

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

Writ Petition No. 12272 of 2013

IN THE MATTER OF:

An 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) and others.

.....Petitioner

-VERSUS-

The Hon'ble Speaker, Bangladesh Zatio  
Sangsad, Zatio Sangsad Bhaban, She-E-  
Bagla Nagar, Dhaka and Others

..... Respondents

**Mr. Manzill Murshid**, Advocate

.....for the petitioners.

**Mr. Biswojit Roy**, D.A.G with

**Mr. Md. Jahangir Alam**, A.A.G and

**Mr. Swarup Kanti Deb**, A.A.G.

.....for the Respondents

Heard on : 23.01.2014 & 29.01.2014

Judgment on : 30.01.2014

**Present:**

**Ms. Justice Quazi Reza-Ul Hoque**

And

**Mr. Justice A.B.M. Altaf Hossain**

A.B.M. Altaf Hossain, J;

The Rule under adjudication, issued on 25.11.2013, was on the following terms:

"Let a Rule be issued calling upon the respondents to show cause as to why the impugned Section 32Ka of Anti Corruption Commission (Amendment) Act, 2013 (published on official Gazette on 20.11.2013), should not be declared to be void and ultra vires to the Constitution of Bangladesh as being violative of the fundamental rights guaranteed under Articles 26(1)(2), 27 and 31 of the Constitution (annexure-"A") and/or pass such other or further order or orders as to this court may seem fit and proper".

The averments figured in the writ petition, in generating, are as follows:

The instant Public Interest Litigation under Article 102 of the Constitution of the Peoples' Republic of Bangladesh, is preferred by an organization in the name & style the Human Rights and Peace for Bangladesh(in brief "HRPB") and some practicing Lawyers of this Court. The petitioner have challenged the Section 32Ka of the Anti Corruption Commission (Amendment) Act, 2013 (hereinafter referred as "(Amendment Act" 2013) on the ground of discrimination and inconsistent with the Constitution of the People's Republic of Bangladesh (in brief "Constitution").

It is alleged in the writ petition that by inserting section 32Ka in the Anti-corruption Commission Act' 2004 by the Amendment Act, 2013, respondents have given special privilege to a certain group of people of the country by depriving a large scale of citizens of Bangladesh in respect of filing corruption cases. The new section 32Ka requires Government sanction/ permissions before filing cases against Judge, Magistrate and Government employee. Being aggrieved with the Amendment Act, 2013, on 24.11.2013, the petitioners sent a demand of justice notice to the respondents through their lawyer for taking steps to withdraw or cancel the provision of section 32Ka. The respondents are yet to respond to the Demand of Justice Notice of the petitioners. Finally, the petitioners have taken shelter under Article 102 of the Constitution challenging the provision of section 32Ka in the Amendment Act, 2013 and obtained the present Rule.

Mr. Manzill Murshid, the learned Advocate appearing on behalf of the petitioners submits that Section 32Ka in the Amendment Act,

2013, is violative of Article 27 of the Constitution, and is also inconsistent with Articles 26(1)(2), and 31 of the Constitution. It is argued that this section is discriminatory in nature as it has been amended for giving opportunity to judges, magistrates and Government employees.

Mr. Murshid, further submits that Article 27 of the Constitution prohibits class legislation, and not 'classification' for the purpose of legislation. It is argued that the impugned section is a class legislation, as it has given privileges, only to judges, magistrates and Government employees which is against the spirit of Article 27 of the Constitution, and is ultra vires of the Constitution, as such, the impugned section is liable to be struck down.

He further submits that the respondents enacted section 32Ka with a mala fide intention for saving a group of privileged people from corruption cases by ignoring fundamental rights of to the people of the Country to save a small privileged class.

It is further argued that as part of amending the Anti-Corruption Commission Act, 2004, some proposals were made by the relevant standing Committee as reported in September, 2012. Accordingly, Bill was prepared, but the Standing Committee did not propose and/or recommend for inserting section 32Ka in the proposed Anti-Corruption Commission (Amendment) Bill 2013, and in the proposed Anti-Corruption Commission (Amendment) Act, 2012, as well, which demonstrate a high level of mala fide intent to pass the Act.

