Chapter – 7

COURT CASE – 1

Shahryar Murshed, A.Z.M Mahfuzur Rahman, Abul Hasnat Md. Rezaul Hossin, Faisal lqbal Chowdhury and Rabiul Karim
Vs.
Principal, Chittagong Medical College and others (May 17th 1994).

Chittagong University Act, 1973 (Act No. XXXIII of 1973), Section 49(3)

Judgment
In the five writ petition bearing Writ Petition No. 2141 of 1993, Writ Petition No. 2142, of 1993, Writ Petition No. 2143of 1993, Writ Petition No. 2195 of 1993 and Writ Petition No. 2196 of 1993 Rules were issued In this Court on different dates in the month of December, 1993 calling upon the respondents to flow cause as to why the impugned order of dated 20-10-93 of the petitioners as student of Chittagong Medical College passed by Respondent No. 1 as evidenced by Annexure-B in the petitions should not be declared to have been sue without any lawful authority and of no legal or such other or further order or orders passed in this court may seem fit and proper.

2. The facts of the respective cases which given rise to the Rules are, briefly, stated as flow:
Petitioner in Writ Petition No. 2141 of 1993 was a 4th Year MBBS student in the Chittagong Medical College bearing Roll No. 113, session 1988-89. He was elected Indoor Games Secretary for the 4 consecutive terms of College Union Sang Sad of the Chittagong Medical College for a bright academic career and a cultural family background and has a keen desire for higher education in Medical Faculty. Having qualified for the competitive examination he was selected for admission in the Chittagong Medical College in Session 1988-89 and was pursuing his studies as a regular student. Simultaneously the petitioner developed a knack for various indoor games and, as such, he was elected Indoor Games Secretary for 4 consecutive terms.

3. The Writ Petition No. 2142 of 19l has been filed by AZM Mahiuzur Rahman, a student of 4th year, MBBS of Chittagong Medical College bearing Roll No. 147 Session 1988-89. 1-Ic was a former Social Service Secretary of Chittagong Medical College Students Union. Since his boyhood he developed a taste for literature and cultural affairs and was a regular contributor of the College journals. In recognition of his cultural tastes and literary attainment he was elected Literary and Cultural Secretary. He had the privilege of editing and bringing out cultural magazine of the college.

4. Writ Petition No. 2143 of 1993 has been filed by Abul Hasnat Md. Rezaul Hossain, a 3rd year MBBS student bearing Roll No. 37, session 19-90 of the Chittagong Medical College. He was elected Assistant General Secretary of Chittagong Medical College Students Union.

5. Writ Petition No. 2195 of 1993 filed by Faisa1 Iqbal Chowdhury who was the student of 5th year MBBS of Chittagong Medical College bearing Roll No. 31 for Sessions 1987-88. He was the Vice-President of Chittagong Medical Chhatra Sangshad having a good academic and cultural family background. He got himself admitted in the Medical College having a desire to study in medicine.

6. Writ Petition No, 2196 of 1993 has been filed by Rabiul Karim who was the student of 4th year MBBS bearing Roll No. 134 Sessions 1988-89 in the Chittagong Medical College. 1-Ic was the General Secretary of Chittagong Medical College Students' Union. He got himself admitted in the Medical College with good academic background.

7. The petitioners in the normal course attended their classes at about 11-00 AM on 18-10-93 when all on a sudden unusually ghastly incident occurred where three people including a Doctor was brutally killed by some masked outsider armed bandits. The petitioners along with other persons were taken by surprise being rudely shocked and mortally wounded. When firing started in the College Cafeteria the petitioners and other students started running here and there for safety and ultimately wok shelter in the Lecture Gallery. After the occurrence was over the petitioners left the college premises for their residences being perplexed. The petitioners came to learn subsequently that on the same day of occurrence on 18-10-93 when the principal of the College was away from Chittagong an emergent meeting of the college staff and Academic Council under the Chairmanship of the Principal-in-Charge was held when the college campus was sized and surrounded by those armed cadres. The meeting which was adjourned on 18-10-93 was held subsequently under the Chairmanship of the Principal of the College on her return from Dhaka and in the said meeting held resolution to expel the petitioners and four other students of the College from the College for ever was adopted amongst other resolutions, allegedly for bringing back the academic atmosphere in the institution. The petitioners having come to learn through a notification published in Dainik Purbakone of Chittagong to the effect that the purported action has been taken against the petitioners with a direction upon to file appeal before the respondent No. I by 20th November 1993. Appeals were filed before the Principal of the College on 8-11-93 with no result. Finding no other alternative the petitioners through their lawyer sent a telegraphic notice demanding justice on 3-12-93. No reply having been received the demand for justice seemed to have been denied and hence the petitioners filed these writ petitions and obtained the present Rules.

8. Rules in Writ Petition Nos. 2141 of 1993, 2142 of 1993, 2143 of 1993 were issued on 5-12-93 arid the Rules in respect of two other Writ Petition No, 2195 of 1993 and 2196 of 1993 were issued on 9-12-93 and though the petitioners in the 5 Rules arc different those were ordered to be heard together as all of them were students of the same Medical College pursuing their studies in different classes of the same academic session. The impugned order out of which all the writ petitions have arisen is the same and the common question of law being involved in all the writ petitions those were heard together and disposed of by the same judgment.

9. The facts and circumstances common to the entire writ petitions arc that there was an occurrence on 18-10-93 within the Chittagong Medical College campus and in the said occurrence 3 persons including a Doctor were brutally killed by the armed hoodlums. The petitioners in the writ petition as medical students pursuing their studies in different classes of the same academic session. There was meeting of the college staff and the academic concern of the college on 1810-03 under the Chairmanship of the Principal-in-Charge and the said meeting having been adjourned was held again on the date at 9-00 PM under the Chairmanship of the Principal on her return from Dhaka and in the said meeting resolution have been adopted and the name of the petitioners were sent to the disciplinary committee for taking appropriate measure. The disciplinary committee in its meeting held on 20-l0-93 found the five students, who art petitioners in the 5(five) petitions, guilty of bread of discipline and took decision for expelling them from the Medical College for good. The decision of the disciplinary committee was sent to the academic Council for approval and in the joint meeting of the Academic Council and Disciplinary committee held on the same date at 8.00 PM the resolution adopted in the meeting of the Disciplinary Committees was unanimously approved and the Principal of the College was asked to implement the decision immediately and accordingly, the notification was issued by the Principal of the College expelling petitioners from the college for good. It is submitted that the decision taken by the college authority expelling the petitioners from the college for snapping their entire career is illegal, arbitrary has been made without any lawful authority the product of malice in law and fact and be purported action of expulsion from the college for ever has been made by the authority being influence by some extraneous circumstances. The petitioners have challenged the validity and propriety of the action of expulsion on various grounds.

10. Mr. Zakir Ahmed, the learned Advocacy appearing for the petitioners in all the five petitions, submitted that the petitioners have get very good academic career with respectable family background and they never indulged in any untoward activities and were never involved in the incident as any manner, The order of expulsion for ever manifest the acts of revenge on the part of the college authority and has been taken in violation of the right guarantied to them as citizens of the country to pursue their study to build up their career and become worthy citizens. The learned Advocate Contended that the order of expulsion for ever has the effect of debarring the petitioners from studying for the rest of their lives and it has not only offended their right to study as guaranteed under the constitution but the college authority exceeded jurisdiction vested in them awarding punishment of expulsion for ever as there is no provision either in the Chittagong University Act of 1973 or in any other statutes prescribing disciplinary action for the expulsion of any student for ever from the institution so as to put an end to the career of the student for life. The learned Advocate emphatically submitted that the impugned order of expulsion from the medical College forever is illegal, mollified and has been made without lawful authority in flagrant violation of the principle of natural justice, as before making such an order no notice to show cause was served the delinquent students affording them an opportunity of being heard and enabling them to make effective representation against such severe punishment.

11. Besides the above mentioned grounds the learned Advocate for the petitioners has challenged to be very authority of the Principal of the Medical College to award punishment by way of implementing the resolution allegedly adopted in the meeting of the Disciplinary Committee and Academic Council of the college without referring the matter to and getting the proposed punishment approved by the Syndicate or the appropriate authority of the Chittagong University. In support of the above contention it is submitted that under section 30(1) of the Chittagong University Act the Chittagong Medical College is a faculty in medicine with any other faculty and hence the decision of the Disciplinary Committee should have been referred to the University Syndicate for giving effect but instead of taking such step the Principal of the College himself has implemented the decision by issuing the repugned notification for the expulsion of the students of the college. The appalling and ghastly student which allegedly took place within the college campus in no doubt shocking the highly extensible and the student, whoever he might be, is found responsible for breach of discipline or code of conduct must be reprimanded for breach of discipline in the institution. But the question arises in whether the petitioners have been found guilty of misconduct or indiscipline in a properly held enquiry and have been punished by the competent authority after giving them the opportunity of being heard.

12. The first ground on which the order of expulsion of the petitioner from the college has been challenged is that the principal of the Medical College is not the proper authority to impose any punishment, far less expulsion for ever for an act of indiscipline, unless the decision of the Academic Council and the Disciplinary Committee is referred to the Board of Residence, Health and Discipline of the concerned University and the recommendation of the Board, if any made, be approved by the University Syndicate.

13. Mr. Kaiseruddin Ahmed, the learned Deputy Attorney-General appearing for the respondent No 1, having referred to Annexure ‘A’ and ‘B’ to the petition submitted that consequent on the tragic incident in the college campus on the fateful day a joint meeting of the college staff and Academic Council was held on 18-10-93 under the Chairmanship of the Principal and in the said meeting after thorough discussion and deliberation final decision was taken to expel the petitioners found involved in the incident and accordingly, the Principal of the college implemented the decision vide impugned notification and there was nothing wrong in it. The Deputy Attorney-General submitted that the & principal of the Medical College being the heart of the college is responsible for the internal administration and discipline of the college under section 49(3) of the Chittagong University Act, 1973 (ct

XXXIII of 1973) which was enacted consequent on the repeal of the Chittagong University Ordinance 1966 and, as such, the principal of the College was competent to impose punishment in pursuance of the decision of the Academic Council and Discipline Board. Section 38 of the Chittagong University Act has made a provision for setting up a Discipline Board as may be prescribed by the Ordinance. Section 44 (d) postulates that the matters relating to discipline, the students of the University and College and punishment including rustication and expulsion for misconduct from the college shall be provided by Executive Ordinance. Neither the learned Advocate for the petitioner nor the learned Deputy Attorney-General could enlighten us about any such executive ordinance of the Chittagong University concerning the Chittagong Medical College. As the occurrence took place within the Chittagong Medical College campus causing a threat to the academic atmosphere of the institution and the principal of the college is responsible for the administration and discipline in the college we arc of the view that absence of any provision in the Act authorizing the Principal of the college to take action by way of implementation of the decision of the Academic Council and Disciplinary Committee will not affect the power of the Principal to punish the students for indiscipline or misconduct. Though the point regarding the jurisdiction and authority was raised but the point was not seriously pressed by the learned Advocate as he himself concede that the Principal of a College standing in the position of *loco parentis* to the students is responsible for internal administration and maintains discipline and, as such, authorized to impose punishment on the recalcitrant students in an appropriate case. The educational institution where the maintenance of discipline is essential for the orderly conduct in the institution the person in charge must be given the fullest authority to correct those who are found guilty for breach of discipline in the same manner as a parent or guardian may chastise their wards for their rectification. But the authority is not free from acting in the manner which excludes ever)' reasonable possibility of unfair action being taken.

14. The next point urged by the learned Advocate for the petitioners is that the punishment awarded is shockingly severe inasmuch as it has taken away the right of the students to pursue their study for life. Therefore, the punishment expelling the petitioner forever is very much questioned. It is submitted that it is a rare case in this sub-continent where such a deterrent punishment has been awarded so as to take away the career of the students forever. In the absence of any provision in the Act or any ordinance specifically mentioning that the students found guilty of breach of discipline or misconduct will be liable to be punished by way of expulsion forever the college authority has acted without jurisdiction and without any lawful authority in passing the impugned order of expulsion forever. The learned Deputy Attorney-General found it difficult to support the expulsion of the students for ever as he frankly concedes that he is not aware of such provision of law authorizing the college authority impose punishment of expulsion for ever. The Deputy Attorney-General, however, referred to be unreported judgment in Writ Petitions Nos. 690-692-694, 32 of 1980 wherein it is observed: “The expulsion means one is expulsion good and it is not necessary to qualify i saying that the expulsion was for life.”

15. In the above case observation was made to what will be the interpretation of the expulsion if it is not used with qualifying class ‘for life’. The question in the present case is where the punishment by expulsion for ever is provided under any Act or Ordinance or regulation of the Chittagong University or of the medical collage and if not, whether the college authority could go to extent. From paragraph 8 of photocopy of cyclostyled copy of the amendment to the Residence, Health & Discipline Ordinance stated have been forwarded to the learned Advocate for the petitioners by the Vice-Chancellors of Chittagong University was produced before the court and from those papers is appears that even the Vice-Chancellor of the University is not authorized to take action himself if the period of expulsion exceeds 12 months. Therefore, it is argued that the imposition of punishment for expulsion for more than 12 months and in the instant case expulsion ever which tantamount to expulsion for life is warranted by any law regulation the conduct of students and

authorizing the principal of the collage to award punishment to the delinquent student of the college authority for ever.

