 1975 to March, 1979, Bangladesh was without any Parliament and was ruled by the dictators, as such, lost its democratic character for the said period.

vi) The Proclamations etc., destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism, negation of Rule of law, ouster of the jurisdiction of Court, denial of those constitute seditious offence.

15. Paragraph 3A was illegal. firstly because it sought to validate the Proclamations, MLRs and MLOs which were illegal, and secondln. Paragraph 3A. made by the Proclamation Orders, as such, itself was void.

16. The Parliament may enact any law but subject to the Constitution. The Constitution (Fifth Amendment) Act, 1979 is ultra vires, because:

Firstly, Section 2 of the Constitution (Fifth Amendment) Act, 1979, enacted Paragraph 18, for its insertion in the Fourth Schedule to the Constitution, in order to ratify, confirm and validate the Proclamations, MLRs and MLOs etc. during the period from August 15, 1975 to April 9, 1979. Since those Proclamations, MLRs, MLOs etc., were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.

Secondly, the Proclamations etc., being illegal and constituting offence, its ratification, confirmation and validation, by the Parliament were against common right and reason.

Thirdly, the Constitution was made subordinate and subservient to the Proclamations etc.

Fourthly, those Proclamations etc. destroyed its basic features.

Fifthly, ratification, confirmation and validation do not come within the ambit of 'amendment' in Article 142 of the Constitution.

Sixthly, lack of long title which is a mandatory condition for amendment, made the amendment void.

Seventhly, the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the People of Bangladesh and its Constitution.

17. The Fourth Schedule as envisaged under Article 150 is meant for transitional and temporary provisions, since Paragraph 3A and 18, were neither transitional nor temporary, the insertion of those paragraphs in the Fourth Schedule are beyond the ambit of Article 150 of the Constitution.

18. The turmoil or crisis in the country is no excuse for any violation of the Constitution or its deviation on any pretext. Such turmoil or crisis must be faced and quelled within the ambit of the Constitution and the laws made thereunder, by the concerned authorities, established under the law for such purpose.

19. Violation of the Constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate forever, however, on the necessity of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims, Id quod Alias Non Est Licitum, Necessitas

Licitum Facit, salus populi est suprema lex and salus republicae est suprema lex.

20. As such, all acts and things done and actions and proceedings taken during the period from August 15, 1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever.

21. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble, Article 6, 8, 9, 10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation Order No. IV of 1976, is declared valid and retained.

We further declare:

i) The Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above.

ii) The "ratification and confirmation" of The Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law

Regulation No. VII of 1977) and Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977) with regard to insertion of Paragraph 3A to Fourth Schedule of the Constitution by Paragraph 18 of the Fourth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979), is declared to have been made without lawful authority and is of no legal effect.

We further direct the respondents to handover the physical possession of the premises, known as Moon Cinema Hall at 11, Wiseghat, Dhaka, in favour of the Petitioners, within 60 (Sixty) days from the date of receipt of the copy of this Judgment and Order.

In the result, the Rule is made absolute but without any order as to costs.

Before parting with the case, I would like to express my deep gratitude to the learned Advocates appearing in this case for their unfailing assistance to us. I have enriched my knowledge by their profound learning and experience. I would like to put it on record my deep appreciation for all of them."

বাংলাদেশের দ্বিতীয় সর্বশ্রেষ্ঠ রায়টি হলো সংবিধানের (সপ্তম সংশোধনী) মোকদ্দমা নামে খ্যাত সিদ্দিক আহমেদ বনাম বাংলাদেশ **[1 Counsel (Spl) (2013)]** মোকদ্দমাটি। উক্ত মোকদ্দমার বিচারপতি এ,এইচ,এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি শেখ মোঃ জাকির হোসেন সংবিধানের (সপ্তম সংশোধনী) আইনটি মূল সংবিধানের পরিপন্থী বিধায়

সম্পূর্ণরূপে বাতিল করেছিলেন। নিম্নে রায়ের আদেশের অংশ অবিকল অনুলিখন হলোঃ

> ***"<u>The Ultimate Summing Up</u>***
>
> ***309. Our judgment may be summed up in following terms;***
>
> ***1) Martial Law is totally alien a concept to our Constitution and hence, what Dicey commented about it, is squarely applicable to us as well.***
>
> ***2) A fortiori, usurpation of power by General Mohammad Ershad, flexing his arms, was void ab-initio, as was the authoritarian rule by Mushtaque – Zia duo, before Ershad, and shall remain so through eternity. All martial law instruments were void ab-inito. As a corollary, action purportedly shedding validity through the Constitution (Seven Amendment) Act 1986, constituted a stale, moribund attempt, having no effect through the vision of law, to grant credibility to the frenzied concept, and the same must be cremated without delay.***
>
> ***3) The killing of the Father of the Nation, which was followed by successive military rules, with a few years of intermission, was not an spontaneous act-it resulted from a well intrigued plot, harboured over a long period of time which was aimed not only to kill the Father of the Nation and his family, but also to wipe out the principles on which the Liberation War was fought.***
>
> ***4) During the autocratic rule of Khandaker Mushtaque and General Ziaur Rahman, every efforts were undertaken to erase the memory of the Liberation War against Pakistan.***

5) Two military regimes, the first being with effect from 15th August, 1975, and the second one being between 24th March 1982, and 10th November 1986, put the country miles backward. Both the martial laws devastated the democratic fabric, as well as the patriotic aspiration of the country. During Ziaur Rahman's martial law, the slogan of the Liberation War, "Joy Bangla" was hacked to death. Many other Bengali words such as Bangladesh Betar, Bangladesh Biman were also erased from our vocabulary. Suhrawarddi Uddyan, which stands as a relic of Bangabandhu's 7th March Declaration as well as that of Pakistani troops' surrender, was converted into a childrens' park. Top Pakistani collaborator Shah Azizur Rahman was given the second highest political post of the Republic, while other reprehensible collaborators like Col. Mustafiz (I O in Agartala conspiracy case), A S M Suleiman, Abdul Alim etc were installed in Zia's cabinet. Many collaborators, who fled the country towards the end of the Liberation War, were allowed, not only to return to Bangladesh, but were also greeted with safe haven, were deployed in important national positions. Self-confessed killers of Bangabandu were given immunity from indictment through a notorious piece of purported legislation. They were also honoured with prestigious and tempting diplomatic assignments abroad. The original Constitution of the Republic of 1972 was mercilessly ravaged by General Ziaur Rahman who erased from it, one of the basic features, Secularism and allowed communal politics, proscribed by Bangabandhu, to stage a come back.

