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IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6576 OF 2007

IN THE MATTER OF:

An application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh.

AND

IN THE MATTER OF:

Sheikh Hasina alias Sheikh Hasina Wazed

... ... Petitioner

-VERSUS-

The Government of the People's Republic of Bangladesh, represented by the Secretary Ministry of Home Affairs and others.

.... Respondents

Mr. Mr. Rafique-ul-Huq with
Mr. Shafiq Ahmed
Mr. Tawfique Nawaz
Mr. Ahsanul Karim
Mr. Faheemul Huq
Mr. Sheikh Fazle Noor Taposh
Mr. Md. Mehedi Hasan Chowdhury

.... For the Petitioner

Mr. M. Salahuddin Ahmed
Mr. Mansur Habib

Additional Attorney Generals

Ms. Syeda Afsar Jahan

Deputy Attorney General

..... For the Respondents

Mr. T. H. Khan

Mr. Abdur Rab Chaudhury

Mr. Mahbubur Rahman

Mr. Md. Rafiqul Islam Miah

Mr. Mahbubey Alam

Mr. Md. Munsurul Hoque Chowdhury

... as Amici

Heard on: 23.1.2008, 24.1.2008, 28.1.2008, 30.1.2008, 31.1.2008, 5.2.2008 and
Judgment on: 5th and 6th day of February 2008

Present:

Mr. Justice Shah Abu Nayeem Mominur Rahman
and
Mr. Justice Shahidul Islam

Shah Abu Nayeem Mominur Rahman, J:

The Rule was issued upon the respondents to show cause as to why the sanction given by the respondent No. 2, Additional Secretary, Ministry of Home Affairs, Government of Bangladesh, vide Memo No. স্বঃমঃ (আইন-১)/অকবি-১/০৭/(অংশ-৫)/৭১২ dated 16.7.2007 purportedly under Rule-19ঙ(2) of the Emergency Power Rules, 2007, for proceeding with Gulshan Police Station Case No. 34 dated 13.6.2007 filed under Sections-385 109 of the Penal Code, 1860, under the Emergency Power Rules, 2007, treating the offence-alleged to be of public importance, evidenced by the Annexure-C to the Writ Petition, should not be declared to be without lawful authority and of no legal effect.

The Rule is being opposed by the respondent No. 1, Government of Bangladesh, by filing Affidavit-in-Opposition. The writ petitioner filed a Supplementary Affidavit dated 17.1.2008 against which the respondent No. 1 filed an Affidavit-in-Opposition.

Facts relevant for the purpose of disposal of the Rule are that:

(a) the writ petitioner is a law abiding and peace loving citizen of Bangladesh and a former Prime Minister and also former Leader of the Opposition in the Parliament and is at present President of the Bangladesh Awami League, one of the major political parties of the country;

(b) the writ petitioner was arrested on 16.7.2007 by the Joint Forces from her residence and is now being kept in confinement in the Special Sub-jail set up at Sher-E-Bangla Nagar, Dhaka, implicating her as accused No. 2 in Gulshan Police Station Case No. 34 dated 13.6.2007, initiated on the basis of a written ejahar dated 13.6.2007, lodged by one Azam J. Chowdhury, son of late Mohtosin Ali Chowdhury, Managing Director of East Coast Trading (Pvt.) Limited, alleging, inter alia, that Sheikh Fazlul Karim Selim, an elected Member of Parliament and cousin of Sheikh Hasina, the then Prime Minister of the country, in the year 2000 A.D., created pressure on the informant to pay him a huge amount of money as against the contract and work order, being the First Phase of Erection and Commissioning of the Siddirgonj Power Station, Narayangonj, got by TPE, a Russian Firm, of which the informant's company is the local agent, after being unsuccessful in his attempt to get the local agency-ship of said TPE cancelling the informant's agency-ship, and that as against such pressure the informant offered said Sheikh Fazlul Karim Selim to become consultant in the second project thereof, which was under process, with assurance to pay him a good amount of

money, as commission, but Sheikh Fazlul Karim Selim did not agree and became angry and threatened that he would create hindrance, through Sheikh Hasina, in the progress of the project work, as well as in the payments against the bills by the Power Development Board, if he is not paid from the present project, and faced with such threat ultimately in July, 2000, the informant agreed to pay 2% of the contract-amount of the project work, amounting to US$ 5,80,000.00 (contract amount being US$ 29.00 million) and accordingly, in all, he personally paid to Sheikh Fazlul Karim Selim at his residence at Banani, an amount of Tk.2,99,65,500.00 (Taka two crore ninety nine lac sixty five thousand and five hundred) only, through cheques, on different dates, and that Sheikh Fazlul Karim Selim, with assistance of Sheikh Hasina, delayed the progress of the project-work to materialize his illegal demand of money and that after the payment was made, no disturbance was created and that since Sheikh Hasina was the Prime Minister from 1996 to 2001 A.D. and Leader of the Opposition in the Parliament from 2001-2006 A.D., the informant could not lodge any complaint during the said period; and