16. Section 49 of the Chittagong University Act, 1973 has prescribed the general provision relating to colleges and in sub-section (3) of 49 of the Act, 1973 it is provided that the Printing or Head of a college shall be responsible for internal administration and discipline of the college. In such circumstances we are of the opinion that principal of Chittagong Medical College head of the college is the lawful authority to initiate the proceeding against the petitioners and appropriate punishment for the breach of discipline or misconduct of the students of the college question still remaining for consideration is when the disciplinary action could be taken by the Principal by way of awarding punishment impulsion of delinquent students for life. The learned Deputy Attorney-General has found it difficult to support his contention by way of placing provision of law in this regard. In the absence of such provision though it is not possible to say whether the punishment for expulsion for ever could be extended for ever, it cannot be denied that expulsion for life from the college is the most severe punishment so as to ruin the educational career of students and, therefore great care and action is called for in taking such a measure. Mr. Kabir Ahmed, the learned Advocate for the petitioner, finally argued that since the order of expulsion has been passed ex parte without any advise to the petitioner in utter violation of principle of natural justice the impugned order of expulsion is illegal and void. The learned Advocate's intention was that the principle underlying the 'Audi Alteram Partem' is fully applicable in the present case since the decision has been taken without giving the petitioners any opportunity to face their cases and in that view of the matter the order made by them is liable to be struck down. The learned Deputy Attorney-General appearing for the student No, I contended that the impugned action has been taken in the joint meeting of Academic Council and the Disciplinary Committee held after words were issued to the delinquent petitioners among them to appear before the meeting of the disciplinary committee but they were not available in their addresses. In support of his contention, the learned Deputy Attorney-General pointed out the ding of the meeting of the Disciplinary Committee dated 19-10-93 and 20-10-93. On perusal of the minutes of the meeting it appears that letters issued were returned unserved, as they were not available. Therefore, the learned Deputy Attorney General argued that the issuance of letter, though returned unserved, was sufficient to hold that the delinquent students avoided the notice and hence no other notice was necessary. It is difficult to accept the above contention of the learned Deputy Attorney General as no further attempt was made to serve the notices either by registered post or to give circulation by way of publishing in any local newspaper asking delinquent students to appear before the meeting of Disciplinary Committee. Furthermore, it is nothing to show from the record that any notice was issued and or served on the petitioners among them to show cause as to why the proposed disciplinary action should not be taken against them. The petitioners were practically ignorant about the decision of the Disciplinary Committee and the Academic Council taken against them in their absence. The argument of the Deputy Attorney-General that because of abnormal situation prevailing in the College Campus the delinquent students were keeping themselves away and hence it was not possible to issue Show cause notice on them cannot be accepted.

17. In the case of Farid Sons Ltd. vs. Government of Pakistan reported in 13 DLR (SC) 233 it was made unambiguously clear that if the act in question is judicial or judicial in nature and not administrative, the principles of natural justice will apply irrespective of the character of the persons or the body performing the same. The learned Advocate for the petitioners has referred to the case of Zakir Ahmed vs. University of Dacca through its Vice-Chancellor, the Registrar, University of Dacca reported in 16 DL.R (JIG) 361 and the judgment of the Supreme Court reported in 16 DLR (SC) 722 in which the judgment of the High Court Division has been affirmed and the view taken by the High Court Division with regard to the principle of natural justice was approved by the Supreme Court. In the above reported case in 16 DLR (HC) 361 the High Court Division held:

“Having regard to the nature of the act that Dacca University was called upon to perform under section 8 of the University Ordinance, it was a quasi juridical act and any inquiry that is conducted there into before action is taken must be conducted with tine regard to the rights accorded by the principle of natural justice.”

18. The Appellate Division in the said case reported in 16 DLI? (SC) 722 held:
“Rule of *audi alteram partem*, i.e., natural justice requires that before a person is punished, an opportunity to show cause against the proposed punishment should be afforded to him. Student guilty of misconduct unless such misconduct takes place in the view of the authority should not he punished without a show cause opportunity—Bodies, such as educational institution or police authority, charged with enforcing and maintaining discipline are not absolved from observing principles of natural justice.”

19. In the case of Depa Pal vs. University of Calcutta reported in AIR 1952 Cal 594 it was observed:
“In cases where breaches of discipline are detected by the Invigilators or other officers present in the examination hall and candidates concerned are expelled from the hall or are otherwise dealt with, question of any enquiry or investigation upon notice to the candidates may not arise. But where no case of breach of discipline in actually detected hut subsequently upon exanimation of the answer papers the Examiners come to entertain suspicion about adoption of unfair means by particular candidate or candidates and the Examination Board has to consider such cases and come to a determination as to the nature of the offence committed and has to apportion the penalty which can properly be inflicted upon the delinquents, it is only fit and proper that the party arraigned should have an opportunity to defend himself and to offer an explanation, if any. To brand a candidate which has stigma of adoption of unfair means at the examination or, in other words, finding him or her guilty of dishonesty or misconduct and thereby causing an irreparable injury to the character and reputation of such candidate, without giving him or her any opportunity to explain, is contrary to all notices of justice and good sense.”

20. The learned Advocate for the petitioner referred to the case of Board of High School and Intermediate Education UP Alahabad vs. Ghanshyam Das Gupta and others reported in AIR 1962 (SC) 1110 wherein the principle laid down in the Calcutta Case was approved as being the correct view.

21 In the case of Dhaka University vs. Zakir Ahmed; 16 DLR (SC) 722 the Supreme Court of Pakistan had the occasion of going through a number of decisions cited by both the sides and were of the same view that in all the proceedings by whosoever held, whether judicial or administrative, the principle of natural justice has to be observed if the proceedings might result in consequences affecting the “person or property or rights of the parties concerned” held, that the rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement is to be implied into it as the minimum requirement of fairness.

22. Thus the general consensus of judicial opinion seems to be that, in order to ensure the elementary and essential principles of fairness matter of necessary implication the person sought not be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and “to correct the controvert any relevant statement bought forward to his prejudice.” The authority is to give an opportunity to the person sought to be affected in correct or contradict any relevant statement prejudicial to him. In other words, in order to act justly and to reach just ends by just means the Courts insist that the person or authority should have adopted the above “elementary and essential principles” unless the same had been expressed excluded by the enactment empowering him to so act. Though for maintaining discipline in educational institution or other institutions, which is essential for the conduct of the institution, the person in charge for maintaining discipline and order in

the institution is given full opportunity to correct those charge with discipline just like a parent or guardian but even then they are not so much free from the necessity of acting in a manner which excludes every reasonable possibility of unfair action being taken.

23. It is not denied that the educational institution has abundant powers of taking discipline action against the recalcitrant students and the Court are, in no way, minded to deprive them of their power but all that they arc entitled to insist upon in the interest of fairness is that the minimum requirements of fairness must be observed by them before such action is taken. Relying on the view taken in the case of the University of Dacca through the Vice-Chancellor and the Registrar, University of Dacca vs. Zakir Ahmed "that unfair action may cause greater harm to the prestige of the heads of educational institutions who are expected to be in loco parenties of the students and may seriously undermine the authority which they claim to possess over students placed in their charge', in the present case not find that the action has been taken by the authority against the delinquent petitioners by way of making an order of expu1sion of the petitioners / student from the Medical College for good without affording any opportunity to show cause or submit any explanation or put forward their version in view of the serious consequence that is likely to follow to the recent petitioners as a result of expulsion for ever / he passed against them we are of the view that the principle of natural justice is fully applicable in the present case and petitioners having not been given an opportunity to show cause or explain their conducts there has been utter violation of principle of natural justice in awarding punishment for expulsion of the petitioners for ever and as such, the said punishment of sustained.

24. In view of the fats and circumstances of the case and the reasons stated above, the notification issued under the signature of the Principal, Chittagong Medical College on 20-10-93 which relates to the expulsion of the petitioners over the institution for ever (Annexure-B) is declared have been made without any lawful authority and such, is of no legal effect.
The Rules are accordingly made absolute about any order as to costs. (48 DLR 1996, pp. 482)

COURT CASE - 2

Prof Nurul Amin Bapari
Vs.
Vice-Chancellor & others (June 17th 1998)

Dhaka University Order, 1973, Articles 19, 23(1) & 52(1)
Constitution of Bangladesh, 1972, Article 102

Judgment
The petitioner obtained this Rule calling upon the respondents to show cause as to why resolution dated 12-11-96 constituting Selection Boards for recommending appointment of Assistant Professors and Lecturers of the University of Dhaka in various subjects should not be declared to have been made without lawful authority and is of no legal effect.

2. The petitioner, Nurul Amin Bepari, a professor of the Department of political science of the University of Dhaka filed this petition on his own behalf and on behalf of the whole community of teachers for vindicating public interest. It is stated in the petition that a great anomaly has been created by constituting the Selection Boards including members of Syndicate for nominating the Assistant Professors and Lecturers for appointment in various Departments although there are thousands of teachers available for inclusion in Selection Board. As the Syndicate is the approving authority it included its members in the Selection Board in order to have recommendation of teachers belonging to the ruling political party.

The petitioner states that Dr ATM Zahurul Huq, Dr Bazlul Huq Khandaker were each included in 5 Committees, Dr Md Abdul Aziz, Dr Shahid Akhtar Hossain and Dr AKM Gholam Rabbani in 7, 16 and 14 Committees respectively. For the selection of teachers in the Islamic Studies Department Mr AK Gholam Rabbani of the Department of Islamic History was appointed as a member of the Selection Boards to take interview of the candidates for appointment as Assistant Professors and he will take interview of a lecturer who is his teacher and such inclusion of a student in the Selection Board to take interview of his teacher is unjust and unfair and it disturbs the entire education system. It is further stated that some members of this Board are not teachers of the subjects for which they will recommend the Assistant Professors and the Lecturers and the petitioner stated the names of such teachers. It is further stated that the Syndicate with ulterior motive nominated mostly Junior and incompetent professors including Dr H.K Arefin, Professor of Sociology, who obtained third Division in Intermediate examination. That the Syndicate confirmed the constitution of the Selection Board on 29-12-96. The petitioner stated that the Constitution of the Selection Board is against all norms, ethic, equity and principle of natural justice. The petitioner also stated that the Syndicate included the members of the Selection Board for political consideration.

3. This Rule is opposed by the respondent 1, the Vice-Chancellor and respondent 2, the Registrar of the Dhaka University. They in their affidavit-in-opposition denied the allegation of anomaly created by inclusion of such members in the Selection Board. They stated that nomination of the members of the Selection Board was in accordance with the provision of section 23(1) of the First Statute of the University and Article 53 of the Dhaka University Order, 1973. The Syndicate can nominate its own member for the Selection Board by nomination of such members and no illegality has been committed and no violation of the Rules and Regulation has been made. It is further stated that teachers nominated as expert have knowledge in their respective field.

4. The learned Advocate for the petitioner contends that confirmation of the 47 Selection Boards by the Syndicate on 29-12-96 is void *ab initio.* He further argued that the Syndicate did not take into consideration expertise of the members of the Selection Board in appointing them. He further argued that the Syndicate cannot appoint its own member as members of the Selection Board and the appointment of the members of Syndicate in the Selection Board is malafide and opposed to principle of natural justice and it was obtained on political consideration, which is not the basis for inclusion of the members in Selection Board.

5. Mr Shafique Ahmed, on the other hand, argued first that the petitioner is not an aggrieved person and if it be held that he is so, he has alternative remedy under Article 52 of the Dhaka University Order, 1973. Mr. Shafique Ahmed placing reliance upon Article 19 contends that authorities of the University includes, amongst others, the Syndicate and, as such, nomination of the members of the Selection Board was with due authority and if anybody is aggrieved by an order of the Syndicate die remedy is under Article 52(1) of the Order and not by writ petition under Article 102 of the Constitution.

6. It seems to me that the petitioner does not alone vindicate his personal grievance by this petition but the grievance of the teaching community as a whole as has been stated by him in the writ petition. The order nominating the members of the Selection Board by the Syndicate in no way has infringed either his legal or constitutional right. For invoking Article 102 a petitioner must be an aggrieved person and must show that by the impugned order or act his legal or Constitutional right has been infringed. No such infringement or violation could be shown by the petitioner. Hence this petition cannot be maintained under Article 102 of the Constitution. Anomaly created by the nomination of members of Selection Board by Syndicate is no ground for maintaining a writ petition. The contention on political consideration again is no ground for invoking writ jurisdiction under Article 102 of the Constitution, more so when allegation of political consideration for nomination of the

members was denied by affidavit-in-opposition giving rise to a disputed question of fact. Where a disputed question of fact arises the High Court Division shall not invoke its power conferred by Article 102 of the Constitution. Effective alternative remedy is also a ground for refusing by the High Court Division exercise of its high prerogative jurisdiction under Article 102 of the Constitution. As Article 52(1) of the Dhaka University Order, 1973 provides remedy by way of appeal from any order of any officer or authority of the University affecting any person or class of persons in the University by a petition to the Chancellor. The Syndicate according to Article 19 of the Dhaka University Order, 1973 is an authority. And according to Article 23(1) it is also the executive body of the Dhaka University. Thus, the order nominating the members of the Selection Board has been done with lawful authority as an authority of the University within the meaning of Article 19 and Article 23(1) of the Dhaka University Order, 1973. As the petitioner has effective alternative remedy as provided under Article 52(1) of the Dhaka University Order, 1973, I am also of the opinion that this petition under Article 102 of the Constitution is hit by the doctrine of exhaustion and not maintainable.