He further submits that the impugned section 32Ka has been inserted in the Act of 2004 through the Anti-Corruption Commission (Amendment) Act, 2013, by which power given under sections 17(j), 20(1),(2) and 24 of the Anticorruption Commission Act, 2004 to the Commission has curtailed. By referring the news item published in the daily Star dated 22.11.2013, Mr. Murshid submits that the outburst of Acting Chairman of Anticorruption Commission (ACC), while addressing the 9th founding anniversary of the 'ACC'. The Acting Chairman Mr. Shahabuddin Chuppu showed Commission's incapability/discomfort to find out the real corrupt due to the consequence of the Amendment Act, 2013. He stressed to state that the anti-graft body made as subservient and an unholy alliance has been instrumental in making the bill into law. Mr. Murshid vehemently stands that, if this Court does not interfere with the impugned amendment Act, the ACC will be turned to toothless tiger.

Mr. Biswojit Roy, the learned Deputy Attorney General appearing on behalf of the respondents without filing any affidavit-in-opposition, submits that the Government has rightly enacted section 32Ka in the Amendment Act"2013 in accordance with law. He prays for discharging the Rule.

On perusal of submission of the learned Advocates of both the sides, the petition and the challenged amending Act along with the whole legislation, it appears to us that the question raised relates to the constitutional validity of section 32Ka of the Amendment Act, 2013. It has been contended that this provision of the Amendment Act, 2013 is violative of equality clause of Article 27 of the Constitution. Section 32Ka of the Amendment Act, 2013, has been brought recently into the Anti Corruption Commission Act by the Anti Corruption Commission (Amendment) Act, 2013. The impugned section requires prior sanction of the Government in order to lodge corruption case against the judges, magistrates and the Government employee. It is contended that the prior sanction of the Government offends Article 27 of the Constitution, which provided that all citizens are equal before law are entitled to equal protection", and as such, impugned section is being discriminatory in nature as appeared to the provision of Article 26 of the Constitution.

Article 27 of the Constitution disowns arbitrariness in State action and ensures fairness and equality of treatment to all the Citizens. It is attracted where equals are treated differently without any reasonable basis. The principle underlying the guarantee is that all persons in similar circumstance shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another, as regards the subject-matter of the legislation, the amending has serious constitutional lacking appeared to the provisions of Article 27 of the Constitution.

Article 27 forbids class legislation, but permits reasonable classification for the purpose of legislation. The classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by law. In other words, there ought to be substantive rationale between the basis of classification and the immutable object for such eligibility criterion. While legislation at a

point of time is considered wholly devoid of justification and empowers arbitrary and undesirable effect of dividing a homogeneous class and of introducing discrimination, the same can be easily severed and set aside. It is therefore just and proper that the words introducing the arbitrary fortuitous circumstance, which is vulnerable as denying equality be severed and struck down.

Discrimination visualized by Article 27 of the Constitution has to be within the same class of people and a person falling in one class cannot urge discrimination, basing treatment meted out another class, created by law, in different as per Article 26 that would be void to the extent of such contravention. Therefore, no law repugnant to Article 27 of the Constitution could be made by legislature in view of the Article 26(1) of the Constitution.

Rule of law implies that every citizen is subject to the law. The Oxford English Dictionary has defined "rule of law" this way:

The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviors; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.

In 1607, English Chief Justice Sir Edward Coke said in the Case of Prohibitions (according to his own report) [1607] EWHC J23 (KB) that:

"the law was -the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege (That the King ought not to be under any man but under God and the law)."

In the Case of Prohibitions, King James I, placed himself in the position of judge for a dispute, a "controversy of land between parties was heard by the King, and sentence given...."

When the case went before Chief Justice Sir Edward Coke, the Chief Justice of the Court of Common Plea, he overturned the decision of the King, and held that cases may be tried only by those with legal training and subject to the rule of law. Coke stated that common law cases were "not to be decided by natural reason but by artificial

reason and judgment of law, which law is an art which requires long study and experience...". Owen Hood Philips, *Leading Cases in Constitutional Law* (Sweet & Maxwell, London, 1957) Ch. 13, pp 46-47

In *Jibendra Kishore Vs. East Pakistan*, 9 DLR (SC) 21, wherein, it was observed inter alia that:

"the principle requires that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other class of persons in like circumstances in their lives, liberty and property and pursuit of happiness".