(e) in the year 2000 A.D. the company of the informant, acting on behalf of Messrs Technoprom Export, a Russian firm, (hereinafter referred to as "TPE"), participated in a tender and obtained the work order for "First Phase of the Erection and Commissioning of a Power Plant" at Siddirganj Power Station, Narayanganj, and that while the project work was progressing, Sheikh Fazlul Karim Selim started pressurising the informant for illegal payment of money and in the month of July 2000, the informant agreed to pay and that the alleged payment was made in between the period October, 2000 and March, 2001 A.D.,

through cheques, by the informant personally and that Section-385 of the Penal Code, 1860 is not attracted on the face of the allegations as made in the written ejahar, since there is no ingredient of extortion, defined in Section-383 of the Penal Code, 1860, and that the police after investigation submitted its report (charge sheet) bearing No. 27 dated 23.7.2007 under Sections-385/109/34 of the Penal Code, 1860, and that the impugned sanction under Rule-19৩ of the Emergency Power Rules, 2007 (hereinafter referred to as EPR) was given by the respondent No. 2, for proceeding with the case under the EPR, without fulfilling the condition-precedent, set down by Rule-19৩(4) of the EPR, that is, the sanctioning-authority must be "satisfied that the offence alleged is of public importance", and that the impugned sanction as given is arbitrary, malafide and has been given without considering the gravity of the "offence alleged" but considering the status of the accused and that the Rule-19৩ of the EPR is bad, inasmuch as the sanctioning authority has been given arbitrary and unfettered discretion to "pick and choose" and there is no guideline for determining, which offence can be treated as "offence of public importance" and that the impugned sanction as given is a malafide and colourable exercise of power to harass and cause loss to the accused and that the case has been approved for proceeding under the EPR, with the ulterior motive to treat the accused harshly, and to deprive her from getting fair justice and bail, which is available under the normal law, and that the Court has the authority to test the validity of Rule-19৩ and other provisions in the EPR debarring the grant of bail to an accused, since those are inconsistent with the Articles guaranteeing the fundamental rights, detailed in Part-III of the Constitution and void in view of Article-26(2) thereof; and

(d) Sheikh Fazlul Karim Selim, cousin of the accused petitioner has been made accused No. 1 in the case and a forceful confessional statement was extracted from said Sheikh Fazlul Karim Selim under torture, threat, coercion, duress and intimidation, by the members of the Joint Forces, while he was under custody, on remand, and that another charge sheet bearing No. 501 dated 30.11.2007 has been submitted adding the offence under Section-384 of the Penal Code, 1860, and that said Sheikh Fazlul Karim Selim, on getting first opportunity, retracted the said confessional statement, both orally and in writing, when produced in the Court, and that the accused petitioner by filing an application under Section-265C of the Code of Criminal Procedure prayed for her discharge from the case but the prayer was rejected without considering the provisions of Section-3(3ক) of the Emergency Power Ordinance, 2007 (hereinafter referred to as EPO) and Article-93 of the Constitution, and that the case is being proceeded with illegally, since the alleged offence said to have committed prior to the promulgation of the Emergency and thus hits Section-3(3ক) of the EPO and Article-93 of the Constitution, and that the provisions of Rules-19ঘ and 19ঙ of the EPR, so far infringes the right of the accused petitioner to pray for bail, are void being inconsistent with the provisions of the fundamental rights guaranteed by the Constitution, which are not suspended or affected by Article 141B of the Constitution and thus the proceeding of the case under the EPR, pursuant to the impugned sanction, is bad in the eye of law. Certified copy of (1) the application filed under Section-265C of the Cr.PC, (2) the application retracting the confessional statement of Sheikh Fazlul Karim Selim, (3) the statements recorded under Section-161 of the Cr.PC, (4) FIR, (5) Charge Sheet No. 271 dated

23.7.2007, (6) Supplementary Charge Sheet No. 312 dated 18.8.2007, and (7) Supplementary Sheet No. 501 dated 30.11.2007 have been annexed to the Writ Petition and the Supplementary Affidavit of the Petitioner.