This view of mine is fortified by the decision in the case of *Controller of Examination University of Dhaka and others vs. Mahiuddin and others, 44 DLR 305 (AD).*

For the reasons stated above the Rule is liable to be discharged. Accordingly, the Rule is discharged without any order as to costs. (50 DLR, 1998, pp. 405)

COURT CASE - 3

Managing Committee, Labannaya Prova Bhumukhi High School
Vs.
Aumullya Kumar Sarker (November 15th, 1995)

East Pakistan Intermediate and Secondary Education Ordinance, 1961. Section 45

Judgment

This revisional application under section 115 of the Code of Civil Procedure is directed against the order dated 24-9-1994 passed by Mr. Abu Saleh Sheik Md. Jahirul Haque, Senior Assistant Judge, Manikganj in Title Suit No. 52 of 1993 rejecting the application of the defendants filed under Order 7 rule 11(d) of the Code of Civil Procedure for rejection of the plaint.

2. The case of the plaintiff-opposite party, in shot, is as follows:
The plaintiff is the Assistant Science Teacher of Khabashpur Labannya Prova Bahumukhi High School. The defendant No. 1 is the President, the defendant No. 2 is the Vice President, defendant No. 3 is the Head Master and defendant Nos. 4-10 are the members of the Managing Committee of the said school.

3. The plaintiff at the request of the defendant No. 3 applied for a vacant post of the school as Science Teacher and being interviewed by the Managing Committee he was appointed and since 17-4-83 he has been serving as Assistant Teacher with skill and reputation.

4. While he (the plaintiff) was serving, he was served with a notice by the defendant NO. 3 asking him to show cause as to why he would not be dismissed from service for spreading rumour that Shattaya Ranjan Roy, another teacher of the school developed immoral relationship with a female student of Class X of that School and the plaintiff showed cause on 9-11-91 denying all allegations brought against him (the Head Master). But in spite of that the defendant No. 3, at the instruction of the Managing Committee put the plaintiff and said Shattaya Ranjan Roy under temporary suspension and then the committee proceeded for enquiry. Being influenced by the said Shattaya Ranjan Roy, the committee submitted a biased report against the plaintiff and withdrew the suspension order against the said

Shattaya Ranjan Roy. Consequently the defendant No. 1 dismissed the plaintiff from service and a copy of the said order was sent to the Director General of the Intermediate and Secondary Education Board for approval. The plaintiff then finding no other alternative appealed to the Managing Committee for his re-instatement but in vain. The plaintiff, thereafter submitted a prayer to the proforma defendant No. 12 for withdrawal of his illegal dismissal order. But the order of dismissal was illegally approved by the defendant No. 11 and the same was sent to the defendant No. 3. Hence the plaintiff is constrained to file this suit for re-instatement in his service.

5. The defendant contested the suit by filling written statement stating, *inter alia*, that the plaintiff caused substantial damage to the reputation of the school by spreading rumours against a teacher of the school. The matter was enquired into and after observing all the formalities the plaintiff was dismissed from service, which was duly approved by the defendant No. 11. The plaintiff gave representation before the Managing Committee of the School, then to the defendant No. 12 but his prayer was rejected. The defendant petitioner subsequently came to know that the plaintiff is barred to question about the dismissal order duly approved by the defendant No. 11 in any civil Court and hence the defendants filed an application under Order 7 rule 11 of the Code of Civil Procedure before the trial Court for rejection of the plaint of the suit but the said petition was rejected on 24-9-94. The trial Court observed, amongst others, that the deposition of the witnesses of the plaintiffs has been taken and there was no scope to allow the petition at this stage.

6. Against the said order dated 24-9-94 passed by the learned Senior Assistant Judge, Manikganj, the defendant-petitioner has moved the present Revisional application.

7. Mr. Badruddin A, the learned Advocate appearing for the petitioner has submitted that the plaintiff has been rightly dismissed from service after serving all the formalities and against his dismissal no civil suit lies. The learned Advocate for the petitioner further submitted that learned Senior Assistant Judge illegally and erroneously rejected the petition under Order 7 rule 11 of the Code of Civil Procedure without properly analyzing the law involved therein and the learned Count below ought to have held that the plaintiff has no locus standi to file a suit against the decision of the Managing Committee of the defendants which was duly approved by the Board. He further submitted that the learned court below should have taken notice of the express provision of law as apparent in section 45 of the East Pakistan Intermediate and Secondary Education Ordinance, 1961, wherein it has been enacted as follows:
“No act done, order passed or proceedings taken by the Controlling Authority or the Board or by any Committee under this ordinance shall be called in question in any court by a suit or otherwise.”

8. The learned Advocate for the petitioner further submitted that point of law could be urged at any stage of the proceeding/case.
Mr. Zakir Ahmed, the learned Advocate appearing with Mr. Wajiullah, the learned Advocate for the opposite parties found it difficult to oppose the submission of learned Advocate for the petitioner because in view of the section 45 of the East Pakistan Intermediate and Secondary Education Ordinance, 1961 a civil Court is barred to entertain the plaint of the plaintiff.

9. I have also gone through the language of section 45 of the east Pakistan Intermediate and secondary Education Ordinance, 1961 which runs as follows:
“45. No act done, order passed or proceeding taken by the President or the Government or the Board or by the Chairman or any other officer of the Board or by any Committee under this Ordinance, shall be called in question in any court by a suit or otherwise.”

10. In view of the clear provisions of section 45 of the East Pakistan Intermediate and secondary Education Ordinance, 1961 as stated above I think the learned senior Assistant

Judge ought to have allowed the application of the defendants under Order 7 rule 11 © of the Code of Civil Procedure and ought to have rejected the plaint of the plaintiff as no civil suit lies in the above premises and, as such, reject the plaint of the plaintiff.
In view of the discussions made above the Rule is made absolute without any order as to costs and the impugned judgment and order date 24-9-94 is set aside. (48 DLR, 1996. pp. 303)

COURT CASE – 4

Mofizul Huq
Vs.
Mofizur Rahman & others (March 7th, 1996)

Intermediate and Secondary Education Ordinances (XXXIII of 1961) as amended by Ordinance No. XVII of 1977. Section 30.
Local Government (Union Parishads) Ordinance, 1983 (Ordinance No. LI of 1983). Section 7(2)(e).

Judgment

The moot question in this appeal by leave is whether the High Court Division is right in holding that a recognized non-Government secondary school is a local authority within the meaning of section 7(2)(e) of the Local Government (Union Parishads) Ordinance, 1983, briefly, the Ordinance and that the appellant being a full-time teacher of such a school is disqualified from being a Chairman of the Union Parishad there under.

2. Respondent No. I who is a voter in the concerned Union filed Writ Petition No. 21 of 1995 calling upon the respondents including the appellant, who was made respondent No. 11 therein, to show cause, among others, as to under what authority he (the appellant) was holding the office of the Chairman of Hoglapasha Union Parishad within Police Station Morrelganj, District Bagerhat. It is, *inter alia,* stated that the appellant and one Probir Kumar Halder contested the election for the office of Chairman of the said Union Parishad which took place on 6-2-1992 and the appellant was declared elected by a Gazette notification dated 5-3-1992. The writ-petitioner alleged that respondent No. 11 (the appellant) is a teacher of the Sammilani Girls' High School situated at village Boalpur, PS Morrelganj, District Bagerhat which is a non-Government secondary school within the meaning of section 2 (1)(h)(j) of the Intermediate and Secondary Education Ordinance. 1961 (Ordinance No. XXXIII of 1961) as amended by the amending Ordinance of 1977 (Ordinance No. XVII of 1977). The appellant has been serving as the Headmaster of the said School since long before. It is alleged that the appellant was thus disqualified for election to the office of Chairman of the said Union Parishad under section 7(2)(e) of the aforesaid Local Government Ordinance of 1983 read with the provisions of section 30(1)(b) of the aforesaid Ordinance No. XXXIII of 1961. The appellant filed nomination paper on 7-12-1991 suppressing the fact of his disqualification as aforesaid and contested the election held on 6-2-1992 and that he is still in service of the said school as a teacher without any cessation or break and, as such, he has got no lawful authority in holding the office of Chairman of the said Union Parishad and he is liable to be directed to vacate the said office. The other contesting candidate is entitled to hold the said office of Chairman as duly elected uncontested under Rule 20(3) of the Election Rules.

3. The appellant filed an affidavit-in-opposition denying the allegation of the writ petitioner as to his alleged disqualification under the Ordinance in question for being the Chairman of the_ Union Parishad concerned. It has been stated that the `Sammilani Girls' High School

is a private High School recognized by the Board of Intermediate and Secondary Education, Jessore and has always been a purely private High School and that its recognition by the Board of Intermediate and Secondary Education does not change the said High School into a Government High School. The appellant stated that the allegation as to his disqualification was made upon a wrong view of the law. He was elected Chairman of the said Union Parishad in 1973, 1977, 1983 and 1992 and that he is still functioning as the Chairman thereof. The contention of the writ-petitioner was misconceived and frivolous and, as such, liable to be rejected. It was further stated that the writ-petitioner was a camp-follower of the defeated candidate Probir Halder who having lost in the Election Tribunal Case No. 14 of 1992 set up the writ-petitioner, who, by deliberately suppressing the fact as to the election petition by Probir Halder and its result, misled the High Court Division and succeeded in not only obtaining a Rule but also an order of injunction against the appellant. The writ petitioner also suppressed the fact that Writ Petition No. 1649 of 1992 filed by the said Probir Halder challenging the acceptance of the nomination paper of the appellant was summarily rejected by the High Court Division on 4-5-1992.

4. The appellant, it seems, was not represented at the hearing of the writ petition in the High Court Division and it has been explained in the petition for leave to appeal as to how the default was made by the learned Advocate for the appellant. Be that as it may, it appears from the impugned judgment that in support of the argument made on behalf of the writ-petitioner that the appellant was disqualified for being a Chairman of the Union Parishad on the ground of his holding the full-time job of a teacher of the local Sammilani Girls' High School which is a' local authority' within the meaning of section 7 (2) (e) of the Local Government Ordinance, 1983. Reliance was placed of the case of *Abdul Maid vs. Abu Zaffar Mohammad Khalil & others. 14 BLD (HCD) (1994) 488,* which was a decision by a Single Judge who incidentally happened to be the presiding Judge of the Division Bench hearing the writ petition. The Learned Junior Judge who deliver the impugned judgment in the writ petition quoted *ad verbatim* from the said decision and held in concurrence therewith that the appellant who is a teacher of the aforesaid Girls' High School has been holding an office of profit in the service of a 'local authority' and thereby he is debarred from being a Chairman of the Union Parishad in view of the aforesaid provision of section 7(2)(e) of he Ordinance of 1983. The Rule was accordingly made absolute by the impugned judgment and order dated 26 April 1995.

5. Among other operative orders recorded in the impugned judgment it has been ordered, which is found of be quite unusual, that "accordingly we make him (appellant) unseated from the post of the Chairman of the said Union Parishad.' It was not required to make that kind of an order but a mere declaration that the appellant was holding the office of Chairman of the Union Parishad without any lawful authority was enough. Such a declaration having actually been made the order as above was neither proper nor called for.

6. Leave was granted to consider the submission that the decision in 14 BLI) (FICO) 488 holding that the secondary school in question is a 'local authority' as defined in the General Clauses Act, 1897 (Ordinance No. X of 1897) upon which reliance was placed in the impugned decision is based on a misinterpretation and misconstruction of the provisions of section 7(2)(e) and section 30(l)(b) of the aforesaid Ordinances of 1983 and 1961 respectively read with the definition of 'local authority' in the General Clauses Act.

7. The submission was that the Board of Intermediate and Secondary Education is a 'local authority' having been established by the Government under the Ordinance of 1961 but school which is recognized by such 'Board does not become a local authority itself.

8. For an answer to the question raised in this appeal, the correctness or otherwise of the decision. *14 BLD (HCD) 488* is directly in issue and, so to say, the only issue which is required to be answered. The relevant provisions of the laws, which came up for interpretation in that decision, may be usefully quoted below. Section 7(2)(e) of the Local Government (Union Parishad) Ordinance 1983 reads as follows:

7. Qualifications and disqualifications of Chairman and members of Union Parishad.
(1) .....
(2) A person shall be disqualified for election or nomination as or for being, a Chairman or a member if

a. .....
b. .....
c. .....
d. .....
e. Parishad or of any other local authority; or
f. .....
g. .....
h. .....

Section 30 of the Ordinance of 1961 provides:

30. (1) An employee of a recognized Intermediate College or Secondary School shall be bound by the following general conditions of service, namely:

a. .....
b. He shall not canvass or interfere or use his influence or stand as a candidate in any election to a local body or a legislative body in Bangladesh.

(2) Any person, who contravenes any of the conditions of service as stated in sub-section (1) shall be liable to disciplinary action including removal from his post by an order of the authority which appointed such person on proceeding initiated against him.
(3) .....

9. The definition of 'local authority' under the General Clauses Act as substituted by President's Order No. 147 of 1972 is as follows:
Section 3(28) "Local Authority"- "Local authority" shall mean and include a Pourashava, Zila Board, Union Panchayat, Board of Trustees of a port or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund, or any corporation or other body or authority constituted or established by the Government under any law.

In the aforesaid decision the question of disqualification of the petitioner, who was a teacher of the local secondary school, under section 7(2) (e) of the Ordinance of 1983 came up for consideration. It was observed that the question is, whether the petitioner held a full-time office of a 'local authority' within the meaning of aforesaid section 7(2) (e). The definition of 'local authority' in the General Clauses Act as quoted above was reproduced and the last few words in the said definition were underlined (which has been followed in quoting the said definition as above). In the impugned judgment the relevant paragraph (No.7) of the decision, *14 BLD (HCD)* 488, has been fully quoted and it will be useful to quote the relevant portion of the said paragraph, which bears the entire reason of the decision. It reads:

"7. Thus, it seems that the expression "other body or authority" constituted or established by any law is local authority. As the expression "any authority" falls in the inclusive definition of the local authority it can not be said that "any authority" does not include the school in question, specially in absence of any explicit language in the Ordinance by which the expression "School" is excluded from the definition of "any authority". Therefore, on interpretation of section 7 of the Local Government (Union Parishad) Ordinances, 1983 read with section 30 (1)(b) of the Intermediate and Secondary Education Ordinance, 1961 I hold that the school is a local authority.