6) During General Ershad's Martial Law also democracy suffered devastating havoc. The Constitution was kept in abeyance. Doors of communal politics, wide opened by General Zia, were remained so during his period. Substitution of Bengali Nationalism by communally oriented concept of Bangladeshi Nationalism was also allowed longevity during Ershad's Martial Law period.

7) By the judgment in the Fifth Amendment Case all the misdeeds perpetrated by Mushtaque-Zia duo have been eradicated and the Constitution has been restored to its original position as it was framed in 1972.

8) It is about time that the relics left behind by Martial Law perpetrators be completely swept away for good.

9) Steps should be taken by the government to remove the impeding factors, the Appellate Division cited, in order to restore original Article 6, i. e, Bangalee Nationalism.

10) Those who advised Ershad, including his law minister and Attorney General during his Martial Law period to keep the Constitution suspended, should also be tried.

Rule made absolute in part

310. For the reasons assigned above, the Rule is made absolute in part. The Constitution (Seventh Amendment) Act, 1986 is hereby declared to be thoroughly illegal, without lawful authority, void ab-initio and the same is, hence invalidated forthwith this judgment, subject however, to the condonation catalogued above, where they would apply.

311. Paragraph 19 of Fourth Schedule to the Constitution, is hereby declared extinct wherefor the same must be effaced from the Constitution without delay.

312. The Respondents are further directed, having regard to the Appellate Division's modifying Order in the Fifth Amendment case, to take steps to clear the impediments, cited by the Appellate Division, with a view to eventual restoration of original Article 6.

313. The Respondents No. 1 is directed to reflect this judgment by re-printing the Constitution.

314. No Order, however, is made to interfere with the petitioner's conviction or the sentence for the reasons stated above and hence he must surrender to his bail.

315. The learned Counsel for the petitioner applied for a certificate under Article 103(2)(a) of the Constitution and, as the case raises a substantial question of law as to the interpretation of the Constitution, we have no hesitation to issue the certificate asked for, which is hereby issued.

There is however, no order as to cost."

১৯৮৮ সালে সংবিধানের (অষ্টম সংশোধনী) আইনটি নিম্নে অবিকল অনুলিখন হলোঃ

The Constitution (Eighth Amendment) Act, 1988

(Act No. 30 of 1988)

[9th June, 1988]

An Act further to amend certain provisions of the Constitution of the People's Republic of Bangladesh

WHEREAS it is expedient further to amend certain provisions of the Constitution of the People's Republic of Bangladesh for the purposes hereinafter appearing;

It is hereby enacted as follows.-

1. Short title.- *This Act may be called the Constitution (Eighth Amendment) Act, 1988.*

2. Amendment of article 2A of the Constitution.- *In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, after article 2 the following new article 2A shall be inserted, namely:-*

"2A. The State Religion.- The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic."

3. Amendment of article 3 of the Constitution.- *In the Constitution, in article 3 for the word "Bengali" the word "Bangla" shall be substituted.*

4. Amendment of article 5 of the Constitution.- *In the Constitution, in article 5, in clause (1), for the word "Dacca" the word "Dhaka" shall be substituted.*

5. Amendment of article 30 of the Constitution.- *In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, for article 30 the following article 30 shall be substituted, namely:*

*"**30. Prohibition of foreign titles, etc-*** *No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state.*

6. Amendment of article 68 of the Constitution. - *In the Constitution, in article 68 and its sub-title for the word "salaries" the word "remuneration" shall be substituted.*

7. Amendment of article 100 of the Constitution.- *In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, for the article 100, the following article 100 shall be substituted, namely:-*

"100. Seat of Supreme Court.- (1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent Benches.

(3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of judges of the High Court Division as the Chief Justice may deem it necessary to nominate to that Bench from time to time and on such nomination the judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have Jurisdictions, powers and functions conferred or that may be conferred on the

High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions. (6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches."

8. Amendment of article 103 of the Constitution.- *In the Constitution, in article 103, in clause (2b), for the word "transportation" the word "imprisonment" shall be substituted.*

9. Amendment of article 107 of the Constitution.- In the Constitution, in article 107, in clause (3), for the words "Supreme Court" the words, commas and brackts "or any Bench of a permanent Bench of the High Court Division referred to in clause (3) of article 100" shall be substituted.

সংবিধানের (অষ্টম সংশোধনী) মোকদ্দমা নামে খ্যাত আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমায় মাননীয় বিচারপতি বদরুল হায়দার চোধুরী, মাননীয় বিচারপতি শাহাবুদ্দিন আহমেদ, মাননীয় বিচারপতি এম, এইচ, রহমান এবং মাননীয় বিচারপতি এ,টি,এম, আফজাল সমন্বয়ে গঠিত তৎকালীন মাননীয় আপীল বিভাগ সংখ্যাগরিষ্ঠ মতামতের ভিত্তিতে উপরিল্লিখিত ***The Constitution(Eighth***

Amendment) Act, 1988 এর কেবল মাত্র দুটি ধারা ৭ এবং ৯ বাতিল করে সংবিধানের অনুচ্ছেদ ১০০ এবং ১০৭ পূর্বরূপ পুনঃস্থাপন করেন। [৪১ ডিএলআর (এডি)(১৯৮৯) পাতা-১৬৫]। রায়ের আদেশে বলা হয়েছে যে,

"Order of the Court

1. By majority judgment and appeals are allowed; The impugned orders of the High Court Division are set aside.

2. The impugned amendment of Article 100 along with consequential amendment of Article 107 of the Constitution is held to be ultra vires and hereby declared invalid.