The respondent Government in its Affidavit-in-Opposition denied the allegations as made in the Writ Petition and in the Supplementary Affidavit of the petitioner, which includes denials to the allegations of colourable exercise of power, malafide motive and want of authority under Emergency Power Rules, 2007 (EPR) in granting the impugned sanction asserting, amongst others, that the FIR reveals ingredients of extortion, threat, injury against the accused petitioner and that the police submitted charge sheets after proper investigation following the provisions of Cr.PC and that the trial has been fixed on 17.1.2008 and that Writ Petition has been prepared with deliberate, misleading, incorrect and misconceived interpretation of law, in particular, the Rules-19৯ and 14 of the EPR, and that the provisions of EPR, are not being applied in respect of "minor and unimportant" cases but is being applied only in cases of "public importance" and that retrospective approval under Rule-19৯(5) was required for the cases filed between 12.1.2007 and 23.3.2007 and that in the instant case sanction under Rules-19৯(1) and 19৯(2) of the EPR, has been given considering the "public interest" and that the provisions of Rule-19৯ were introduced to ensure that the there is no abuse in the granting of sanction approval for proceeding with a case under the EPR, and that Rule 19৯ has curtailed the discretion of the "concerned authorities investigating" the offences falling under Rule-14 of the EPR, and said Rule is for protection of the citizens of the Republic and that the instant case do not relate to a dispute between two individuals and that criminal acts are offences against the State and that the instant case arises out of an offence of public importance as it relates to corruption by the "holder of the Public

Office(s) involving power plant" that affects the entire nation, and that the "public importance" depends on the circumstances in which the offence is committed, and that the allegation involves "public property" and "public office" and that the approval has been granted considering the public importance attached to the prosecution of the case, allegation of corruption and extortion against a Prime Minister in connection with the commissioning of Siddhirgonj Power Plant and that because of Rule-19ঘ of the EPR, the accused petitioner can not get bail and that the grounds set-forth in the writ petition are manifestly misconceived and against public interest and the Writ Petition is not maintainable.

In the Supplementary Affidavit-in-Opposition, the respondent Government denied the allegations of "duress, threat, coercion and intimidation" in obtaining the confessional statement from Sheikh Fazlul Karim Selim and asserted that he has given the statements under Section-164 of the Code of Criminal Procedure voluntarily admitting his guilt before the Magistrate implicating himself and others and that the confessional statement has been recorded in accordance with law and that Section-3(3ক) of the Emergency Power Ordinance, 2007 (EPO) contains that the Rules may be made under the EPO "for offences committed during the continuance of the period of Emergency" and Section-3(4) of the EPO clearly states that any rule promulgated under sub-section 3ক can be given retrospective effect and that any Ordinance promulgated under Article-93 of the Constitution shall, as from its promulgation, have the like force of law as an Act of Parliament" and that "under Rule-19ঞ of EPO, the Government has the authority to include any case under EPR, if it concerns an offence mentioned in Rule-14 and is of "public importance" and that the EPR has not been given any power beyond the scope of the EPO or the Constitution, and that the insertion of Section-3(3ক) shows that the

intention of promulgating the EPR is to deal with any offence committed prior to or after the promulgation of the Emergency and that approval with retrospective effect was permitted to be given in respect of the cases initiated "between 12.1.2007 to 23.3.2007 and in respect of offence mentioned in Rule 19(3) of the EPR, provided the cases are of "Public Importance" and that the petitioner's case being lodged on 13.6.2007, trial of the case under within the EPR is permissible under the said Rules and that the expression "any Court or Tribunal", appearing in the Rules, on plain reading can be understood to have included the Courts including the Writ Jurisdiction of the Supreme Court of Bangladesh.

Mr. Rafique-ul Huq, the learned Advocate, made submissions on behalf of the accused petitioner. Mr. Tawfique Nawaz, the learned Advocate, with permission of the Court also made submissions on behalf of the accused petitioner. Mr. Mansur Habib, the learned Additional Attorney General, made the main submissions for the Respondent Government and Mr. M. Salahuddin Ahmed, the learned Additional Attorney General, at a later stage, after the six learned Amici gave their opinions with reasonings on the points referred to them, made some submission on behalf of the Respondent Government.