10. It will be seen from above that the learned Judge completely missed that 'other body or authority', to mean and to be included in the definition of 'local authority', must not only be constituted or established under any law (not' by any law' as wrongly held) but the same

must be constituted or established 'by the Government'. The learned Judge seems to suffer from an apparent misconception by holding that as the expression any authority' falls in the inclusive definition of 'local authority' it cannot be said that 'any authority' does not include the school in question, specially in absence of any explicit language in the Ordinance (of 1983) by which the expression 'school' is excluded from the definition of 'any authority'. The learned Judge has not at all considered whether a secondary school fits in that part of the definition of 'local authority' as has been underlined by him. The question to which he should have addressed himself is: Is the secondary school in question a body or authority constituted or established by the Government under any law? That question which is the only material question has not apparently occurred at all to the learned Judge. It must be held therefore that the view taken in that decision that a secondary school is a 'local authority' is based on a misconception and misinterpretation of the definition of 'local authority' as quoted above.

11. 'Local authority' has not been defined in the Local Government (Union Parricides) Ordinance 1983. Therefore reference has to be made to the General Clauses Act for a meaning thereof, but without considering whether a secondary school answered the description underlined by the learned Judge in the definition of 'local authority', it has been said that on interpretation of section 7 of the Ordinance of 1983 read with section 30(1) (b) of the Ordinance of 1961 "I hold that the school is a local authority". It will be seen that the learned Judge has been suffering from a running misconception in that' he failed to notice that section 30 of the Ordinance of 1961 is not at all relevant for a consideration as to whether a secondary school is a ‘local authority'.

12. Mr. Fazlul Karim, learned Advocate for respondent No. 1, found it difficult to support the reasoning given by the learned Judge for his aforesaid interpretation of law, but he submitted that the conclusion -rived at, however, can be supported by other reasons s which do not find place in the said judgment. We shall consider the other reasons' advanced by Mr. Fazlul Karim shortly but before proceeding further we would like to observe, which is of course not very relevant for the question raised in this appeal, that the view taken by the learned Judge that a teacher of a secondary school is disqualified for election as Chairman of a Union Parishad under section 30(1) (b) of the Ordinance of 1961 and that the provisions of section 30(1) (b) and section 30(2) thereof are independent of each other and mutually exclusive is not correct. Section 30(1) (b) does not provide for any disqualification but lays down some prohibitions for an employee of a recognized intermediate college or secondary school as conditions of his service and sub-section (2) provides for penalty for a contravention of the said conditions of service and, as such, the said provisions are neither independent nor mutually exclusive as has been wrongly held in the said judgment. Mi. Fazlul Karim has frankly submitted that he cannot support this part of the decision also but he has argued that the learned Judge was very much influenced, wrongly though, by the provisions of section 30(1) (b) of the Ordinance of 1961 in interpreting that a secondary school is a local authority within the meaning of the General Clauses Act.

13. Mr. Fazlul Karim has argued that a secondary school comes within the description as delineated in the last part of the definition of local authority’ as given in the General Clauses Act. By the last part of the definition, Mr. Karim has made it clear that he means that portion which has been underlined by the learned Judge (as reproduced above). In other words, he means to say that a secondary school is a body or authority constituted or established by the Government under a law. When asked as to what that law is, Mr. Karim referred to the Ordinance of 1961. He, however, hastened to add that, strictly speaking, a secondary school is neither constituted nor established by the Government under the said law but from the different provisions made there under and other laws including the Constitution it should be inferred that a recognized secondary school is a statutory body entrusted with the implementation of a fundamental principle of state policy of establishing a uniform, mass-oriented and universal system of education and for carrying out the objective of the Government to reorganize the secondary education in the country and accordingly, a recognized secondary school which is largely financed and regulated by the Government by

various laws and regulations is a ‘local authority’. In order to support, what seems to be a long-winding argument, Mr. Karim has, first, referred to Article 17 of the Constitution which provides, among others, that the State shall adopt effective measures for the purpose aforesaid and of relating education to the needs of society and producing properly trained and motivated citizen to serve those needs. For realising the said constitutional objective. Ordinance No. XXXIII of 1961, besides other laws, has been enacted to reorganise the intermediate and secondary education in Bangladesh. In the said Ordinance, ‘Secondary Education’. ‘Secondary School’ and ‘Headmasters’ of a secondary school have been defined. Provision has been made for establishing a Board for the organization, regulation, supervision, control and development of intermediate and secondary education in accordance with the provisions of the Ordinance. The Government has been authorized to establish one or more Boards in respect of such area or areas as may be specified in the notification establishing such Board. Under section 18 of the Ordinance the Board has been vested, inter alia, with power to grant recognition to or to withhold or withdraw recognition from intermediate colleges and schools under certain circumstances. Regulation No. 12(4) of the First Regulation of the Board provides that the Board shall accord recognition to secondary schools in Bangladesh if it is satisfied on the basis of inspection reports that conditions prescribed for recognition were satisfactorily fulfilled. The recognition of a secondary school may, however, be cancelled if the Board is satisfied, on the basis of reports that conditions of recognition have subsequently ceased to be fulfilled by the school.

14. Mr. Karim has also referred to the Board of Intermediate and Secondary Education, Jessore (Managing Committee of the Recognized Non-Government Secondary Schools) Regulations, 1977 and the Recognized Non-Government Secondary School Teachers (Board of Intermediate and Secondary Education, Jessore) Terms and Conditions of Service Regulation, 1979. Reference was also made to Government’s order showing that Government contribution towards the salary of teachers and employees of non-Government educational institutions and the medical allowance for the said teachers and employees were issued from 70% to 80% and from Taka 100.00 to Taka 150.00 per month respectively.

15. Mr. Karim has argued that it is not disputed that the Sammilani Girls' High School has been accorded recognition under the aforesaid section 18(2)(ii) read with regulation 12(4) of the First Regulation by the Board of Intermediate and Secondary Education, Jessore and that the major portion of the salary of the teachers and employees of the said School is borne by the Government. Mr. Karim has brought to our notice even an inspection report of the said Girls' High School submitted upon inspection by an Assistant Inspector of Education of the Inspection and Audit Directorate of the Ministry of Education. Mr. Karim made all this exercise to impress upon us that a recognized secondary school is a statutory body over which the Government stain much control including the all-important matter of finance and, as such, it is a 'local authority'.

16. We are far from convinced by the line of reasoning adopted by Mr. Karim and find it impossible to agree with his submission that a recognized secondary school is a 'local authority' within the definition as give in the General Clauses Act. It may be examined first whether a secondary school recognized and regulated under the Ordinance of 1961 and substantially financed by the Government is a body constituted or established under the said Ordinance or any other law, so as to make it a statutory body which is the sheet-anchor of Mr. Karim's submission. To be a statutory body it must, first of all, owe its existence to a statute. In other words, it must be created by or under a statute. There is nothing in the Ordinance of 1961 nor any other law has been brought to our notice showing that a secondary school or, to be more particular, the Sammilani Girls' High School in this case, is or has been created by or under any law. A distinction must be made between a body or institution, which is created by or under a statute and a body, or institution which is not so created but is governed by certain statutory provisions for the proper maintenance and administration of the said body or institution. A secondary school is undoubtedly governed by the provisions of the Ordinance in question and the various other regulations made there under but it does

not necessarily follow that the school is a creature of the said Ordinance or any other law. Ire order to support his argument that a recognized secondary school is a statutory body, Mr. Karim referred to *Vaish Degree College vs. Lakshrni Narain AIR I970 (Supreme Court) 888* which upon scrutiny, however, turned out to be a self-defeating citation. In that case question arose whether the executive committee of a private college which was affiliated to an University (Agra) and the said college having agreed to be governed by the provisions of the University Act an the statute and the Ordinances made there under was a statutory body. It was held which may be usefully quoted here

"It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words, the position seems to be that the institution concerned must owe its very existence to a statute, which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body."

17. In the present case Mr. Karim also does not dispute that the Sammilani Girls' High School does not owe its existence to the Ordinance of 1961 or to any other law. The said school like any other secondary school is governed in accordance with the provisions of the said Ordinance and other regulations. We have therefore no doubt in our mind that the Sammilani Girls' High School is not a statutory body at all.

18. Mr. Fazlul Karim also referred to some other decisions, which are not quite relevant for the purpose of determining the issue at hand. In the case of *Anwarur Rahman vs. Election Tribunal 27 DLR (HCD) 300* the question for determination was whether under clause (f) of article 9 of the Bangladesh Local Government (Union Parishad and Pourashava) Order, 1973 which is somewhat similar to section 7(2)(c) of the Ordinance of 1983, the petitioner who was a whole time salaried teacher of the University of Dhaka could seek election to the office of Chairman of Union Parishad. There an argument was advanced on behalf of the petitioner relying on an exception clause as provided in the said clause (f) itself, which was not accepted. Then the University was found to be a public statutory Corporation as provided in the said clause (I) but that is not an issue in this case.

19. In the case of *Panchkari Halder vs. Purna Chandra Holder 1984 (2) CLJ 89* question arose whether the appellants who were holding the posts of Inspector under the District School Board were disqualified for election to Gram Panchayat under section 8(b) of the West Bengal Panchayat Act 1973 which postulates that a candidate Would be disqualified to such election or to become a member *of* Gram Panchayat, if he is in service of, or receives remuneration from, the Central or State Government or a Gram Panchayat or Panchayat Samiti or a Zila Parishad. It was held that the District School Board, so far as that case was concerned, had no independent existence and every employee under the Board were in fact holding office under the Government. Evidently this decision is not at all relevant for determining what a 'local authority' is meant under the General Clauses Act.

20. In yet another case cited by Mr. Karim, we do not see for what purpose. AISSE Assocn, vs. Defence Minister-cum-Chairman,' BOG SS Socy. AIR 1989 (Supreme Court) 88 question arose whether the Sainik School Society, the overall control of which vests in the Governmental thirty, is 'State' within the meaning of Article 12 of the Constitution so as to attract the application of article 14 and the directive principles. The question was answered in the affirmative. The present appeal before us presents no such question and we do not therefore see any relevance of the said decision for the purpose at hand.

21. Having regard to the definition of local authority' in the General Clauses Act (quoted above) a non-Government secondary school can only be held to be a 'local authority', which is not disputed by Mr. Fazlul Karim, if it is found to be a body or authority constituted or established by the Government under any law. The school in question, namely, the Sammilani Girls' High School of which the appellant is the Headmaster for a long time is admittedly a recognized non-Government secondary school. The very fact that it is a non-government school is sufficient to exclude any suggestion that it is .a body constituted or established by the Government. It has not been possible on the part of Mr. Fazlul Karim to refer to any law under which the said school has been constituted or established. It is, however, true that the school like any other non-government secondary school is regulated and managed in accordance with the provisions of the Ordinance of 1961 and the various regulations made there under. The Government has control over these schools in a very large measure. Nevertheless it is clear from what has been discussed above that thereby a recognized non-Government secondary school does neither become a statutory body nor a 'local authority' within the meaning of the General Clauses Act as contended y Mr. Karim. That being the position in law, the appellant does not become disqualified for being a Chairman of the Union Parished under section 7(2)(e) of the Ordinance of 1983 by reason of being a full-lime teacher of the Sammilani Girls' High School.

22. In view of the discussion above, we are clearly of the opinion that the question raised in this appeal has been wrongly decided by the High Court Division relying quite erroneously upon the decision, 14 BLD (HCD) 488, which is again based upon a misinterpretation and misconstruction of section 7(2)(c) of the Ordinance of 1983 and section 30(1)(b) of the Ordinance of 1961 read with the definition of 'local authority' as in the General Clauses Act. The appeal is, accordingly, allowed without any order as to cost and the impugned judgment and order are set aside. (48 DLR (AD), 1996. pp. 121)

COURT CASE - 5

Moniruddin (Md) Abedullah and others
Vs
Controller of Examinations, Dhaka University and others (October 26th, 1997)
Dhaka University Order, 1973. Articles 32 and 52
Judgment

This Rule Nisi was issued calling upon the respondents to show cause as to why the impugned order dated 31-12-90 issued under the signature of the respondent No.1 and impugned proceeding pursuant to which die said order was made, the rejection of the appeal made there from should not be declared to have been made without lawful authority and is of no legal effect.