3. This invalidation however will not affect the previous operation of the amended Articles and judgments, decrees, orders, etc. rendered or to be rendered and transactions past and closed.

4. In view of this invalidation, old Article 100 of the Constitution stands restored along with the Sessions of the High Court Division.

5. Civil Petition No. 3 of 1989 is disposed of in terms of this Order.

6. There will be no order as to costs."

অর্থাৎ মাননীয় বিচারপতি বদরুল হায়দার চৌধুরীর নেতৃত্বে তৎকালীন আপীল বিভাগ সংখ্যা গরিষ্ঠতার ভিত্তিতে উপরিল্লিখিত ***The Constitution(Eighth Amendment) Act, 1988*** এর কেবল মাত্র দুটি ধারা ৭ এবং ৯ বাতিল করে সংবিধানের অনুচ্ছেদ ১০০ এবং ১০৭ পূর্বরূপ পুনঃস্থাপন করলেও উক্ত আইনের অন্যান্য ধারা বিশেষ করে সংবিধানের অনুচ্ছেদ ২ক। সংশ্লিষ্টতায় ধারা ২ সম্পর্কে কোনরূপ মতামত প্রদান না করে মৌনতা অবলম্বন করেন। সংবিধানের (অষ্টম সংশোধনী) মোকদ্দমা নামে খ্যাত আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমাটিতে

সংবিধানের (অষ্টম সংশোধনী) আইনটি সম্পূর্ণরূপে বাতিল করা হয় নাই। সংবিধানের (পঞ্চম সংশোধনী) এবং সংবিধানের (সপ্তম সংশোধনী) মোকদ্দমার রায়ে সংবিধানের (পঞ্চম সংশোধনী) আইন এবং সংবিধানের (সপ্তম সংশোধনী) আইন সম্পূর্ণ বাতিল করা হয়েছিল। কিন্তু আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমাটি সংবিধানের (অষ্টম সংশোধনী) আইন সম্পূর্ণ বাতিলের রায় নয়। আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমার রায়কে সংবিধানের অনুচ্ছেদ ১০০ এবং ১০৭ পুনঃবহালের রায় বলা যায়।

সংবিধান দিবস, ২০০০ উপলক্ষ্যে বাংলাদেশ সুপ্রীম কোর্টের সিনিয়র এ্যাডভোকেট বাংলাদেশের অন্যতম শ্রেষ্ঠ এ্যাডভোকেট সৈয়দ ইশতিয়াক আহমেদ এর প্রদত্ত বক্তব্যটি বাংলাদেশ সুপ্রীম কোর্ট বার এসোসিয়েশন এর ২০০২-২০০৩ সালের কার্যকরী কমিটি কর্তৃক প্রকাশিত "The Law Magazine"–এ ছাপা হয়েছিল। উক্ত বক্তব্যের অংশ বিশেষ নিম্নে অবিকল অনুলিখন হলোঃ

> *''সংবিধান গণতান্ত্রিক শাসন ব্যবস্থার একটি দলিল। গণতন্ত্র ধর্ম বা অধর্মের ব্যাপার নয়। এ এমনই এক মতবাদ যা স্বাভাবিক কারণেই ধর্মনিরপেক্ষ। কোন ধর্মীয় মতবাদের ভিত্তিতে সংবিধান রচিত হলে তা গণতন্ত্র, মৌলিক অধিকার, আইনের শাসন, রাজনৈতিক বিজ্ঞান ও দার্শনিক নীতির ভিত্তিতে প্রতিষ্ঠিত হবে না। আমাদের দেশের মানুষ, যারা সহজ সরল ও ধর্মপ্রাণ অথচ দরিদ্র এবং দুঃখী, তাদের ধর্মীয় অনুভূতির সুযোগ নিয়ে শাসকেরা যুগে যুগে তাদের উদ্দেশ্য হাসিল করবার প্রয়াস পেয়েছে। আমাদের প্রথম সামরিক শাসনামলে চালু ছিল। প্রথম সামরিক শাসনামলের এই সংশোধনগুলোর মূল বৈশিষ্ট্য হল প্রথমতঃ প্রস্তাবনায় দয়াময় পরম দয়ালু আল্লাহর নাম সংযোজিত করা। শুধু তাই যদি হতো তাহলে হয়তো বলার কিছু ছিল না। কিন্তু এর মূল উদ্দেশ্য ছিল প্রস্তাবনার দ্বিতীয় অনুচ্ছেদের পরিবর্তে অন্য অনুচ্ছেন প্রতিষ্ঠা করা, যা এখনো বলবৎ আছে। মূল সংবিধানের প্রস্তাবনার দ্বিতীয় অনুচ্ছেদটিতে ছিল আমাদের মুক্তিযুদ্ধের সেই মহান আদর্শের অঙ্গীকার, যে আদর্শের জন্য আমাদের বীর জনগণ জাতীয় মুক্তি সংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রাণ উৎসর্গ করতে উদ্বুদ্ধ করেছিল। যা ছিল জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র এবং ধর্ম নিরপেক্ষতা। এগুলো ঘোষিত হয়েছিলো সংবিধানের মূল নীতি হিসাবে। সামরিক শাসনামলে প্রধান এবং মৌলিক মূল নীতি অর্থাৎ ধর্ম নিরপেক্ষতা প্রতিস্থাপিত করা হয়, 'সর্ব শক্তিমান আল্লাহর উপর পূর্ণ আস্থা এবং বিশ্বাস" এই শব্দসমূহ দ্বারা। মুক্তি সংগ্রামকেও আখ্যায়িত করা হল স্বাধীনতার জন্য যুদ্ধ হিসাবে। তারপর এই শাসনের দীর্ঘকাল অকারণে সামরিক ফরমান দ্বারা খেয়াল খুশি মত সংবিধান*