Considering the facts and circumstances of the Rule as issued, and the submissions made by the learned Advocates, on behalf of the contesting parties, and having regard to the fact of pendency of numerous cases involving the "same or similar issue" i.e. challenging the sanction given under the EPR, in respect of alleged offences committed before promulgation of the Emergency, and after consultation with the learned Advocates of the contesting parties, we requested Messrs (1) T. H. Khan, (2) Mahmudul Islam, (3) Abdur Rab Chaudhury, (4) Mahbubur Rahman, (5) Mahbubey Alam, (6) Md. Rafiqul

Islam Miah and (7) Md. Munsurul Hoque Chowdhury, the learned Advocates of the Supreme Court of Bangladesh, to address us, as Amici, on the following points:

(i) whether alleged criminal offences committed prior to the promulgation of Emergency can be proceeded with tried under the provisions of the Emergency Power Rules, 2007 in view of Section-3(3Ka) of the Emergency Power Ordinance, 2007 and Articles 93 and 35 of the Constitution;

(ii) Whether the incorporation of penal provisions in the Rules, in particular, in Rules 15Gha(ঘ), 19Gha(ঘ), 19Cha(চ) of the Emergency Power Rules, 2007, are inconsistent with the provisions of Articles-27, 31, 32, 33 and 35 of the Constitution and are void in view of Article-26(2) read with Article-7(2) of the Constitution;

(iii) in view above whether the sanctions given under Rule 19 Nye(1) and (5) of the Emergency Power Rules, are valid for the cases, proceeded with/tried under the Emergency Power Rules, 2007, arising out of the alleged offences committed prior to the promulgation of the Emergency;

to facilitate in coming to a proper decision in the Rule. Mr. Mahmudul Islam, the learned Advocate, for his personal reasons requested us to relieve him from addressing us, and we acceded to his request.

Mr. Rafique-ul Huq, the learned Advocate, appearing for the petitioner submitted that the case has been initiated malafide in order to restrain the accused petitioner from participating in the ensuing national election and that the case is based on "no evidence" and in elaborating his submissions the learned Advocate took us through the certified copy of the FIR, annexed as Annexure-A to the Writ Petition, and pointed out that the

informant did not state that he had any personal contact with the accused petitioner or he made any payment to her or that he was required to make any payment for getting any contract and that the FIR discloses that the informant got a contract for his foreign principle prior to the alleged demand for money made by Sheikh Fazlul Karim Selim and that the work was in progress and that accused Sheikh Fazlul Karim Selim compelled him to pay 2% of US$29.00 million i.e. the contract-amount against the said contract and thus the alleged demand was for payment of money by one individual to another individual not involving any loss to the state and that had there been a demand for payment of money either promising to procure a contract of a national project, which was under process, or with threat to create obstacle in getting such contract, causing monetary loss to the State, then such demand could be treated as an extortion referable under the EPR, inasmuch as the EPO and the EPR relates to the offences affecting (1) the security or (2) safeguarding the interest of the State and the public, or (3) the maintenance of the law and order situation as well as (4) economic life of the people or (5) the supply and availability of the essential commodities and (6) the service to the public as mentioned in Section-3(1) of the EPO, but in the FIR no such accusation has been made, therefore, the case as initiated on the basis of such FIR, is malafide in nature. The learned Advocate then submitted that the provisions of EPO and for that matter the EPR relate to the offences committed referable to Section-3(1) of EPO during the period the Emergency is in force and in support of his contention he took us through the preamble as well as Section-1(2) and Sections-3(1) and 3(3ক) of the EPO, which show that the EPO is to remain in force during the existence of the Emergency promulgated on 11th January 2007 and applicable in respect of the offences committed, under any law, affecting Section-3(1) of EPO, during the period the Emergency is in force. The learned Advocate taking

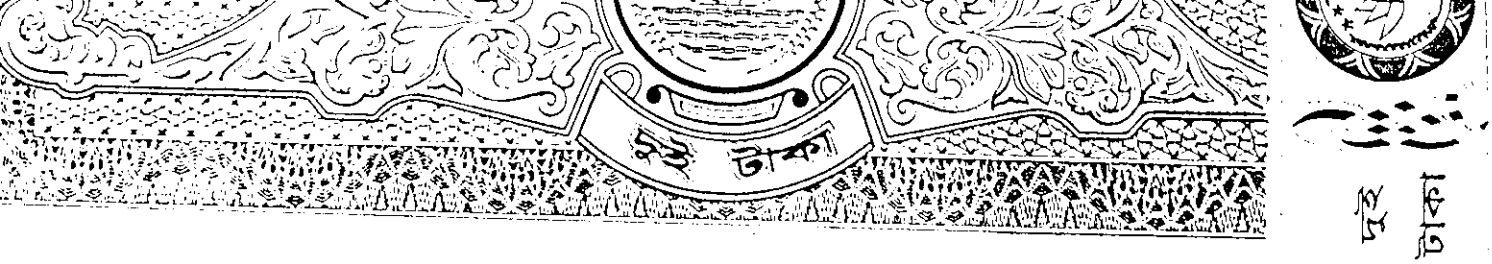
us through Section-3(1) of the EPO, the power to frame Rules under the EPO, quoted below:-