In *Sheikh Abdus Sabur Vs. Returning Officer & Ors*, 41 DLR(AD) (1989) 30, wherein, it was observed that:

"Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of 'equality' a classification, besides being based on intelligent differentia, must have reasonable nexus with the object of the legislature intends to achieve by making the classification. A classification is reasonable if it aims at giving special treatment to a backward section of the population; it is also permissible to deal out distributive justice by taxing the privileged class and subsidizing the poor section of people. What is of fundamental importance in law making is that while making a classification the legislature shall not act arbitrary but must make selection on rational basis. In the light of these observations I shall see whether the impugned legislation is supportable in terms of 'equality of law' with the meaning of Art. 27 of the Constitution".

In the said case the Apex Court again has settled that:

"it forbids class but it does not forbid reasonable classification for the purposes of legislation. In order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded of an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on the different bases, namely, geographically or according to subject or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration."

The equality protection as like our Constitution is guaranteed in Article of 14 of the Indian Constitution. The Supreme Court of India time and again had observed that the principle underlying the guarantee of Article 14 of the Constitution is that all persons similarly placed shall be treated alike, both in privileges conferred and liabilities imposes.

In *Maneka Gandhi V. Union of India* (1978) SCC 248, it has been observed that:

"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits Article 14 strikes at arbitrariness in State action and ensures fairness and equality treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence...."

In *Ramana Dayaram Shetty v International Airport Authority of India*, reported in (1979) 3 SCC 489, wherein it was held that:

"a discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which itself was not irrational, unreasonableness or discriminatory."

In the case of *D.S. Nakra v. Union of India* (1983)1 SCC 305, wherein, the Supreme Court of India inter alia observed that:

"The thrust of Article 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequal a welfare State will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of State affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bedrock of equality enshrined in Article 14. The Court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State action must move as constitutionally laid down in Part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some

such segments of the society in need of succour. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate it to the objects sought to be achieved."

In *Shujat Ali Vs. Union of India*, AIR 1974, SC 1631, it has observed that:

"The doctrine of classification should not be carried to a point where instead of being a useful servant it becomes a dangerous servant".

In the present case, section 32Ka of Amendment Act, 2013 permits preference to be given to judges, magistrates and Government employees in corruption cases. We have noted that in absence of any indication in the Act as to how and on what objective basis an individual shall be the beneficiary of such a preferential treatment to the detriment and exclusion of a large numbers of people. Therefore, it can be said that this „provision sanctioning arbitrary selection is flouting of Article 27, 28, 29(1) and 2 and 31 of the Constitution. In this regard, in the absence of such objective standards, especially invalidate the introduction by amendment of the impression of privileged treatment and cause to be these unconstitutional given that it endorses discrimination on ground of unjust classification.

It will be judicious, however, to note in this regard that rule making authority of the Government ought to have been actively exercised by the Government by now to overcome the objections raised with regard to the continuation of such of the above referred provisions of the Act as have been found by this Court is enacted in violation of Article 27, 28(1) and (2) and 31 of the Constitution.

It is pertinent to be mentioned here that Section 32Ka is silent as regards the filing corruption case against the Ministers and Head of the Government. If a Minister and/or Head of the Government may involve in a corruption case along with a Government employee, what will be the consequence for filing and/or initiating corruption case for the alleged offences. Section 32Ka does not require permission and/or sanction to initiate corruption case against a Minister and/or Head of the Government, but in the same circumstance for initiating, corruption case sanction shall be



required for judges, magistrates and the Government employees. In the result, Minister(s) and/or Head of the Government(s) may face the consequence of alleged corruption case in a similar situation, but judges, magistrates and the Government employees will accumulate himself from the proceeding of corruption case under the pretext of section 32ka of the Amendment Act, 2013. The action is discriminatory as it amounted to discrimination on the ground of discrimination against the vast numbers of people of the Country.

The section 32Ka has given privileged to a certain group of people, those who are public employee (magistrates and Government employees) and also judges. It can be noted that there is discrimination within the discrimination as Section 32Ka has given privilege to the judge of the Supreme Court of Bangladesh. Under article 152 of the Constitution, definition of "Judge" set as Judge of the Supreme Court of Bangladesh, i.e. member of the lower judiciary will be deprived from the preferential privilege under Section 32ka of the Amendment Act, 2013, despite they are also Government employees. Our Constitution does not allow any body to get special privilege for restraining to file corruption case again him/her. The embargo of prior permission and/or sanction from Government to lodge corruption case against judges, magistrates and Government employees has created an inconsistency with the fundamental right guaranteed in Part III of the Constitution.