সংশোধন করা হয়। কে বলবে এগুলো দরকার ছিল মানুষের মঙ্গলের জন্য, দেশের স্বার্থে অথবা সাংবিধানিক কোন সংকট উত্তরণের জন্য। শাসকগোষ্ঠীর নিজস্ব স্থায়ীত্বের স্বার্থে এগুলোর প্রয়োজন ছিল বলেই করা। সামরিক শাসনের শেষে তথাকথিত গণতন্ত্র প্রতিষ্ঠার প্রাক্কালে সংবিধানকে পুনরুজ্জীবিত করবার জন্য পঞ্চম সংশোধনী আনা হয়। এই ধরণের সংশোধনীর তথাকথিত সাংবিধানিক পদক্ষেপ পৃথিবীর ইতিহাসে বাংলাদেশেই প্রথম। তারপর ৬ষ্ঠ সংশোধনী আনা হল সম্পূর্ণ ব্যক্তিগত ও দলীয় স্বার্থে। বিচারপতি আব্দুস সাত্তার তথা বি এন পি-র শাসনের স্বার্থে। উপ-রাষ্ট্রপতি হিসাবে বিচারপতি সাত্তারের নির্বাচনে অংশ নেয়ার পক্ষে সাংবিধানিক বাধা ছিল। এই সংশোধনীর মাধ্যমে সেই বাধা দূর করা হয়। ফলে পরবর্তীতে বিচারপতি সাত্তার রাষ্ট্রপতি হিসাবে নির্বাচিত হলেন। পঞ্চম সংশোধনীর মতই সপ্তম সংশোধনীর মূল উদ্দেশ্য ছিল সামরিক শাসন বৈধ করা এবং সামরিক শাসন প্রতিষ্ঠাকারীকে রাষ্ট্রদ্রোহিতার অভিযোগ থেকে রক্ষা করা। এই সংশোধনীতে দেশ অথবা জনগোষ্ঠীর স্বার্থ কোথায়?

সামরিক স্বৈরশাসন সজ্ঞাগত ভাবেই ধর্ম, নীতি ও আদর্শের তোয়াক্কা করে না অথচ তাবা অষ্টম সংশোধনীর মাধ্যমে ইসলামকে রাষ্ট্র ধর্ম হিসাবে ঘোষণা করল। দেশে কোন ধর্মীয় সংকট ছিল না। ছিলো না কোন সাংবিধানিক সংকট। তাছাড়া এ বিষয়ে জনগণের পক্ষ থেকে কোন দাবীও উত্থাপিত হয়নি। আশির দশকের স্বৈরশাসকরা রাষ্ট্র ধর্ম ঘোষণা করা ব্যতিরেকে যা কিছু করেছেন তার সবই অধর্ম, অন্যায়, নীতিহীনতা, প্রতারণা, লুটতরাজ এবং বল্গাহীন দুর্নীতি। সন্ত্রাস এবং কুশাসন এ সব কিছু মিলেই এমন এক পরিস্থিতির সৃষ্টি হয় যা থেকে পরিত্রাণ পাওয়ার জন্যে এদেশের সব শ্রেণী ও পেশার মানুষ দীর্ঘ নয় বছর ধরে এই স্বৈরশাসনের অবসানের জন্য সংগ্রাম, ত্যাগ ও আত্মোৎসর্গ করেছে। মানুষের কাঁধে কাঁধ মিলিয়ে এ দেশের সমগ্র আইনজীবি সমাজ এই সংগ্রামের পুরভাগে দাঁড়িয়ে আন্দোলন করেছিলেন, ত্যাগ স্বীকার করেছিলেন।''

সংবিধানে অনুচ্ছেদ ২ক। 'প্রজাতন্ত্রের রাষ্ট্রধর্ম হবে ইসলাম, তবে অন্যান্য ধর্মও প্রজাতন্ত্রে শান্তিতে পালন করা যাইবে।' এর বৈধতা চ্যালেঞ্জ করে ১৯৮৮ সালে 'স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি'-র পক্ষে স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটির প্রেসিডিয়াম সদস্য বিচারপতি কামাল উদ্দিন হোসেনসহ অপর ১৫ (পনের) জন সদস্য দরখাস্তকারী হয়ে গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১০২ মোতাবেক এক দরখাস্ত

বিগত ইংরেজী ১৪ই আগষ্ট, ১৯৮৮ সালে অত্র বিভাগের কমিশনার অব এফিডেভিটের সম্মুখে হলফনামা সম্পাদন করে দরখাস্তটি নিবন্ধিত করেন।

১৪ই আগষ্ট, ১৯৮৮ সালে উক্ত হলফনামা সম্পাদন করার পর দরখাস্তকারীগণ দীর্ঘ ২৩ (তেইশ) বৎসর যাবৎ তাদের রীট পিটিশনটি (রীট পিটিশন নং-১৪৩৪/১৯৮৮) অত্র বিভাগের কোন বেঞ্চে মোশন (Motion) শুনানীর জন্য উপস্থাপন করেন নাই।

দরখাস্তকারীগণ উপরিল্লিখিত রীট পিটিশনটি দীর্ঘ ২৩ (তেইশ) বৎসর কোন আদালতে মোশন (Motion) শুনানীর জন্য উপস্থাপন না করে বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে একটি অতিরিক্ত দরখাস্তের হলফনামা সম্পাদন করেন।

অতঃপর, দীর্ঘ ২৩ (তেইশ) বৎসর পর, বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে দরখাস্তকারীগণের বিজ্ঞ এ্যাডভোকেট জনাব সুব্রত চৌধুরী অত্র রীট পিটিশন নং ১৪৩৪/১৯৮৮ দরখাস্তটি মোশন (Motion) শুনানীর জন্য বিচারপতি এ, এইচ, এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি গোবিন্দ চন্দ্র ঠাকুর সমন্বয়ে গঠিত অত্র বিভাগের একটি দ্বৈত বেঞ্চে উপস্থাপন করেন। হাইকোর্ট বিভাগের উপরিল্লিখিত বেঞ্চ দরখাস্তকারীগণের রীট পিটিশনটি শুনানীঅন্তে ঐদিনই তথা বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে প্রতিপক্ষগণের উপর কারণ দর্শানো পূর্বক অত্র প্রথম রুলটি ইস্যু করেছিলেন। যা অবিকল নিম্নরূপঃ-