"৩। বিধি প্রণয়নের ক্ষমতা।- (১) রাষ্ট্র ও জনসাধারণের নিরাপত্তা ও স্বার্থ রক্ষার্থে বা জন-শৃঙ্খলা বজায় রাখা বা অর্থনৈতিক জীবন সমুন্নত রাখা বা জাতীয় জীবনে বিভিন্ন স্তরে দুর্নীতিমূলক কার্যের দমন, প্রতিকার এবং তৎসংশ্লিষ্ট অন্য কোন প্রয়োজনে" অথবা সমাজ জীবনে অত্যাবশ্যক সামগ্রীর সরবরাহ ও সেবাকার্য নিশ্চিত করিবার উদ্দেশ্যে সরকার যেরূপ বিধি প্রণয়ন করা সমীচীন ও প্রয়োজনীয় বলিয়া বিবেচনা করিবে সেইরূপ বিধি, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, প্রণয়ন করিতে পারিবে।"

submitted that Rules are to be framed for the purposes of ensuring the (1) security and (2) safeguarding interest of the State and its people, and (3) the maintenance of law and order situation, (4) the economic life, (5) supply and availability of the essential commodities and (6) delivery of service to the people, which thus,are of prospective in nature and the said prospective nature is confirmed by Section-3(3ক) of the EPO. The learned Advocate then submitted that the items of Sections-3(2), particularly contained in 2(ক) to 2(ছ) are for the purpose of preventing, and in 2(জ) to 2(ত) are prohibitive in nature, and in 2(দ) to 2(ন) are for controlling purpose and all those relate to the future acts and cannot be related to any past act of any period prior to promulgation of the EPO. The learned Advocate taking us through the EPR submitted that certain penal provisions have been included in some of the rules of EPR, which cannot be included legally without promulgating a proper law by the proper authority i.e. now President under Article-93 of the Constitution. It has been submitted that the Rules under authority of any law are being framed for the purpose of the implementation or execution of the provisions of the parent law and in the instant case the EPR has been framed under the authority, delegated by the EPO, and subsequently, through amendments, certain penal provisions have been incorporated in Rules-3, 4, 5, 6, 7, 8 and 15ঘ of EPR, which are inconsistent with the

rights guaranteed by the Constitution (Articles-27, 31, 32, 33 and 35) as well as the existing law (Code of Criminal Procedure), and hence such penal provisions are void in view of Article 26(2) read with Article 7(2) of the Constitution. The learned Advocate also referred to Rules-10, 11 and Rule-19ক of EPO, which curtails the right to seek bail and the Court's authority to grant bail and thus to such extent the said Rules-10, 11 and 19ক of the EPR are inconsistent with the provisions of fundamental rights guaranteed by the Constitution, and hence void. The learned Advocate referring to Rule-19ঙ of the EPR submitted that though the provisions of giving sanction therein appears, apparently, to be good but there being no guideline in giving such sanction, the authority is armed with unguided and unfettered power, which is being abused and misused, both malafide and arbitrarily, and as such the said Rule-19ঙ, in the absence of guideline, is bad. The learned Advocate submits that by the said Rule-19ঙ, the sanctioning authority has been given authority to give sanction under the EPO, only to the cases, which arises out of the offences of "public importance" relatable to the purpose mentioned in Section-3(1) of the EPO, which is the condition precedent, and in the instant case the sanction has been given not on consideration of the "public importance" of the "offence" alleged to have committed but the sanction has been given considering the status of the persons implicated in the case and that in the paragraph-19 of the Supplementary Affidavit-in-Opposition it is stated that the sanction has been given considering the "public importance" of the "case" itself. The sanction as given, is without fulfilling the condition-precedent, hence malafide and not in accordance with law.