2. The 8 petitioners in this writ petition are students of the Jagannath College, Dhaka who appeared in the Degree Honours Examination of 1987 held in the year 1989. The petitioners were served with notices dated 20-10-90 directing them to submit written statement by way of showing cause to be written in their respective hands to respondent No.2 for alleged offences of depositing answer script /papers written from outside the examination hall annexed hereto the petition as Annexure-A. Subsequently, the petitioners came to learn that the respondent No.2 also issued a letter to the Principal Jagannath College, Dhaka i.e. the respondent *No.6* on 30-7-90 requesting him to appear before the inquiry committee/disciplinary board on 7-8-90 along with Vice Principal, Convener and Member of the examination committee at the office of the Vice-Chancellor, Dhaka University. It was mentioned in the said letter that an inquiry committee has been formed by the University Syndicate to inquire into some allegations received with regard to irregularities and unfair

means adopted in the Degree Honors examination of 1987, which was, held in 1989 at the Jagannath College Examination Centre. The letter annexed here to as Annexure-B. The teachers' council of the day shift and night shift *of* Jagannath College, Dhaka met is an emergent meeting on 7-8-90 which was presided over by the principal of the college and the council denied all the allegations specifically and in unambiguous terms. The resolution of the said emergent meeting was sent to the Vice Chancellor and other concerned authorities of Dhaka University and demanded publication of results of the examinees, which were withheld subsequent to publication of the result. The copy of resolution annexed hereto as Annexure-C. The teacher's council stated in their resolution that the said examination was held in fair and proper manner and no illegality or irregularity or any unfair means was adopted. The council further stated in their resolution that almost all the members of the teachers' council were invigilators of the said examination and they conducted the examination in fair, smooth and peaceful manner and they also took serious objection as to the language of the letter issued by respondent No.2 i.e. the Member Secretary. The letter annexed hereto as Annexure-D. It is stated in the petition that the respondent No.1 the Controller of Examination, University of Dhaka published the result of the concerned degree honors examination on different dates in 1990, but suspended the result of 415 examiners on the plea that allegations of unfair means had been received against them and withheld their result. Subsequently the University Authority i.e. respondent No.1, the Controller of Examinations, cancelled the withholding order with regard to 192 examinees. The petitioners were asked by the respondent No. 2 to show cause about the alleged supply and submission of written answer script from outside the examination hall. The replies were submitted in due course vide Annexure-E series. It is stated that the petitioners in their reply in show cause notices categorically denied the allegations leveled against them asserting in their statements that they appeared in the examination in their specific centre and hall and that the invigilators supervised and conducted the examinations and that they deposited their answer scripts with invigilators on duty and that they also signed the scripts and also signed the register of attendance and, as such, they have in no violated Rule or Regulation of the examination. It is further stated that the petitioners were not asked to appear before the inquiry committee disciplinary board and, as such, the specific allegation nor particulars of the complaint were known to them as no specific report or particular of the basis of such allegation was supplied and the petitioners could not say any thing except denying the charge as they did. It is stated that no proper investigation/inquiry as required by the Ordinance and the Rules has been held, no opportunities of what is stated in the said show cause notices were ever given to the petitioners either orally or in writing nor any witness was produced before them to substantiate the vague and unspecified allegations set out in the said show cause notices. It is further stated that no evidence whatsoever was recorded or existed and none of the witnesses was ever produced before the inquiry committee or the Board of Discipline to substantiate the allegations leveled against the petitioners. It is stated in the petition that no specific charge sheet by way of setting out the particulars of alleged unfair means and malpractices even having been served upon the petitioners nor they had been asked to appear before the committee/board to answer the charges nor any witness or other evidence having been produced to substantiate such allegations and to their utter surprise respondent No.1 served the petitioners the order No.10312-72 (Complaint)/ examination dated 30-12-90, to the Principal of Jagannath College, Dhaka and others stating that disciplinary action had been taken against the petitioners and others in which it was stated that examination results of 176 examinees along with petitioners have been declared void and cancelled and further they had been debarred from appearing at the following year's examination to be held thereafter. In the same order 51 examinees had been exempted from the charges leveled against them vide Annexure-F. It is stated that the allegations and charges against all the examines were of the same nature; as for exLmp1e may be quoted here that charges against examines bearing Roll Nos.4209, 416, 327, 360, 435, 436 and 437 who also submitted their answer scripts being written and supplied from outside the examination centre and allegations against examines bearing Roll No.2356 and 5249 where their answer scripts did not bear the signature of the invigilator but the Committee/Board acted arbitrarily and in a discriminatory

manner taken altogether a different view with regard to the petitioners and others. It is stated that the petitioners along with others numbering nearly 200 examinees went on hunger strike until death in front of the office of the Vice Chancellor, Dhaka University starting from 29th December 1990 and demanded to review the result withheld by the Controller of Examination. All Party Students Union (Apsu) made representation to the Vice Chancellor with a prayer to withdraw the impugned order who in his turn was pleased to give word of honor that the matter would be reviewed and re-considered in a just and fair manner but nothing was done. Then the Apsu met again on 10th April, 1991 and adopted unanimous resolution by way of praying and requesting the Vice Chancellor, Dhaka University to exonerate degree honors examinees of 1989 including the petitioners from the charges leveled against them and to publish their results but with no resç1onse. It is further stated that the impugned order it's been made manifestly in violation of the principle of natural justice. The petitioners filed Writ Petition No.856 of l991 challenging the impugned order and after hearing the Rule was made absolute vide judgment and order dated 6-1 1-91 declaring the disciplinary proceeding and the impugned order dated 3 1-12-90 passed by the Controller of Examinations, Dhaka University respondent No.1 to have been made without any lawful authority and of no legal effect.

3. It is stated that as against that the respondents preferred Civil Appeal No.3 of 1992 before the Appellate Division which was heard by their Lordships along with Civil Appeal No.10 of 1992 allowing the appeal setting aside the order of the High Court Division and dismissing the Writ Petitions as not maintainable holding that the remedy available by appeal to the Chancellor is efficacious and speedy without availing the said forum writ would not lie. It is stated that the petitioners jointly filed the appeal before the Chancellor on 4-1-92 under Article 52 of the University of Dhaka in Dhaka University Order with a prayer to set aside the impugned order; the memo of appeal is annexed hereto as annexure-I. It is stated that the period of nearly $1^1/_2$ years have elapsed since the submission of the appeal before the Chancellor, University of Dhaka but received no reply; the petitioners sent several letters requesting the Chancellor to dispose of the appeal and to communicate result of the same hut till date no response has been received. Again on 8th June, 1994 through their lawyer the petitioners requested the Chancellor to dispose the appeal of the petitioners expeditiously and communicate the result thereof to the petitioners or to their lawyer within 7 (seven days from the receipt of the legal notice failing which the petitioners would have no other alternative but to seek redress by way of moving this court under Article 102 of the Constitution, Since no reply was received the Petitioners filed Writ Petition No.1125 of 1994 on 18-7-94 before this Court which was rejected summarily with an observation that the appeal is still pending before the Chancellor and, as such, the application is premature, marked as Annexure-K to this petition. Thereafter the petitioners came to learn from the notice board of Registrar's Building of Dhaka University that the petition of appeal under Rule 52 of the University Rules 1973 to the Chancellor was rejected on 6-6-94 vide Memo No.15(2)10/4/93 dated 3-7-94 without assigning any cogent reason. A copy of the said rejection order is annexed hereto as Annexure-L.

4. Respondent Nos.1-5 contested the petition by filing affidavit-in-opposition denying all material assertions in the petition. It is stated that the petitioners, were the examinees in the traditional course of Dhaka University and appeared in the Honors Examination in the year 1987 held in 1989 and completed the examination. Respondent No.1, the Controller of Examination, published the results of the concerned Honors Examinations withholding the result of the petitioners along with others, who were served with show cause notices for offences of smuggling in written answer scripts from outside and submitted the same, with direction to show cause by 11-11-90, 11-11-90, 11-11-90, 16-11-90, 10.11-90, 10-11-90, 10-11-90 and 10-11-90 respectively, as to why the appropriate disciplinary action should not be taken against them in accordance with law otherwise the matter would be disposed of ex parte. It is stated that the University authority on receipt f information of serious examination offences in traditional Honors Examinations 1987 held in Jagannath College

Centre in the year 1989 a 7-member enquiry committee was formed to investigate into the matter by the Syndicate The Principal and Vice Principal of Jagannath College, Convener & Members of the Examination Committee of that centre were all asked to meet the Enquiry Committee to help it in the matter. But instead of helping the University they took it otherwise challenging the action of the University authority lending support to the students. Subsequently, two Members were co-opted in this Committee. The said Committee after making a thorough enquiry submitted its report against 423 examinees to the Discipline Board which as per examination rules of the university asked the Controller of Examinations to issue show cause notice to delinquent examinees and they replied in time. The Discipline Board considered the explanations in the light of facts as found by the Enquiry Committee and found prima facie case of the examination offences, such as smuggling in scripts with the procured signatures of fictitious invigilators and some scripts without any signature, was established against the petitioners and some others totaling 181 examinees. The Discipline Board with the recommendations sent the record to the Syndicate for its consideration who after due consideration by a resolution dated 29-12-90 approved the recommendation of the Discipline Board awarding punishment of the petitioners and some others totaling 181 examinees. It is stated that on the prayer of the students headed by Apsu a Review Committee was also set up to look into the matter again and the Review Committee looked into the matter and submitted a report without any recommendation to revise the previous decision. It is stated that there was no violation of any Rules or principles of natural justice and the petitioners were given the opportunity of explaining their cases and their replies were found unsatisfactory and the University according to law took the appropriate disciplinary action against them. It is stated in this connection that the hand writing appearing in the replies were compared with the writings of the scripts and it became clear that the scripts were smuggled in and written out by somebody else and not by the students concerned. It is stated in the affidavit in-opposition that on the first day of examination one teacher of the Deportment of Statistics, Dhaka University at about 11-00 AM informed the Controller of Examination over telephone that scripts of Honors Examination of 1987, being Statistics on that day, were written some where in the vicinity of Dhaka University and away from the examination Hall of Jagannath College Centre. The Controller of Exanimation could not believe it; on hearing this teacher concerned accepted the challenge and told the Controller that before the scripts could go to the Jagannath College Centre he would manage to get a photocopy of script so written outside the examination hall. Subsequently he submitted that photocopy of the said script to the controller of examinations. This was immediately informed to the Vice-Chancellor. Next day with prior permission of the Vice-Chancellor the packet of script was opened in presence of the Controller of Examination in the office by the Chairman of the said examination committee. It was found and identified that the hand writing of the script tallying with that of the photocopy. It was revealed that the signature of invigilator on this script is different from those of invigilators of other scripts written in the examination Hall. On the report of this event, the Enquiry Committee as referred to above was formed to identify the smuggled in scripts. The seven man committee as referred to above along with co-opted members very laboriously scrutinized all the scripts of all the subjects of all the examinees of Honors examination in 1987 held at the Jagannath College Centre and identified the scripts which bore the fictitious signatures of fake invigilators. In the process it was found out that the scripts of a particular candidate has been written by not less than 3 fake persons not to speak of fictitious signatures of the fake invigilators. The smuggled scripts written outside the examination hall were identified by unusual signatures of the fake invigilators on the cover page of the scripts. It is stated that the report of the inquiry committee was submitted to the Vice-Chancellor who referred it to the Discipline Board, which had decided to withhold the results of the reported examinees, and to issue show cause notices to such examinees. Show cause notices were served upon the examinees specifying the charges against them that they had written their scripts outside the examination hall and they were asked to reply in writing by their own hands within the specified time, as to why disciplinary action as per rules and regulations should not be taken against them for the offences. They replied and some of them had even

admitted their offences. The handwritings in the scripts and replies were also compared. Considering the replies of the examinees including the petitioners the discipline board recommended the punishment of such examinees including the petitioners. The discipline Board very liberally and leniently recommended the punishment, which was approved by the Syndicate. The Controller of Examinations as per rules and his duties and responsibilities published the list of such punished examinees dated 31-12-90 as per practice of this University and sent copies thereat to relevant authorities concerned. It is further stated that the causes which drew the slightest doubt regarding commitment of offences were released from charges and the results of their examination were published as usual, hence out of 423 withheld examinees only 176 were punished and the rest were released and exempted.

5. Mr M. Amirul Islam, the learned Advocate for the petitioners, submits that the impugned order has been manifestly made in the impugned proceeding in violation of the principles of natural justice inasmuch as no specific allegation or charges were served upon the petitioners nor any evidence was produced to substantiate the charge or charges nor the petitioners were afforded any opportunity to refute the allegations or to cross-examine any of the witnesses. He next submits that there has been violation of the University Ordinance and the Rules as there had been no enquiry before the appropriate authority nor any resolution passed to the effect before inflicting punishment upon the petitioners. He submits that the impugned order was made in violation of the principles of natural justice as the petitioners were not given opportunity to appear before the inquiry committee/disciplinary Board to hear the charge leveled against them and to refute those charges. He submits that the petitioners moved the Chancellor of the University of Dhaka, the highest appellate authority, under Article 52 of the University Ordinance, 1973 and no action was taken by the Chancellors for over 18 months and the appeal was disposed of without any hearing nor any reason has been given for such rejection in violation of the provision of the ordinance/rules which requires the compliance with the stipulated requirements and principles of natural justice. He submits that the impugned order has been made without lawful authority inasmuch as it has been made malafide and for collateral purpose. In support of his contention he refers the case of Principal, Chittagong Medical College and others vs. Shahrayar Murshed, reported in 48 DLR (AD) 33 wherein their Lordships observed:
‘Fair compliance of the rule of natural justice - the first requirement of the rule is that the person to be proceeded against must be made aware of the allegations against.’

The learned Advocate also referred the case of the University of Dhaka through its Vice-Chancellor, and the Registrar vs Zakir Ahmed, reported in 16 DLR (SC) 722 wherein it has been held:
“Natural justice-Rule of audi alrerãm partem ie, natural justice requires that before a person is punished, an opportunity to show cause against the proposed punishment should be afforded to him-Student guilty of misconduct unless such misconduct takes place in the view of the authority should not be punished without a show cause opportunity- Bodies, such as educational institution or police authority, charged with enforcing and maintaining discipline are not absolved from observing principles of natural justice.”