> *"Let the supplementary affidavit form part of the main petition.*
>
> *Let a Rule Nisi be issued calling upon the respondents to show cause as to why the insertion of Article 2A in the Constitution of Bangladesh by section 2 of the Constitution (Eighth Amendment) Act, 1988, (Act No. XXX of 1988) should not be declared to have been made unconstitutional, ultra vires the constitution and without lawful authority and of no legal effect and/or why such other or further order or orders, as this Court may deem fit and proper, should not be passed.*
>
> *The following learned Advocates be requested to assist us as amicus curie.*

1. *Mr. T.H. Khan*
2. *Dr. Kamal Hossain*
3. *Mr. Rafiqul Hoque*
4. *Mr. M. Amirul Islam*
5. *Dr. M. Zahir*
6. *Mr. Mahmudul Islam*
7. *Mr. A.F. Hasan Arif*
8. *Mr. Rokonuddin Mahmud*
9. *Mr. Aktar Imam*
10. *Mr. Fida M. Kamal*
11. *Mr. Ajmalul Hossain QC*
12. *Mr. Abdul Matin Khasru*
13. *Mr. Yousuf Hossain Humayun and*
14. *Mr. A.F.M. Mesbahuddin.*

The matter shall be taken up for hearing on 16.06.2011.

The Office is directed to put in the requisites for service of notices upon the respondents in usual course and through registered post.

Sd/-illegible"

অতঃপর বিগত ইংরেজী ১৬.০৬.২০১১ তারিখে অত্র রুলটি আংশিক শুনানী হয়ে বিগত ইংরেজী ১৪.০৭.২০১১ তারিখ পর্যন্ত শুনানী মুলতবী রাখা হয়।

অতঃপর বিগত ইংরেজী ২৫.০৮.২০১১ তারিখে বিচারপতি এ,এইচ,এম শামসুদ্দিন চৌধুরী এবং বিচারপতি গোবিন্দ চন্দ্র ঠাকুর সমন্বয়ে গঠিত অত্র বিভাগের দ্বৈত বেঞ্চ অত্র রুলটি তদবীর অভাবে খারিজ করেন।

অতঃপর বিগত ইংরেজী ০১.১২.২০১১ তারিখে বিচারপতি এ, এইচ, এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি জাহাঙ্গীর হোসেনের সমন্বয়ে গঠিত অত্র বিভাগের দ্বৈত বেঞ্চ বিগত ইংরেজী ২৫.০৮.২০১১ তারিখের স্বাক্ষর বিহীন আদেশ প্রত্যাহার করে

অত্র রুলটি পুনরুজ্জীবিত করেন এবং অতিরিক্ত (supplementary) রুল ইস্যু করেন যা নিম্নরূপঃ-

"The unsign order is hereby recalled. The matter shall come up in the list for hearing on 05.12.2011.

Let a Supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the insertion of substituted Article 2A in the Constitution of Bangladesh by Section 4 of the Constitution (15th Amendment) Act, 2011 described in paragraph No.2 of this application, should not be declared to have been made unconstitutional, ultravires to the Constitution and without any lawful authority and is of no legal effect and/or why such other or further order or orders as to this court may deem fit and proper, shout not be passed.

The Rule is made returnable within 10(ten) days from date.

The petitioners are directed to put in the requisites for service of notices upon the respondents in usual course and though registered post.

Sd/-illegible"

অতঃপর বিগত ইংরেজী ২৭.০৮.২০১৫ তারিখে বিচারপতি জুবায়ের রহমান চৌধুরী এবং বিচারপতি মাহমুদুল হক আদেশ প্রদান করেন যে,

" Since the instant writ petition is appearing as Item No. 32 before a senior Bench (Court No.9 Annex),

which has been sent there by the Hon'ble Chief Justice, let this matter go out from the cause list of this Court.

Sd/-illegible"

অতঃপর বিগত ইংরেজী ৩১.০৮.২০১৫ তারিখে বিচারপতি জিনাত আরা এবং বিচারপতি এ, কে, এম, সাহিদুল হক আদেশ প্রদান করেন যে,

"On the prayer of the learned Advocate on behalf of the petitioner, the matter is adjourned to 07.09.2015.

Sd/-illegible"

উপরিল্লিখিত বিগত ইংরেজী ৩১.০৮.২০১৫ তারিখের আদেশ মোতাবেক অত্র মোকদ্দমাটি শুনানীর জন্য মাননীয় বিচারপতি জিনাত আরা এবং মাননীয় বিচারপতি এ, কে, এম, সাহিদুল হক এর আদালতে বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে দিন ধার্য থাকলেও উক্ত আদালত উক্ত তারিখে মোকদ্দমাটি কার্যতালিকায় আনেন নাই। এমনকি শুনানীর জন্য পরবর্তীতে কোনো তারিখও উক্ত আদালত কর্তৃক নির্ধারন করা হয় নাই।

অপরদিকে, বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে অত্র আদালতের বিজ্ঞ এ্যাডভোকেট সমরেন্দ্র নাথ গোস্বামী নিজে দরখাস্তকারী হয়ে অত্র মোকদ্দমাটির বিষয়বস্তু সংশ্লিষ্টতায় তথা সংবিধানের "অনুচ্ছেদ ২ক" সংবিধান পরিপন্থী ঘোষণা চেয়ে মাননীয় বিচারপতি মোঃ এমদাদুল হক এবং মাননীয় বিচারপতি মুহাম্মদ খুরশীদ আলম সরকার এর দ্বৈত বেঞ্চে রীট পিটিশন নং ৮০৫৬/২০১৫ উপস্থাপন করলে উক্ত বেঞ্চ শুনানী অন্তে ঐদিনই প্রদত্ত রায় ও আদেশে রীট পিটিশনটি সরাসরি প্রত্যাখ্যান করেন।

গুরুত্বপূর্ণ বিধায় মাননীয় বিচারপতি মোঃ এমদাদুল হক এবং মাননীয় বিচারপতি মুহাম্মদ খুরশীদ আলম সরকার কর্তৃক রীট পিটিশন নং ৮০৫৬/২০১৫ শুনানী অন্তে বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে প্রদত্ত রায় ও আদেশ নিম্নে অবিকল অনুলিখন হলোঃ

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 8056 of 2015.