The learned Advocate then submitted that EPR cannot be said to have been promulgated with retrospective effect, in view of provision of Article-93 of the Constitution as well as Sections-1(2) and 3(3ক) the EPO, in that the Article 93 of the



Constitution contains that any law to be promulgated will be effective from the date of its promulgation and that no law can be made, by Ordinance under Article-93 of the Constitution, which cannot be made by the Parliament under the Constitution, and that as such no law inconsistent with the provisions of the Constitution, and in particular violating the provisions of Part III of the Constitution, which relate to fundamental rights, can be made, and that in view of Article 141B of the Constitution, during the period of Emergency, the authority is permitted to make law and take action, violating the provisions of Articles 36, 37, 38, 39, 40 and 42 of the Constitution but such violation will cease with the revocation of the Emergency or ceasation of the Emergency otherwise, and thus no law can be made inconsistent with the remaining other Articles of Part III i.e. Articles-27 to 35 of the Constitution and that referring to the provisions of Order No. 1 of 2007 and Order No. 2 of 2007 made under the provision of Article 141C of the Constitution, the learned Advocate, submitted that it has been categorically mentioned therein that a Court of law cannot be moved for enforcement of the fundamental rights detailed in Part-III of the Constitution and that the same does not mean that the Articles-27 to 35, relating to the fundamental rights, are not in force. The learned Advocate then submitted that the learned Judges of the Supreme Court of Bangladesh, in view of their oath taken to the effect that they will preserve, protect and defend "the Constitution and the laws of Bangladesh", are duty bound to preserve, protect and defend the provisions of Articles 27, 31, 32, 33 and 35 of the Constitution and if required this Court is empowered to declare the laws or part thereof, inconsistent with said Articles, to be void as per Article 26(2) of the Constitution. The learned Advocate taking us through the Article 7(2) of the Constitution submitted that the solemn expression of the will of the people of Bangladesh is that if there be any law inconsistent with the Constitution such law, to the

extent of such inconsistency, shall be void and therefore the provisions of Articles-31, 32, 33 and 35 of the Constitution cannot be negated by framing or promulgating any law or Rules, which in the instant case is the EPO and EPR. Since Article 35 of the Constitution provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than or different from, that which might have been inflicted under the law in force at the time of the commission of the offence, the accused Petitioner is guaranteed to be proceeded with in connection with the alleged offence under the law as prevailing at the time of commission of the alleged offence, and that in view of the provisions of Article-31, which provides that accused petitioner is to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law and no action detrimental to the life, liberty, body, reputation or property can be taken except in accordance with law, which is an inalienable right guaranteed to the petitioner, the right of the accused petitioner for bail in the instant case cannot be denied and the Court's power to grant bail cannot be curtailed and that in view of Article-26(2) of the Constitution, no provisions inconsistent with the provision of Articles-31, 32, 33 and 35 of the Constitution can be included either in the EPO or in the EPR, legally, and if any such inconsistent provision is found or added therein, those are void ab-initio and this Court has the authority to declare those as void in terms of the Constitution. Thus the provisions of Rules-19ঘ, 10(2) and 11 of the EPR so far relates to bail, are bad and void.

The learned Advocate in support of his contention that the Rule-19ঙ of the Rules, 2007, relating to the authority to give sanction for proceeding with a case under the EPR, is bad, since there is scope for discriminatory use, as no guideline is given and the authority has been given unfettered and unguided power, referred to the decision in the

cases of (i) Waris Mea -v- The State, reported in 9 DLR 1957 (SC) 117; (ii) Mustafa Kamal -v- the Commissioner of Customs and others, reported in 20 BLD 2000 (AD) 1; (iii) Dr. Nurul Islam -v- Bangladesh, reported in 33 DLR (1981) (AD) 201; and (iv) Bangladesh -v- Shafiuddin Ahmed and others, reported in 50 DLR (AD) 27.

The learned Advocate referring to the words "পূর্তাপেক্ষ কার্যকারতা" as contained in Section-3(4) of the EPO, 2007 submitted that the word "পূর্তাপেক্ষ" has been translated in English Language as "ex post facto", which is found in Section-18 of the Anti-Corruption Commission Act, 2004, and that the words 'ex post facto' referable Section-3(4) of EPO do not mean retrospective effect as to the offence committed and the same relates to any Rule framed under the EPO during the continuance of the Emergency, as has been given to the subsequently added provisions in the EPR and referring to the provisions of Article-93(1) and Article-141C of the Constitution and Section-1(2) and Section-3(3ক) of the EPO, the learned Advocate submitted that the question of retrospectivity in the implementation or execution of any of the provisions of the EPO, is not available and any such attempt will negate the intention of the law framers and he has also submitted that most of the penal provisions included in the EPR have been made through amendments and not found in the original EPO or EPR.