6. Dr. Rafiqur Rahman, the learned Advocate for the respondent Nos.1-5, submits that they were served with show cause notices on different dates as to why appropriate disciplinary action should not be taken against them in accordance with law for the offence or smuggling in scripts and accordingly, the petitioners replied to the show cause notices Annexure-E series to the main petition. He further submits that on receipt of information of serious examination of offence at Jagannath College Centre in the year 1987 a 7-member Inquiry committee was formed to investigate into the matter by the Syndicate. The Principal and Vice-Principal of Jagannath College, Convener & Members of the Examination Committee of that centre were all asked to meet the Enquiry Committee to be held in the matter. But instead of helping the University, they took it otherwise challenging the action of the University lending support to the students. Subsequently two members were co-opted in this committee. The said committee after making a thorough inquiry submitted its report against

423 examinees to the Discipline Board as per examination rules of the University. The Discipline Board considered the explanations in the light of the facts as found by the Enquiry Committee and found prima facie case of the exanimation offences such as smuggling in scripts with the procured signatures of fictitious invigilators and some sue h scripts without any signatures was established against the petitioners and other 181 examinees and recommended to the Disciplinary Board for awarding punishment to the petitioners and others. He submits that the Disciplinary Board with its recommendation sent the record to the Syndicate for its consideration and the Syndicate after due consideration by way of resolution dated 29-12-90 approved the recommendation of the Disciplinary Board awarding punishment of the petitioners. Furthermore, he submits that on the prayer of the students for review to the Vice- Chancellor a review Committee was also formed and the Review Committee also found nothing calling for revision to the previous decision and sent it back to the Syndicate maintaining its previous recommendation which was previously approved by the Syndicate. In the written replies to the show cause notices submitted by some of the students admitted the offences leveled against them. He further submits that the writings in their own hand' in the reply submitted by the students were compared by the committee with the scripts and found that those were in different hands. He submits that there was no violation of the principle of natural justice and the petitioners were given ample opportunity to defend themselves. The learned Advocate next submits that admittedly the cases which drew slightest doubt regarding commission of offences were released from charge and the results of their examination were published as usual and out of 423 withheld examinees only 176 were punished including the petitioners, 6 are still withheld for more punishment and the rest are exempted and released. The learned Advocate for the respondents submits that all the averments made in the affidavit-in-opposition have not been controverter by any counter-affidavit by the petitioners. All these facts show, Dr Rahman submits that there was no violation of natural Justice as contended by the learned Advocate for the petitioners. He further submits that all requirements of natural justice had been complied with while dealing with case of the petitioners. In support of his contention he referred the case of Suresh Koshy George vs University of Kerala and others repotted in AIR 1969 page 198 relevant paragraph 11 wherein it has been held:

'The requirements of natural justice in case of an enquiry of this kind are, first, that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. There is really nothing more,'

The learned Advocate referred the University of Dhaka Calendar Part-II, chapter XLII wherein Article 1 Examination Offences and Disciplinary Action, which are as follows:

The following shall be considered as Exanimation offences:

1.

(i) .....

(ii) .....

(iii) .....

(iv) .....

(v) .....

(vi) .....

(vii) .....

(viii) .....

(ix) Smuggling of script into and out of Examination Hall,

(x) Writing of answer-script in an unauthorized place,

(xi) Replacing the cover or any page of the answer script,

(xii) .....

(xiii) .....

(xiv) .....

(xv) .....

(xvi) .....

2. Disciplinary action in the form of cancellation of the examination and debarring for appearing at the subsequent examinations shall be taken by the Syndicate on the recommendation of the Discipline Board against the examinees who commit an examination offence as defined above.

3. In making the recommendation, the Discipline Board shall follow the under-mentioned principles:

(i) .....

(ii) .....

(iii) .....

(iv) .....

(v) Examinees who use abusive language or hold out threats to the Chief Supervisor/Officer-in-Charge/Invigilator or any other person in the precincts of the Examination Hall, smuggle answer-script into and out of the Examination Ha]l, or replace the cover or any page of answer script, substitute one answer script or part thereof for another, or add to an answer script any extra page with answer not written by him in the Examination Hall during Examination period, shall be debarred from appearing at three more Examinations in addition to the cancellation of the examination concerned.

4. .....

5. .....

6. .....

7. Any other case not covered by the above Ordinances shall be dealt with by the Discipline Board as it deems fit of such provisions in the Rules, he submits, that though severe punishment of debarring for 3 years has been incorporated but the authority concerned took a lenient view debarring them for only one year which has taken effect from 29-12-90 long before issuance of the Rule on 4-9-94. He next referred section 52 of the Dhaka University Order, 1973 in the Calendar Part-I, which reads as follows:

“52(1) an appeal against the order of any officer or authority of the University affecting any person or class of persons in the University may be made by petition to the Chancellor who shall send a copy on receipt of the petition thereof to the officer or authority concerned and shall give such officer or authority an opportunity to show cause why the appeal should not be entertained.”

(2) The Chancellor may reject any such appeal or may, if he thinks fit, appoint an Enquiry Commission consisting of such persons as arc not officers of the University or members of any authority thereof, to enquire into the matter and to submit to him a report thereon.

(3) The Chancellor shall, on receipt of the Enquiry Commission’s report, send a copy thereof to the Syndicate and the Syndicate shall take the report into consideration and shall, within three months of the receipt thereof, pass a resolution thereon which shall be communicated to the Chancellor, who shall then take such action on the report of the Enquiry Commission and resolution of the Syndicate as he may think fit.

(4) An Enquiry Commission appointed under clause (2) may require any officer or authority of the University to furnish it with such papers or information as are, in the opinion of the Enquiry Commission, relevant to the matter under enquiry, and such officer or authority shall be bound to comply with such requisition.”

Referring to the aforesaid Rule Dr Rafiqur Rahman submits that an appeal against the order of any officer or any authority of the University or class of persons may be made by a petition to the Chancellor. But here the present petitioners did not prefer any appeal to the Chancellor as provided under the aforesaid order. He referring the Annexure-1 of the main petition submits that the petitioners before us did not file the appeal but somebody else on their behalf preferred the appeal. Their Lordships in their judgment in Civil Appeal Nos.8 and

10 of 1992 while allowing the appeals dismissing the Writ Petitions on point of maintainability observed that before filing Writ Petition they did not avail the alternative forum by filing the appeal as provided in Article 52 of the University Order, 1973. He submits that any person or any student aggrieved by any order must avail the forum by way of an appeal under Article 52 of the University of Dhaka Order, 1973 and since these petitioners did not prefer any appeal their Writ petition is not maintainable.

7. In this Writ Petition the petitioners were charged for malpractice and to have committed examination offence by smuggling in the scripts written from outside with signatures of fictitious invigilators. The submission of Mr. Aminul Islam that on such allegation the petitioners were not given any show cause notice before issuance of the final order though initially they were informed about the charges and allegations and asked to show cause in writing. We have checked up the Dhaka University Order, 1973 both in Calendar Part I and II. No where it has been provided either in Article 52 of the University Order or Dhaka University Ordinance or Regulation in Calendar Part II chapter XLII for such notice before issuance of final order. The submission of Mr. Islam regarding such notice is of no substance. The question of violation of natural justice advanced by the learned Advocate for the petitioners that no opportunity of defending themselves were given to the petitioners is also of no substances. It appears that admittedly from Annexure-E series in replies to the show cause notice to the petitioners they themselves in their own hand writing, as directed prayed for mercy and some of them admitted their guilt. In the affidavit-in-opposition the respondents have categorically stated that 7 (seven) members inquiry committee was formed with 2 other co-opted Members who after thorough inquiry submitted report against 423 examinees as per Examination Rules of the University asked the Controller to issue a show cause notice and in the light of the facts as found by the Board prima facie case of examination offences, i.e. smuggling in scripts with the procured signatures of fictitious invigilators and some such scripts without any signatures was established against the petitioner and some others and the Discipline Board with its recommendations sent the record to the Syndicate for as consideration. It was duly considered by the Syndicate which by its resolution dated 29-12-90 approved the recommendation of the Discipline Board awarding punishment of the petitioners and some others totaling 181 examinees. It further appears according to representation of Apsu and the students to the Vice-Chancellor for reconsideration a review commute was formed and review committee did not find anything to revise the previous destruction and out of the 423 examinees only 176 including the petitioners were punished. It further appears that- the hand writing appearing in the replies to the show cause notices were compared with the writings of the scripts and it became clear that the scripts were smuggled in and written out by somebody else and not by the concerned student examinees. There is no counter-affidavit against these averments filed by the petitioner to controvert these facts stated therein in the affidavit-in-opposition, Article 52 of the University of Dhaka Order 1973 provides for an appeal against an order of any officer or authority of the University affecting any person or class of persons in the University may be made by petition to the Chancellor but here admittedly the present petitioners numbering 8, who arc affected, did not prefer any appeal before the Chancellor as provided by the aforesaid Article. Rather it appears that one Mohinuddin who is not petitioner before us in this Writ petition filed an appeal vide Annexure-L to the petition which after due consideration was rejected. Mr Amirul Islam, the learned Advocate, tried to make out a case that one person can file appeal on behalf of others but we find from the reading of Article 52 of the Dhaka University Order, 1973 that it is not provided therein that an appeal can be flied by a person on behalf of others in the representative character. There is also no substance in the submission of the learned Advocate for the petitioners. Their Lordships in the Civil Appeal Nos. 8 and 10 of 1992 observed while allowing the appeal dismissing the Writ Petition Nos. 668 and 1560 of 1991 filed earlier on the ground of maintainability as the alternative remedy as provided in Article 52 of the University Order, 1973 have not been availed by the petitioners. Admittedly this present petitioners did nor file any appeal as provided aforesaid and without preferring appeal, the petitioners who are affected, preferred

this Writ petition. In view of the finding of their Lordships in Civil Petition Nos. 8 and 10 of 1992 we hold that this Writ petition is not maintainable.
In the result the Rules discharged without any order as to costs. (50 DLR, 1998. pp. 567)

COURT CASE - 6

Professor Dr. M. A. Hadi
Vs.
Bangladesh and others (June 10th, 1997)

Constitution of Bangladesh, 1972, Article 102.
Dhaka University Order, 1973 (PO 11 of 1973.

Judgment

This Rule Nisi was issued calling upon the respondents to show cause why the impugned order as contained in Annexure-C should not be declared to have been made without lawful authority and is of no legal effect.

2. The facts, as stated in the petition, in short, are that the petitioner is a reputed physician and served in many capacities including as an 'Urologist in Dhaka Medical College with additional duty of the Principal of the same College. He was eluted Dean of the Faculty of Medicine for two Sessions 1995-96 and 1996-97 on 30-9-95 under Article X7(5) of the Dhaka University Order, 1973. He was also elected for the first time for the year 1994-95 and 1995-96 (Annexure 'A' and A(l). The petitioner was transferred to Health Directorate, Maahakhali, Dhaka as a Director of the same Hospital on 18-7-96 (Annexure-'B'). After his transfer the petitioner received a letter from the respondent No. 3 Registrar, Dhaka University, intimating him that Dr. Syed Modassir Ali, Professor of Eye Department, Dhaka Medical College had been appointed in his place as the dean of the Faculty of Medicine, Dhaka University under Article 17(2) of Dhaka University Order, 1973 on 14-8-96 (Annexure-'C'. Thereafter, the petitioner sent a letter dated 24-8-96 to the respondents demanding justice but to no avail.

3. Being aggrieved by the appointment of Syed Modassir Ali as the Dean of the Faculty of Medicine the petitioner moved this Court and obtained the Rule.

4. The respondent No. 3 after receiving the writ of summon cancelled the impugned order by an order dated 9-9-96 (Annexure-'E' to the Supplementary Affidavit). Since a stay order was granted along with the Rule by this court on 26-8-96 the petitioner presided over several meetings as the Dean of Medicine, held between 9-2-97 to 10-5-97. The petitioner also claims that he is still working as a Professor of the Medical Education. In this connection he has annexed the certificate from Professor MH Molla, Director, and Centre for Medical Education, Mahakhali, Dhaka (Annexure-V) to *the* effect that "Professor M.A. Hadi has been working as Professor of Medical Education (Curriculum Development & Evaluation). Centre for Medical Education, Dhaka from 28-8-96 to till date".

5. Respondent Nos. 2 and 3, Vice-Chancellor, Dhaka University and Registrar, Dhaka University respectively by filing an affidavit-in-opposition denied the material allegations made in the -writ petition and claimed that the petitioner was transferred as a full time employee under the Health Directorate. Therefore, he cannot remain as a Dean of

the Faculty of Medicine under the provisions of the Dhaka University Order, 1973. It is also claimed that on transfer to a full time position under the Health Directorate the petitioner ceased to remain a Professor or an Associate Professor of Dhaka Medical College and thereby the petitioner has lost his right to act as the Dean.

6. The grounds taken in the writ petition is that the impugned order was made in gross violation of Dhaka University Order (President's Order 11 of 1973). The impugned order is malafide or that it amounts to colorable exercise of powers. The petitioner is still the Dean of Faculty of Medicine as he never remained absent for a period, not exceeding 90 days a**s** contemplated under Article 17(2) of the first statutes of the Dhaka University Order, 1973. Therefore, his elected post can not be taken away before the expiry of the period for which he is elected. The petitioner being an elected person has a special status both as a Professor and an elected Dean therefore; Article 52 of the President's Order 11 of 1973 is not applicable in his case.

7. Mr. Abdul Halim Chakladcr, the learned Advocate appearing for the respondent Nos. 2 and 3, on the other hand, contested the Rule on the ground of its maintainability. He has submitted that equally efficacious remedies are available to the petitioner under Article 52 of the Presidents Order No. 11 of 1973 by way of appeal to the Vice-Chancellor or by going to the Administrative Tribunal as the petitioner is a Government servant. But the petitioner did not exhaust them before coming to this court. He further submits that after his transfer to the medical institute of Mahakhali Health Directorate the petitioner ceased to be the Dean of the Faculty of Medicine.