In the matter of:

An application under Article 102(1) and (2)(a)(ii) read with article 26 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:

Samarendra Nath Goswami, Advocate.

.....Petitioner.

-Versus-

Government of Bangladesh, represented by the Secretary. Ministry of Law Justice and parliamentary Affairs, Bangladesh Secretariat, Dhaka.

.....Respondent.

Mr. Samarendra Nath Goswami, Advocate.(In person)

....For the petitioner.

Mr. Murad Reza, Addl. Attorney General with
Mr. Md. Khushedul Aiam, D.A.G.

....For the State.

Present:

Mr. Justice Md. Emdadul Huq

And

Mr. Justice Muhammad Khurshid Alam Sarkar

Order on: 07-09-2015.

Advocate Mr. Samarendra Nath Goswami has, in his personal capacity, filed this Writ Petition and has prayed for

issuance of a Rule Nisi with regard to the vires of article 2ka of the Constitution as inserted by the Constitution (15 Amendment) Act. 2011.

The petitioner has stated that he is an enrolled Advocate of this Court and that he has filed this petition "in his capacity as public spirited citizen to protect and uphold the Constitution and law by way of public interest litigation. This pro bono Writ Petition is brought by the petitioner to preserve the integrity of the rule of law and for enforcing public duty having grave public importance the petitioner file this writ petition as an expression of social commitment and obligation to advance public aims in the interest of public at large to defend public collective right and prevent public wrongs. The petitioner files this writ petition for ventilation of collective and common grievance injurious to public welfare.....

At the hearing of this Writ Petition as a Motion, Mr. Goswami appears in person, and submits that the new article 2ka is violative of the ideal of secularism (ধর্মনিরপেক্ষতা) which has been declared in the Preamble as one of the four basic ideals of this Country and further enunciated in articles 8 and 12 of the Constitution.

Mr. Goswami next submits that this new article 2ka has been inserted in the Constitution by the Constitution (Fifteenth Amendment) Act, '201 I declaring Islam as the রাস্ট্র ধর্ম, but there should have been a referendum under article 142, as it stood before amendment of that article by the Constitution (Fifteenth Amendment), Act, 2011.

Mr. Goswami, lastly submits that this new article creates discrimination between the followers of Islam and

the followers of other religion and thus violates article 27 which guarantees equality of all citizens and therefore a Rule Nisi should be issued.

At the hearing of this Writ Petition as a Motion, Mr. Murad Reza, the learned Additional Attorney General, appears and submits that the contents of article 2ka has been inserted in the Constitution by substituting the old article 2ka and in making such amendment all the requirements of article 142 of the Constitution have been followed and therefore it is not a provision of a simple Act of Parliament.

Mr. Reza, the learned Additional Attorney General, next submits that Part-1 of the Constitution contains specific declarations about the various aspects of the identity of the Republic including a declaration in Article 2ka that the State Religion is Islam with a specific direction that the State shall ensure equal status and equal rights in the practice of all other religions.

Mr. Reza next submits that the declaration made in article 2ka is nothing but a narration of the ideal of "secularism" as declared in the Preamble and articles 8 and 12 of the Constitution.

Mr. Reza, lastly submits that this article 2ka is not a provision conferring any fundamental rights that are guaranteed in Part III and that it can not construed as violative of any fundamental right and therefore no rule should be issued.

We have considered the statements made in the Writ Petition and the submission made by Mr. Goswami, the petitioner appearing in person, and also the submission made by the learned Additional Attorney General and the

relevant provisions of the Constitution and the Preamble thereof.

The issue raised in this case with regard to constitutionality of the declaration of Islam as the State Religion in article 2ka of the Constitution need to be examined in the context of the constitutional development of this Country, particularly in the light of the ideal of secularism as embodied in the preamble and articles 8 and 12 of the Constitution.

Secularism: In the Preamble (প্রস্তাবনা) of the Constitution, the Constituent Assembly, among others, made a declaration about the high the ideals that inspired the people of this Country to engage in the national liberation struggle leading to the liberation and adoption of the Constitution. One of the four ideals as enshrined in the original 2nd paragraph of the Preamble is ধর্মনিরপেক্ষতা (secularism) and it runs as follows:

> "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগনকে জাতীয় মুক্তি সংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রানোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল-জাতীয়তাবাদ, সমাজতন্ত্র, গনতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে।"

The ideal of "secularism" is a political theory that originated in Europe in the back ground of the debate on separation of the Church from the State. The theory spread out to non-European countries. However the manner of depicting this political philosophy and the implication thereof in reality are different in various countries of the world. There is no universally acceptable definition of

secularism, nor there is any universally accepted form of practice of this ideal.

In this country, secularism has been declared as one of the four basic ideals of the State in the Preamble and further enunciated in articles 8 and 12 of Part II of the Constitution. But the ideal of "secularism" was never practiced in this country in the sense that all religious practices are to be completely separated from the activities of the State. This reality is manifest from various executive actions including declaration of public holidays on the occasion of various religious festivals of the followers mainstream religions like Islam, Hinduism, Christianity, Buddhism etc., patronization of pilgrimage like haj etc.

In the legal arena, article 149 of the Constitution has approved tile continuation of all "existing laws" that were enacted in the pre- liberation days. These laws include some important laws based on religions tenets e.g. The Muslim Personal Law (Shariat) Application Act, 1937 with regard to inheritance, gift, will, marriage, divorce, etc of Muslims. The principles and practices based on the religion have been followed by the Hindu Community of the country with regard to inheritance, marriage etc these principle and practices have been judicially recognized and enforced by courts. Such principles and practices have been approved by the constitution as "existing laws". The Constitutional scheme becomes clear when we consider the definition of "law" in article 152 as follows:

> *"Law" means any Act, Ordinance rule, regulation bye-law notification of other*

instrument, and any custom or usage. having the force of law in Bangladesh.