The learned Advocate then submitted that through EPR, particularly Rules-19ঘ, 19(2) and 11 thereof, the power of the Court has been tried to be curtailed, in that it is the inherent power of the Court to pass any order, as to bail matter, in a case or in appeal, pending before it having regard to the existing laws and the Constitution, and that to seek bail before a Court of law is an inherent right of an accused as per Articles-31, 32 and 33 of the Constitution as well as Sections-496, 497 and 498 of the Cr.PC but by Rules-19ঘ, 19(2) and 11 of EPR, such inherent right is tried to be taken away, and that ex-facie said

Rules are inconsistent with the right to life and liberty of a citizen guaranteed by the Constitution. Apart from that, the jurisdiction of the High Court Division under Article-102 has not been made or provided by any normal law but said jurisdiction has been provided as per "will of the people of the country and the Constitution itself". Article-44 read with the Preamble of the Constitution confirms the contention of Mr. Huq. The High Court Division, while acting under the jurisdiction of Article 102 of the Constitution, cannot be treated at par with that of normal Courts, constituted under the Constitution or any law, and therefore the submissions made on behalf of the respondent Government that the word "Court" also includes the Supreme Court of Bangladesh with its jurisdiction under Article 102 of the Constitution is misconceived and erroneous and that it could not be the intention of the framers of the Constitution, who, at the relevant time, embued with their faith and conviction to defend and uphold the rights of the people, having experience of the pains and sufferings caused by denial of such rights by the previous Rulers, during British period and Pakistani period, and to safeguard the democratic rights and the fundamental rights of the people of the newly born country, provided a check point like Article-102 of the Constitution.

The learned Advocate in summing up his submissions submitted that the impugned sanction as given is illegal inasmuch as admittedly the sanction has been given considering the "status of the accused petitioner" and not considering the "public importance of the offence", which is the condition-precedent set out in Rule-19(4) of EPR and that the alleged offence having been committed on a date prior to the promulgation of Emergency, such offence cannot be tried under the Emergency Power Ordinance, 2007 (EPO) or the Rules framed thereunder in view of Section-3(3ক) of the Ordinance and the Articles-31, 32, 33 and 35 of the Constitution read with Article-93

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thereof, and that the continuation of proceeding of any case arising out of Gulshan Police Station Case No. 34 dated 13.6.2007, under the EPR pursuant to the impugned sanction, is illegal and without lawful authority and therefore such proceeding under the EPR should be quashed.

The learned Additional Attorney General Mr. Mansur Habib appearing for the respondent-Government submitted that in view of Section-3(4) of the EPO the offence committed prior to the promulgation of the Emergency can be tried under the provision of EPO and the Rules framed thereunder, giving retrospective effect. However, when his notice has been drawn to the provisions of Articles-93 as well as Articles-31, 32, 33 and 35 with 141B of the Constitution and Sections-1(2), 3(1), 3(2) and 3(3ক) of the EPO, he found it difficult to elaborate his submissions in favour retrospective effect to the offences allegedly committed prior to promulgation of the EPO. The learned Additional Attorney General, however, referred to a decision of Indian Jurisdiction in the case of Rao Shiv Bahadur Singh and another -v- The State of Vindhya Pradesh, reported in AIR 1953 (SC) 394, wherein another decision has been referred to namely Phillips -v- Eyre, reported in L. R.(1870) 6 QB 1, in which the phrase "ex post facto" referring to retrospective effect has been discussed, to the effect that "there can be no doubt as to the paramount importance of the principle that such 'ex post facto' laws, which retrospectively create offences and punish them, are bad as being highly inequitable and unjust" and thus said decision do not support the learned Additional Attorney General. The learned Additional Attorney General submitted that the sanction as given is in accordance with law and has been given on the basis of the materials placed before the sanctioning authority and that the sanctioning authority in the instant case is an high official of the country, from whom unreasonable or illegal act cannot be expected.

However in view of the statements made in the Affidavit-in-Opposition to the effect that the sanction has been given having regard to the "status of the accused", the learned Additional Attorney General could not make further submission on Rule-19ঙ as to the fulfillment of the condition-precedent for giving sanction.

The learned Amici have unanimously opined that (1) the offences committed prior to the promulgation of Emergency cannot be tried under Emergency Power Ordinance, 2007 and the Emergency Power Rules, 2007, and that (2) the inclusion of the penal provisions, including the bar to pray for bail, in the Emergency Power Rules, 2007 are bad and without lawful authority; and that (3) the sanctions given under Rule-19ঙ(4) for trying cases, arising out of offences committed on dates, prior to promulgation of the Emergency, are bad and without lawful authority.