8. As regards the question of maintainability the learned Advocate for the respondents has referred us to the case of *Controller of Examination vs. Mohiuddin* reported in *44 DLR (AD) 305* wherein it has been held that if a person is affected by an action of the University authority he will be a person under Article 52 of President's Order 11 of 1973 and such a person has a right to challenge the order of the University authority in an appeal to the Vice-Chancellor.

Article 52 provides that,
"**52(1):** An appeal against the order of any Officer or authority of the University affecting any person or class of the University may be made by petition to, the Chancellor who shall send a copy of receipt of the petition thereof to the Officer or authority concerned and shall give such Officer or authority an opportunity to show cause why the appeal should not be entertained.
(2) The Chancellor may reject any such appeal or may, if he thinks fit, appoint an Enquiry Commission consisting of such persons as arc not officers of the University or members of any authority thereof, to enquire into the matter and to submit to him a report thereon.
(3) The Chancellor shall, on receipt of the Enquiry Commission's report, send a copy thereof to the Syndicate and the syndicate shall take the report into consideration and shall within three months of the receipt thereof, pass a resolution thereon which shall be communicated to the Chancellor, who shall then take such action on the report of the Enquiry Commission and resolution of the syndicate as he may think it."

9. Article 9 of President's Order No.11 of 1973 gives a list of persons who are be considered as the Officers of the University. This includes the Deans of the Faculty also. Article 27(1) provides that the University shall include the Faculties of Arts, Science, Special Science, Commerce, Law and Medicine. Article 27(x) provides that there should be a Dean of each Faculty who shall be subjected to the control and general supervision of the Vice-Chancellor and be responsible for the due observance of the Statutes, Ordinance and Regulation relating to the, faculty. Article 27(5) lays down that the Dean of Faculty shall be elected from among the Professors and

Associate Professors by all teachers belonging to the Department within the faculty and shall hold office for two academic years. Therefore, a Dean of the University is very much a person under Article 52 and President's Order 11 of 1973.

10. In the aforementioned case some students of the University seeking relief on the ground that they were affected by an order of the Authority of the University were held to be persons with the right to challenge an order of any Authority of the University in an appeal to the Vice-Chancellor. In the instant case the Dean of the Faculty of Medicine being the Officer of the University is in a better footing than these students in order to be considered as a person under Article 52 of President's Order 11 of 1973. The remedy provided under Article 52 is equally efficacious. It provides for enquiry by a commission consisting of such persons who need not be officers of the University. The report of the enquiry commission is required to be given within three months and then placed before the Syndicate. Therefore, it appears that the procedure followed in dealing with an appeal filed by a person to the Vice-Chancellor is not cumbersome. It is equally efficacious and the petitioner should have exhausted the alternative remedy of 'appeal to the Vice-Chancellor before coming to this Court.

11. In view of the above, we are of the opinion that the writ petition is not maintainable. In the result, the Rule is discharged without costs. Since the writ petition is discharged on the ground of maintainability we do not think it is necessary to go into the merits of the case. (50 DLR, 1998. pp. 218)

COURT CASE – 7

Farzana Haque
Vs.
University of Dhaka, represented by the Registrar, Dhaka University, Dhaka and others (August 21, 1989)

Constitution of Bangladesh, 1972 (as amended upto date)
The Dhaka University Order, 1973 [Persident’s Order No. 11 of 1973]
Dhaka University (amendment) Ordinance, 1986
Dhaka University Order (P. O. No. 11 of 1973).

Judgment

This Rule arises out of an application under Article 102 of die Constitution challenging the validity of an order issued by the Respondent No. l the University of Dhaka, on 23rd September, 1987, under the signature of its registrar expelling the petitioner from the University.

2. According to the averments in the Writ petition, the petitioner had been a student of the University of Dhaka in M.A. Class in the Department of philosophy. He appeared at the final examination held in 1987 but his results have been with held. He had also been a student in die course of Diploma-in Library Science of the said University. The petitioner claims to have passed the S.S.C., the H.S.C. and the Bachelor of Arts Examinations with good results. He also claims to have been a good debater and the extempore speaker. He is also alleged to have taken active parts in the corporate activities of the University and is alleged to have participated in developing the cultural and corporate life of the students of the Mohsin Hall of the University of Dhaka in which he was a resident student. During his career as a student he was attracted to the political philosophy propounded by the late President Ziaur Rahman who set up a political party under the name, Bangladesh Nationalist Party and

became an active member of its student's wing named Bangladesh Jatiyatabadi Chhatra Dal. He devoted himself to peaceful and constructive politics shunning all sorts of violence and became its organizing secretary. Under his organizing capacity tile Bangladesh Jatiatabadi Chhatra Dal became very influential and in order to counteract its influence another political party, the Jatiya Party, set up two students organizations in the University of Dhaka, namely, Chhatra Samaj and Juba Sanghati. Along with these another rival organization named Chhatra League controlled by another political party named Jatiya Samajtantrik Dal created terror and panic in the University by indulging in use of various types of arms including fire-arms against the students and, particularly, against the supporters of the Bangladesh Jatiyatabadi Chhatralal. The authorities of the University of Dhaka and particularly, its Vice-Chairman, were sympathetic to these organizations and they supported them in their destructive and violent activities with a view to suppressing the organization of the petitioner. In the month of June, 1987, these organizations created serious disturbances in the University and as a result of machinations and Conspiracy of the Vice -Chancellor and these rival organizations the Petitioner was arrested by the police on 12.9.87 and on 15.9.87 he was produced before a Magistrate and was informed that an order of detention under section 3 of the Special Powers Act, 1974 had been passed against him and since then he has been in detention in the Dhaka Central Jail. On 20.9.87 he came to know through two newspapers, the Ittefaq and the New Nation, that he along with some other students had been expelled from the University and that they had been declared as undesirables and non-students of the University of Dhaka. The petitioner then contacted the University Authorities through his wife in Order to get detailed particulars about his expulsion but could not succeed. Then his wife somehow secured the order of expulsion signed by the Registrar of the University and the copy of the order of expulsion is at Annexure 'E'. He then contacted the Registrar of the University through his Advocate requesting to supply the charges against him and all other connected papers but failed to secure any paper from the University Authorities relating to the punishment imposed on him. It is alleged in the Writ petition that the petitioner was never informed of the charges leveled against him nor was ever heard before imposition of the punishment The order of expulsion, according to him, is illegal, arbitrary, malafide and void.

3. As against the above order of expulsion, he has filed this Writ petition challenging the order on various grounds and obtained die present Rule.

4. In the affidavit-in opposition by the respondent Nos. 1 to 4, apart from general denial of almost all of the allegations made by the petitioner, it has been stated by the respondent Nos. I to 4 that far from being a student believing in constructive politics shunning all sorts of violence the petitioner was a terror in the University. Since admission in the University he has been indulging in the use of firearms against rival students. It has further been stated that between 27.6.87 and 29.6.87 the petitioner along with others created/terror by free use of fire-arms and by perpetrating grievous assaults on other students in two Halls namely, Mohsin Hall and Surja Sen Hall. Having no other alternative the Vice-Chancellor appointed an Enquiry Committee to investigate into the matter in order to ascertain as to who had been creating disturbances on those days in the University. The Enquiry Committee held an inquiry and submitted a report fixing responsibility on tile petitioner and others. Thereafter, the Vice-Chancellor forwarded the report of the Enquiry Committee to the Discipline Board of the University. The Discipline Board duly considered the report and framed various charges against the petitioner and others and sending copies of the charges to the petitioner asked him to show cause but he did not appear to show any cause. The Discipline Board then placed die matter before the Syndicate with its recommendation and after due consideration the syndicate, by adopting a resolution on 19.9.89, expelled the petitioner and others from the University of Dhaka. The Registrar simply communicated the decision of the Syndicate to the petitioner by the impugned memo No. 20208-24 dated 23.9.87.

Mr. Mirza Golam Hafiz, the learned Advocate appearing on behalf of the petitioner, has, first of all, challenged the impugned order on the ground that the petitioner had been illegally

found guilty of misconduct and breach of discipline for using firearms in the University Campus and thereby creating terror among the students and others because, “use of fire-arms and creation of terror among the students” are neither “misconduct’ nor “breach of discipline” within the meaning of “misconduct” and “breach of discipline” as defined in the Dhaka University Order, 1973 and the Dhaka University Ordinances and Regulations, and as such, the entire proceeding taken against the petitioner was based upon a misconception of “misconduct” and “breach of discipline.” by the Vice-Chancellor, The alleged activities for which the petitioner has been proceeded against cannot, therefore, be construed as misconduct and consequently, the whole proceeding and the impugned order had been illegal and without jurisdiction.

5. As against this, Mr. Asrarul Hossain, the learned Advocate appearing on behalf of the respondent Nos. 1 to 4, while conceding that the activities with which the petitioner had been charged were not specifically mentioned as “misconduct” or “breach of discipline” in the Dhaka University Order or the Ordinances and Regulations the conduct and the activities of the petitioner were nonetheless serious misconduct and breach of discipline. He has also argued that the code of conduct of the students in the Dhaka University Order 1973, and the Dhaka University Ordinance and Regulations arc not exhaustive so as to exclude such acts of misconduct and breach of discipline as are not specifically mentioned therein.

6. The Dhaka University Order, 1973 (President’s Order No. 11 of 1973) is silent about the meaning of “misconduct” and “breach of discipline” and about the procedures to be followed in case of misconduct and breach of discipline committed by the students of the University except in clause (m) of Article 4 thereof where it lays down the powers of the University regarding maintenance of discipline among the students in a few words as follows: “4. The University shall have the powers: (m) to supervise and control the residence and discipline of the students of the University.”

7. The provisions relating to conduct of and discipline among the students and the procedures for appropriate action against those who are accused of breach thereof are available in Chapter IX Part I of the University Ordinances and Regulations published in the Dhaka University Calendar Part Il, 1986 page 26. In this Chapter there are as many as 35 Rules, Rules 1 to 4 relate to departure from and arrival to the Houses and the halls of the University by the students, gate-book, roll calls, etc. Rule 5 relates to damage of University properties. Rule 6 relates to return of students to the Hall after vacation. Rule 7 relates to change of seats by the students. Rules 8 and 9 relate to entertainment of guests in the Hall by the students, Rule 10 relates to the Dining Hall and Rule 11 relates to the furniture and other properties of the Hall including the Dining Hall. Rule 12 imposes prohibition against employment of private servants by the students and Rule 13 forbids any assault on any Hall servant by the students. Rule 14 prohibits cycling in the verandahs of the Halls. Rule 15 instructs the students to keep their rooms clean and tidy. Rule 16 lays down the/provisions regarding payment of dues. Rule 17 encourages out-door exercises by the students. Rule 18 lays down the procedures of submitting applications, representations and complaints by the students. Rule 19 relates to the procedure of publishing notices, etc. Rules 20 to 25 impose restrictions on formation of clubs, holding of meetings, publication of articles, holding of functions, etc. Rules 26 and 27 relate to prayers, appointment of Imam, etc. Rule 28 is about Hall union funds, etc. Rule 29 is about drawing and disbursing of University money allotted the Halls, Rule 30 relates to the libraries attached to the Ha1ls. Rule 31 and 32 are about Hall dues. Rule 34 is about clearance of Hall dues and return of books of the University library. Rules 33 and 35 arc some-what relevant to our purpose and a such, these arch quoted below:

“33. Students committing serious offences, such as, absence without leave from the Hall, holding any meeting without the approval of the Provost and introduction of any person unauthorized by the Provost into the Hall, will be subject to disciplinary action which may involve expulsion from the Hall.”

"35(a) The results of a student who is appearing or has appeared at any Examination conducted by the Dhaka University may be withheld for any of the following reasons:
(i) if the student in question has liability the University:
(ii) if disciplinary proceedings are pending against him/her
(b) For misconduct or any act prejudicial 10 discipline the syndicate may withhold the result."

8. Mr. Mirza Golam Hafiz wants to say that none of the three specific charges leveled against the petitioner as at Annexure W (1) that the petitioner along with others being armed with deadly weapons such as, S.M,G.s, Sten-Guns and Rifle, took position at the gate of Mohsin Hall on 20th June, 1987 (2) that the petitioner along with others opened indiscriminate fire on the students of Mohsin Hall and Surjya Sen Hail, ransacked their rooms and assaulted them on 25th June, 1987; (3) and that the petitioner attacked the Vice-chancellor and abused him, arc not covered by the aforesaid University Ordinance and Regulations and cannot, therefore, be construed as 'misconduct' or 'breach of discipline'.

9. The following view expressed by His Lordship Sattar, J, in *Zakir Ahmed Vs. University of Dhaka, reported in 16 DLR 361* on which Mr. Mirza Golam Hafiz himself has relied for formulating his points in this case, is a complete answer at least to his Contention that 'misconduct and 'breach of discipline' by the students of the Dhaka University mean only those acts of omission and commission which are covered by the above quoted rules in the University Ordinance and Regulations:

"It is indeed inconceivable that there can be an exhaustive code of discipline for a University. The provisions of this chapter clearly indicate that some obvious acts of indiscipline have not been specifically mentioned. Absence of provision for punishing a student for assaulting a teacher in a classroom may be cited as one of the numerous illustrations that strike us readily in this connection. Can it be argued that such an act is not an act of indiscipline within the meaning of the provisions of the Dhaka University Act, 1920 and the Statutes and Ordinances framed there under? We have no hesitation to answer it in the negative and that, we think, clinches the issue leaving no room for doubt that these provisions are not exhaustive in regard to discipline…."