After adoption of the Constitution in 1972 not only the pre- liberation statutes and "customs or usage having the force of law" were continued, but also new laws patronizing religious matters were enacted e.g. (1) Islamic Foundation Act, 1975. (2) Hindu Religious Welfare Trust Ordinance, 1983. (3) Christian Relicious welfare trust Ordinance, 1983. 4) Buddhist Religious welfare Trust Ordinance, 1983. 5) Zakat Fund Ordinance, 1982, etc.

So in this Country religion was never completely separated from State activities as propagated by the theorists of the ideal of secularism. Various provisions of the Penal Code (sections 295-298) even make certain actions punishable offence in respect of religious belief, place of worship etc.

However there were some changes in depicting the ideal of Secularism in the Constitution. During the Martial Law Period, the 2 para of the original Preamble was substituted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. 12 of 1978) as follows:

> "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগনকে জাতীয় স্বাধীনতার জন্য যুদ্ধে আত্মনিয়োগ ও বীর শহীদদিগকে প্রানোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গনতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচারের সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে।"

By the same Proclamation Order No. 12 of 1978 the original article 8(1) was substituted in the light of the

change made in the Preamble and article 12 was repealed. These changes were even ratified by the Constitution (Fifth Amendment) Act, 1979.

The above noted changes in the Preamble and in articles 8 and 12 continued till the decision of the High Court Division in the Case of Bangladesh Italian Marble Works Limited vs. the Government of Bangladesh and others in which the High Court Division summarized its findings in Para 14 with regard to the illegality of the Constitution (Fifth Amendment) Act, 1979 (vide the Special Issue, Bangladesh Legal Decision (2010) In that judgment the High Court Division declared as follows:

> *"14. all Proclamations, martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and non est because".*
>
> *(i)*
>
> *(ii)-(vi) .....*

We further declare:

> i) The Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above".

The above noted finding of the High Court Division was approved by the Appellate Division in the appeal being the case Of Munsif Ahsan Kabir and other vs. Bangladesh Italian Marble works. Dhaka and other (vide-Special Issue 2010 BLD (Special).

The above noted judicial decision has been reflected in the Constitution (Fifteenth Amendment) Act, 2011, by which the original 2nd para of the Pre-amble has been restored and the relevant article of the Constitution containing the ideals of secularism, namely article 8 was restored and the original article 12 was substituted. These two articles are quotea below:

> " জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার-এই নীতিসমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভুত এই ভাগে বর্নিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূলনীতি বলিয়া পরিগনিত হইবে।"
>
> "১২। ধর্ম নিরপেক্ষতা নীতি বাস্তাবায়নের জন্য-
>
> (ক) সর্ব প্রকার সাম্প্রদায়িকতা,
>
> (খ) রাষ্ট্র কর্তৃক কোন ধর্মকে রাজনৈতিক মর্যাদা দান,
>
> (গ) রাজনৈতিক উদ্দেশ্যে ধর্মীয় অপব্যবহার,
>
> (ঘ) কোন বিশেষ ধর্ম পালনকারী ব্যক্তির প্রতি বৈষম্য বা তাহার উপর নিপীড়ন, বিলোপ করা হইবে।"

The Parliament of this country has the constitutional and lawful authority to identify the extent of "secularism" and narrate the same keeping in view of the realities of this country and it has lawfully done so.

State Religion: The concept of State Religion was not there in the original Constitution. However the Parliament of this Country, by the Constitution (8th Amendment) Act, 1988 inserted article 2ka containing a declaration about State Religion as follows:

> "প্রজাতন্ত্রের রাষ্ট্রধর্ম ইসলাম, তবে অন্যান্য ধর্মও প্রজাতন্ত্রে শান্তিতে পালন করা যাইবে।"

Later on, the Parliament by the Constitution (Fifteenth Amendment) Act, 2011 substituted article 2ka, and modified the concept of State Religion as follows.

> "২ক। প্রজাতন্ত্রের রাষ্ট্রধর্ম ইসলাম, তবে হিন্দু, বৌদ্ধ, খৃষ্টানসহ অন্যান্য ধর্ম পালনে রাষ্ট্র সমমর্যাদা ও সমঅধিকার নিশ্চিত করিবেন।"

It is evident that article 2ka declares Islam as the রাষ্ট্রধর্ম and at the same time declares that it is the duty of the State to ensure "equal status" and "equal rights" (সমঅধিকার) to the followers of all other religions. We do not consider that the declaration made in article 2ka is derogatory from the ideal of secularism as declared by the Constituent Assembly and lastly restored by our Parliament in the Preamble, Nor is it derogatory from any provision of the Constitution including article 8 or 12 or 27. The Parliament has the constitutional and lawful authority to identify the ideal of secularism in the light of the realities of this Country and to make the declaration in article 2ka as quoted above. Parliament has lawfully done so by the Constitution (Fifteenth Amendment), Act, 2011.

In view of the above we are not inclined to issue Rule. The Writ Petition is summarily rejected.