In order to coming to his opinion Mr. Abdur Rab Chowdhury, the learned Advocate, submitted that the sanction as required under the law should not be for collateral purpose or be mechanical but should be based on materials placed before the sanctioning authority and in support of his contention relied on a decision of Indian Jurisdiction in the case of Mansuke Vitaldas Chauhan v State of Gujrat, reported in 1977 (7) SCC 622. The learned Advocate submitted that by the Order No. 1 of 2007 the right to move any Court for enforcement of the fundamental rights has been suspended but no authority has been given to violate the provisions of fundamental rights, except those mentioned in Article 141B of the Constitution, and that in view of Article 26(2) of the Constitution no law can be made inconsistent to the fundamental rights guaranteed under Articles-31, 32, 33 and 35 of the Constitution. Hence trial of the cases arising out of the offences committed prior to 11.1.2007 can be initiated only under the normal laws as were in force at that time and not under the provisions of the EPR. The provisions for

granting bail under Section-497 and 498 of the Cr.PC being guaranteed by Articles 31, 32 and 33 of the Constitution, the provisions of Rules-19ঘ and 10(2) of the EPR, so far relates to the denial of bail, being inconsistent with said Articles of the Constitution as well as provisions of Cr.PC, are void and the Courts power to grant bail cannot be curtailed during Emergency.

Mr. Md. Munsurul Hoque Chowdhury, in giving his opinion, submitted that the EPR framed under the authority of EPO cannot have power or authority beyond the powers the EPO itself, and that Sections-1(2) of and 3(3ক) of the EPO provides that the offences committed during the period of Emergency are to be proceeded with under the EPR and that Article-93(1) of the Constitution provides that laws made under it will be effective from the date of its promulgation and that the Section-3(1) of the EPO delegates the power to the government to make Rules for prevention, prohibition and protection of the rights and interest of the State and the public relating to their security, interest, maintenance of law and order situation, economic life, ensurement of supply of essential commodities and delivery of service to public, which indicates only to the future acts, and the offences committed during the period between 12th January 2007 and till Emergency is revoked, can be tried under the EPR. The learned Advocate referring to the case of Arjan Singh and another –v- The State of Punjab and others, reported in AIR 1970 (SC) 703, submitting that retrospective effect cannot be given to a law for trial of any case arising out of an offence committed earlier date, when different law was in force.

Mr. Mahbubur Rahman, the learned Advocate, submitted that the EPO or the EPR, as framed, are to meet the situation during the Emergency period only and accordingly in Article 14(3) it has been mentioned that any law or rule made or any action taken violating the provisions of Articles-36, 37, 38, 39, 40 and 42 of the Constitution are good

laws during the period of Emergency and these will cease to have any effect with the lifting or revocation of the Emergency. The learned Advocate further submitted that it is the cardinal principle of laws that normally no provision in respect of any fiscal law and or penal law is given retrospective effect and in view of Article 26(2) of the Constitution no law can be made inconsistent with fundamental rights guaranteed by the Constitution and therefore when Articles-31, 32, 33 and 35 are in force, any offence committed should be tried under the laws prevailing at the time of commission of such offence and that such law includes both substantive law and procedural law. The learned Advocate however submitted that retrospective effect may be given to procedural laws but if such procedural law infringes any right of an accused, such procedural law cannot have retrospective effect, since rights guaranteed by Articles-31, 32, 33 and 35 of the Constitution cannot be infringed. Therefore, the right of seeking bail by an accused or convict and the power of the Court to grant bail cannot be taken away by Rules-19ঘ, 10(2) and 11 of the EPR and the cases arising out of offences committed prior to promulgation of the Emergency are to be tried under the normal law as were in existence on the date(s) of commission of the offences, and those cannot be tried under the EPR.

Mr. Md. Rafiqul Islam Miah, the learned Advocate, adopted the submissions made by Messrs Abdur Rab Chaudhury and Md. Munsurul Hoque Chowdhury and referring to Clauses-2.135 to 2.138 on the Chapter "Fundamental Rights" contained in the Book titled Constitution Law of Bangladesh written by Mahmudul Islam, submitted that "ex-post facto" laws do not mean to attract the offence committed prior to the promulgation of Emergency and to infringe the existing rights guaranteed by the Constitution and that a law which comes in conflict with Article-35 of the Constitution becomes void only in so far as it is retrospective, however such invalidity will not affect its prospective operation.