The Constitution is the Supreme Law and any statute inconsistent with the Constitution shall be void to the extent of its inconsistency. Article 7(2) of our Constitution strictly provided that if any other law is inconsistent, with the Constitution that shall, to the extent that inconsistency, be void. The Provision of Section 32 (Ka) of the Amended act, 2013 is inconsistent with Article, 27 of the Constitution. It is pertinent to mention here that Article 7B of the Constitution provides that basic provisions of the Constitution are not amendable. Article 27 of the Constitution requires all laws and actions to be non-discriminately and reasonable. An arbitrarily or unreasonable law cannot be the said to be a law or action passed or taken by or under authority of the Constitution will come within the mischief of Article, 27.

Article 26 of the Constitution provides that all existing law inconsistent with the provisions of Part-III of the Constitution shall, to the extent of such inconsistency be void.

If we glance on the Anti-Corruption Act, 2004, under Section 17(j) of the Act, 2004 the functions of the Commissions are to determine the procedure of the enquiry, investigation, filing cases and also procedure of according sanction of the Commission filing case against corruption.

Section 20(1) of the Anti-Corruption Act, 2004 stipulated that "nothing anything contained in the -Code of Criminal Procedure, the offence under this Act and offences mentioned in the schedule shall only be investigated by the Commission" and sub-section (2) of the aforesaid section provides that "the Commission may, by notification in the official Gazette, empower any of its subordinate officers to investigate the offences mentioned under sub-section (1)".

It can be noted here that as per section 24 of the Anti-Corruption Commission Act, 2004, "Subject to provisions of this Act, the Commission shall be independent in the performance of their functions under this Act".

We stress that insertion of Section 32Ka of the Act, 2013 has interfered with the independent of the function of the Commission and have frustrated the object of the Anti-Corruption Act, 2004:

We must maintain that if the Statute would purport to confer absolute unbridled powers upon the executive to pick and choose parties for the purpose of more beneficial or prejudicial treatment, it shall be liable to be struck down for being foul to Article 27 of the Constitution.

The use of group classifications for any purposes amounts to invidious discrimination. The goal of free society should be colour-blindness, gender-blindness, blindness to all those ascribed characteristics that historically served as markers of inferiority and exclusion. The aim is only thwarted by assessments of well being that compare categories of people. Social and administrative classifications presume fixed immutable identities, and they thereby perpetuity the very social divisions their benign uses are intended to overcome.

Whereas, we have considered that, having regard inter alia to article 27 of the Constitution, it is desirable to provide 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 these grounds except in such cases as

provided for by law, and that to enforce this prohibition it is desirable that an equal treatment should be established.

The submission of Mr. Murshid in respect of mala fide intention of the legislature, it can be said that in absence of provision of impugned section in the Anti-corruption Commission (Amendment) Bill, 2011 and the proposed Anti-Corruption Commission (Amendment) Act, 2012 is mere procedural irregularities, it does not necessarily lead to mala fide intention of the legislature, rather than discrimination.

We have to say that status or position cannot shield privileged persons as provided in the impugned section, and safeguard them from unconstrained probe by the ACC in cases of corruption. It is apparent that Section 32Ka of the Amended Act, 2013, which restrains investigations without sanction is discriminatory, and obstructs to track down the corrupt persons.

The protection in Section 32Ka has susceptibility of shielding the corrupt. We hold that the provision suffers from the vice of classifying offender differently for treatment there under for inquiry and investigation of offences, according to their status and/or rank in life. Every person accused of committing the same offence is to be dealt with in the same manner in accordance with law. The status or position of preferential person does not qualify for exemption from equal treatment under article 27 of the Constitution. The decision making power does not isolate corrupt persons into two classes as they are common crime doers and have to be tracked down by the same process of inquiry and investigation. The corrupt persons, whether privileged or general people, are birds of the same feather and must be confronted with the process of investigation and inquiry equally, based on the position or status in the society, no distinction can be made.

The result of the impugned legislation is that the very group of persons, namely, Government officials, magistrate and judges whose misdemeanor and illegalities may have to be inquired into would be decided by the ACC should even start an inquiry or investigation against them or not.

The reasons as stated above, the Rule deserves to be made absolute.

In the result, the Rule is made absolute; and thereby inclusion of section 32Ka vide Anti Corruption Commission (Amendment) Act,

2013 into the Anti Corruption Commission Act, 2004, is hereby declared to have been done without lawful authority and is of no legal effect.

There is no order as to costs.

Office is directed to communicate the judgment forthwith.

-----