Md. Emdadul Huq

M. K. A. Sarkar.

অপরদিকে, অত্র মোকদ্দমাটি একটি বৃহত্তর বেঞ্চ গঠনের মাধ্যমে নিষ্পত্তির নিমিত্তে দরখাস্তকারী পক্ষের বিজ্ঞ এ্যাডভোকেট সুব্রত চৌধুরী বিগত ইংরেজী ০৬.০৯.২০১৫ তারিখে হলফনামা সহকারে দরখাস্ত দাখিল করেন।

উক্ত দরখাস্তের প্রেক্ষিতে বিগত ইংরেজী ০৩.১১.২০১৫ তারিখের আদেশে বাংলাদেশের তৎকালীন মাননীয় প্রধান বিচারপতি আদেশ প্রদান করেন যে,

"Let this matter be heard and disposed of by the Larger Bench Constituting of Naima Haider, Quazi Rezaul Haque and Mohammad Ashraful Kamal, J.J)

Sd/-illegible"

রীট পিটিশন নং-৮০৫৬/২০১৫-এ বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে প্রদত্ত রায় ও আদেশে অত্র মোকদ্দমার বিষয় সংশ্লিষ্টতায় অত্র বিভাগ থেকে নিষ্পত্তি হওয়ায় এটি কার্যত আপীল বিভাগের এখতিয়ারাধীন বিষয় হয় এবং অত্র রুলটিও কার্যত অকার্যকর হয়ে পড়ে।

অতঃপর বিগত ইংরেজী ২৯.০২.২০১৬ তারিখে অত্র বৃহত্তর বেঞ্চ বসেন এবং সংক্ষিপ্ত আদেশে পরবর্তী শুনানীর তারিখ বিগত ইংরেজী ২৮.০৩.২০১৬ তারিখ নির্ধারন করেন। বিগত ইংরেজী ২৯.০২.২০১৬ তারিখের আদেশ নিম্নে অবিকল অনুলিখন হলোঃ

29.02.2016

M. H. Afric, Advocate

-------- Fro the petitioner

The order dated 08.06.2011 with regard to the assisting the court as amicus curie is hereby recalled for the time being and this matter may come up in the list on 28.03.2016 for hearing.

মাননীয় জ্যৈষ্ঠ বিচারপতি নাইমা হায়দার তার রায়ের দ্বিতীয় পাতার তৃতীয় প্যারায় লিখেছেন যে, "The learned Counsel for the petitioners takes us through the provisions of the Constitution and vehemently argues that the impugned

amendments affect basic structure or our Constitution and therefore, there is no scope but to declare the said impugned amendments as unconstitutional. The learned Counsel emphasize that under no circumstances, the basic structure of the Constitution can be amended. He also argues that the impugned amendments have the effect of nullifying different constitutional provisions; in this regard, he points out that any amendment to the Constitution which results in contradiction with the Constitution as a whole or any part thereof is liable to be struck down as being unconstitutional."

প্রকৃত পক্ষে অদ্য অত্র বৃহত্তর বেঞ্চ কর্তৃক অত্র রুলটির শুনানী মাত্র ১০/১২ মিনিট স্থায়ী হয়। শুনানীর শুরুতেই রাষ্ট্রপক্ষের অতিরিক্ত অ্যাটর্নি জেনারেল মুরাদ রেজা আদালতকে উদ্দেশ্য করে বলেন, **"এটা অনেক আগের মামলা। এতে দু'টি রুল হয়েছে। ১৯৮৮ সালের রীট এবং পরে দু'টি সম্পূরক আবেদনের রুল।"** উত্তরে জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার বলেন যে, **"আগে আবেদনকারীর আইনজীবীকে শুনবো।"** এরপর সুপ্রিম কোর্টের সিনিয়র আইনজীবী বিচারপতি টিএইচ খান, এবিএম নুরুল ইসলামসহ কয়েকজন আইনজীবী রাষ্ট্রধর্ম হিসেবে ইসলাম ধর্ম বহাল রাখার পক্ষে পক্ষভুক্ত হওয়ার আবেদন নিয়ে দাঁড়ালে জ্যৈষ্ঠ বিচারপতি নাইমা হায়দার তাদের বলেন, **"আপনারা এখন বসেন। এখনো শুনানি শুরু হয়নি।"** অতঃপর জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার দরখাস্তকারীর বিজ্ঞ এ্যাডভোকেট সুব্রত চৌধুরীকে বলেন, **"আপনাকে আমরা দেখে আসতে বলেছিলাম 'স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটির' পক্ষে এ রীটটি দায়েরের লোকাস স্ট্যান্ডি (রীট করার এখতিয়ার) ছিল কি?"** অর্থাৎ স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি কোন নিবন্ধিত সংগঠন কিনা? কিংবা আইনানুগ ব্যক্তি তথা কৃত্রিম ব্যক্তি তথা আইনগত ব্যক্তি স্বত্বা রয়েছে বলে স্বীকৃত তথা আইনানুগ অধিকার ও কর্তব্য ভোগ করতে এবং আইনানুগ অধিকার কর্তব্যের অধীন হতে পারে এমন একটি সংস্থা কিনা? সর্বোপরি উক্ত কমিটি তথা দরখাস্তকারীগণ অত্র মামলা করার আইনত অধিকারী কিনা তথা মামলা করার অথবা আইনের বৈধতা সম্পর্কে প্রশ্ন উত্থাপনের অধিকারী কিনা? এছাড়াও, স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি নামে কোন কমিটির বর্তমানে কোন অস্থিত্ব আছে কিনা? জবাবে সুব্রত চৌধুরী বলেন, **"সংগঠন ছাড়াও রীটটি আলাদা আলাদাভাবে প্রত্যেক আবেদনকারী করেছেন।"** তখন জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার বলেন, **"আমরা দেখছি, ওই**

সংগঠনটির পক্ষে রীট আবেদন করা হয়েছে।" তখন সুব্রত চৌধুরী বলেন, **"শুনানীর সময় আমরা বিস্তারিত বলবো। সন্তোষজনক জবাব দেবো। আমাদের শুনানী করার সুযোগ দিন।"** তখন জ্যৈষ্ঠ বিচারক মাননীয় বিচারপতি নাইমা হায়দার আমাদের সকলের পক্ষে বলেন যে, **"দরখাস্তকারী সংগঠনের মামলা করার এখতিয়ার নাই। রুলটি খারিজ"।**

দরখাস্তকারী সংগঠনের অত্র মোকদ্দমা অত্র আদালতের সামনে উপস্থাপনের নিমিত্তে প্রয়োজনীয় আইনগত যোগ্যতা না থাকা হেতু অত্র রুলটি খারিজ যোগ্য।

অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় খারিজ করা হলো।