10. Similarly, we have no hesitation to hold that the present University Ordinances and Regulations are by no means an exhaustive code of conduct of the students and misconduct and breach of discipline include many more acts of omission and commission, according to the nature of each such act, which are not specifically mentioned in those Ordinances and Regulations. We have also no hesitation to hold that the acts, which the petitioner was charged with, would, if established, amount to serious misconduct and breach of discipline.

11. The next ground on which Mr. Mirza Golam Hafiz has attacked the impugned order is that the Vice Chancellor was not empowered under the Dhaka University Order, 1973 or under the Dhaka University Ordinance and Regulations to appoint an Enquiry committee to enquire into the allegations against the petitioner as there is no provision to appoint such Enquiry Committee. In this connection, Chapter Vll of the Dhaka University Ordinances and Regulations is relevant. Chapter VII of these Ordinances and Regulations published in the University of Dhaka Calendar, Part II, 1986, provides the procedures regarding establishment of the Discipline Board and regarding disciplinary action against the students. Rules 1 to 4 of this Chapter provide for constitution and powers of the Discipline Board. Rule 6 of this Chapter relating to initiation of proceedings against the students by the Vice-Chancellor runs as follows:

'6.' Save as provided for in section 8 below, whenever the Vice-Chancellor is of opinion that there has been a case of breach of discipline or a case of misconduct which requires the expulsion of a student from the University for more than twelve months to be counted from the date of the order of expulsion, he shall refer the matter the Board and place the

recommendation of the Board before the Syndicate. Thereupon, the Syndicate shall either accept the recommendation of the Board or refer it back to the latter for reconsideration. In making this reference the syndicate may recommend to the Board for consideration of such point or points as the Syndicate may think fit to suggest to it. The Vice-Chancellor shall lay before the Syndicate the recommendation of the Board after its reconsideration of its previous decision, in the light of the suggestion or suggestions, if any, made to it by the Syndicate. The Syndicate shall then either accept the recommendation, or pass such order thereon, as it may think fit."

12. Mr. Mirza Golam Hafiz has argued that Rule 6 quoted above simply empowers the Vice-Chancellor to refer the matter to the Discipline Board if he is of opinion that there has been a case of breach of discipline or a case of misconduct which requires the expulsion of a student from the University for more than twelve months and as there is no provision in the University Ordinances and Regulations to appoint any Enquiry Committee, the setting up of the Enquiry Committee by the Vice-Chancellor for the purpose of enquiring into the allegations against the petitioner was absolutely illegal and without jurisdiction vitiating the whole proceedings. Rules 6 of Chapter VII of the University Ordinances and Regulations lays down that the Vice-Chancellor has first of all to form an opinion that there has been a case of breach of discipline or a case of misconduct which requires the expulsion of a student for more than twelve months before he takes further action but in these Ordinances and Regulations no procedure has been laid down as to how he should form his opinion. It, therefore, appears that in absence of any specific provision the procedure, which the Vice-Chancellor should adopt to form his opinion, has been totally left to his discretion. Therefore, in order to form his opinion the Vice-Chancellor may adopt any procedure which he may deem fit according to the nature of each particular case. In this connection, the best authority is the Privy Council decision in *University of Ceylon Vs. Fernando, reported in (1960)1 AER, 631* which case has also been discussed and considered by this Court in the case of *Ztikir Ahmed Vs. The Univcrsity of Dacca reported in 16 DLR, 361* and by the Supreme Court of Pakistan in the same case rcxrted in *1965 PLD,* 90. In the case before the Privy Council certain allegations of unfair means in an examination were made against a student of the University of Ceylon and in order to satisfy himself as to the truth or otherwise of the allegations, the Vice-Chancellor appointed an Enquiry Committee to hold an enquiry. It was contended that there being no provision in the General Act of the University of Ceylon for constituting such an Enquiry Committee the action of the Vice-Chancellor was illegal. Overruling this contention their Lordships held, 'Turning now to the actual terms in which the Vice-Chancellor is invested with the quasijudicial function here in question, it is to be observed that all that clause 8 provides is that where the Vice-Chancellor is satisfied that any candidate has acquired knowledge of the nature or sub- stance of any question or the content of any paper before the date and time of the examination' the Vice-Chancellor.....shall report the matter to the Board of Residence and Discipline...' The clause is silent as to the procedure to be followed by the Vice- chancellor in satisfying himself of the truth or falsity of given allegation. If the clause contained any special directions in regard to the steps to be taken by the Vice-chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed, it is for him to determine the procedure to be followed as he thinks best, but, to adapt to the present case the language of the judgment of this Board in De Verteuil v. Knaggs (9), subject to the obvious implication that some form of inquiry must be made such as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out. As was said by LORD SHAW OF DUNFERMLINE in Local Government Board V. Arlidge (10), of the authority there concerned it....."must do its best to act justly, and to reach just ends by just means. If a status prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means."....,

13. Respectfully agreeing with the views expressed above, we are of opinion that in absence of any specific provision the Vice-Chancellor was competent to adopt any means including

formation of an Enquiry Committee in order to form his opinion required for application of Rule 6 of Chapter VII of the University Ordinances and Regulations. The only condition is that the means were just. It cannot be said that appointment of an Enquiry Committee was not just means. We, therefore, hold that by appointing the Enquiry Committee and by acting on its findings the Vice-Chancellor did not commit any illegality.

14. In the next place, it has been argued by Mr. Mirza Golam Hafiz that the University Authority, and, particularly, the Vice-Chancellor acted with gross malafide intention against the petitioner and in this connection, he has mainly relied on the correspondences made by the Advocate for the for petitioner for particulars and connected papers and reply of Registrar to these correspondences. The first respondent of the Advocate of the petitioner addressed to the Registrar of the Dhaka University is at Annexure-B. The date on which this letter was written is very relevant for the purpose of decision on the question of malafide. The date is 5.10.87. By this letter Mr. Abdul Barek, the learned Advocate on behalf of the petitioner, requested the Registrar of the University of Dhaka to furnish the impugned order of expulsion, the copy of the notice to show cause, if any, enquiry report, if any, and other connected papers of the proceedings against the petitioner so that appeal or review might be preferred before the proper authorities. The reply of the Registrar of the University to this letter is at Annexure-C dated 10.10.87 and by this, he informed the learned Advocate that there was no such student named Sanaul Huq alias Niru in the Dhaka University and as such, it was not possible for him to furnish the papers sought for. It also appears that Mr. Abdul Barek, the learned Advocate, issued another letter to the Registrar of the Dhaka University which is at Annexure-D on 17.10.87, giving detailed particulars of the petitioner and again requesting to furnish the necessary papers to him. The Registrar of the University or any other authority of the University did never reply to this correspondence. Mr. Mirta Golam Hafez, the learned Advocate for the petitioner, has argued that this conduct on the part of the Registrar of the Dhaka University clearly showed the malafide intention of thc Vice-Chancellor and the members of the Syndicate. We are unable to accept this contention, because, first of all, even if it is conceded that the Registrar acted in a malafide manner this act took place long after the impugned order of expulsion had been passed and, secondly, malafide action of the Registrar cannot vitiate the action taken by the Vice-Chancellor or the members of the Syndicate. In order to establish malafide on the part of public function arises malafide must be conclusively established and cannot be readily inferred. On the other hand, a perusal of the affidavit-in-opposition shows that before taking the impugned action the Vice-Chancellor constituted an Enquiry Committee consisting of certain teachers of the University. It further appears that the Syndicate deliberated on the Enquiry Report and then came to a finding as to the guilt of the petitioner and then imposed the impugned punishment on him. It further appears that under the signature of the Secretary of the Dhaka University Discipline Board several notices were dispatched to the petitioner directly to show cause against the proposed penalty. We will, however, consider these notices at the relevant time but the fact that the Discipline Board dispatched notice to the petitioner shows that there was no malice against the petitioner in the minds of the Vice-Chancellor and the members of the Syndicate. In view of the above, we are unable to accept the contention of the learned Advocate for the petitioner that the impugned order of expulsion was passed against the petitioner by the Vice Chancellor and the members of the Syndicate with malafide intention and in malafide manner.

15. Mr. Mirza Golam Hafez, the learned Advocate for the petitioner, has, last of all, attacked the pugned order alleging that no opportunity was given to the petitioner to show cause against the punishment and he was condemned unheard in violation of the principles of natural justice. Mr. Mirza Golam Hafiz has placed reliance on a number of decisions of this Court and has mainly based his case on the principles laid down by this Court in *Zakir Ahmed Vs. The University of Dhaka reported in 16 DLR 361* and by the Supreme Court of Pakistan in same case reported in *1965 PLD (SC)* 90.

16. In Zakir Ahmed's case similar question as this case was involved and it was argued on behalf of the University of Dhaka that the principle underlying *audi alteram partem* was not applicable in case of disciplinary proceedings initiated by Administrative Authorities. This contention was advanced in this Court as well as in appeal before the Supreme Court of Pakistan and both the Courts concurrently held that the contention was fallacious. After exhaustively considering Tariq Transport Co., 11 DLR (SC) 140; Farid Sons Ltd. 13 DLR (SC) 233,' Ghansyam Das Vs. Board of high Schools, AIR 1956 Allahabad, 5396 and AIR 1962 (SC) 1110; Province of Bombay Vs. Khushlal Das, 1950 S.C.R., 621; Dipa Pal Vs. University of Calcutta, AIR 1952 Calcutta, 595, C. Das Gupta Vs. Buoyranjan Raks hit, AIR 1953 Calcutta, 212; Ridge Vs. Baldwin 1963 WLR 935; and University of Ceylon Vs. Fernando 1960 1 AER 631; his Lordship Sattar, J, while speaking for a Full Bench of this Court in the said case, 16 DLR, 361, observed as follows:

"Mr. Pal has argued that since the impugned order has been passed *ex parte* without notice to the petitioner, it is violation of the principles of natural justice and as such void. Learned Advocate's contention is that the principle underlying the maximum *audi alterarn partem* applied in the present case, and since the Syndicate took the decision without giving the petitioner an opportunity to place his case, the order made by it cannot he sustained. Learned Counsel for the respondents, however, has contended that, since the impugned action of the University is of an administrative nature, the principle that 'No man should be condemned unheard has no application. It has further been argued that in matters of discipline the maxim audi alteram partem is not attracted. In support of this contention, reliance has been placed on *Ram Chunder Roy V. University of Allahabad and Ors. (1) and Jogendra Raj Kishore V. University of Allahabad and Ors. (2).* It has been pointed out that in these cases the precise point conversed in the present instance, i.e. the question of application of the principle of natural justice in cases of punishment for indiscipline, was considered and found to be inapplicable. In both the cases referred to above, the Division Benches concerned took the view that in matters of disciplinary action the principle of *audi alteram parterm* has no application. These two decisions are presumably based on an observation of Lord Goddard, C.J. in the case of *ex parte* Fry reported in (1954) 2 A.E.R. That observation runs thus:

"It seems to me impossible to say where a Chief Officer of a force which is governed by discipline, as is a fire brigade, is exercising disciplinary authority over a member of the force that he is acting judicially or quasi-judicially, than a school master who is exercising disciplinary powers over his pupils."

17. In an earlier case, i.e. R.V. Metropolitan Police Commissioner ex pane Parker 1 953-2 AER 777, the learned Chief Justice had marked:
"Where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of *certiorari* and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has."

These observations of Lord Goddard have not been directly considered in any case and dissented from or disapproved and, if we may say so with respect, the same, insofar as they relate to action taken for acts done in the presence of the punishing authorities, are unexceptionable. If, however, they are taken to refer also to action taken after the events on the basis of evidence collected, then we must record our respectful disagreement. In the latter class of cases, the opportunity given to the delinquent to have his say may put the authority concerned on guard and help in focusing attention on something which otherwise might have escaped notice. In the present case, the, assertions on behalf of the respondents clearly indicate that the authorities, who decide this case, did not claim any direct knowledge about the acts of which the petitioner has been found guilty. The affidavit-in-opposition only shows that, after the Registrar called for reports from the teachers who had

been detailed on the clay of the Convocation. Dr. M. Ahmed, the Provost of the S.M. (Sic) submitted a report in which he implicated the present petitioner. We arc, therefore, to see whether in such circumstances it was necessary to follow the principles of natural justice. It has to be remembered that the principles of natural justice are nothing but principles of fair play. Mr. Pal has strongly relied upon the case of Farid Sons Ltd. reported in *(1961) 13 DLR (SC) 233* and contended that as the University authorities under Section 6 of the University Ordinance were called upon to determine the guilt of the petitioner objectively, it was their duty to allow the petitioner an opportunity to place his case. Learned Advocate-General, on the other hand, has contended that the Rule of *audi alterarn partem* has five exceptions, or in his own words, limitations, i.e. that it has no application (i) when the act is done in exercise of a discretionary power; (ii) where urgent or immediate action is necessary (iii) where the act performed is administrative or ministerial in nature and the function discharged is not judicial or quasi-judicial in character, (iv) when the act is done in exercise of disciplinary power; and (v) when the nature of the function rules out the principle. It is not permissible after the decision of the Supreme Court in the case of Farid Sons Ltd. to argue that the principle of *audi alteram partem* is not applicable when the act in question is done by an Administrative Body. In this case, the Supreme Court considered whether the said principle could be invoked in relation to an order passed by the Chief Controller of Imports in canceling the Import Registration Certificate of the petitioner-company granted under the provisions of the Registration (Importers and Exporters) Order, 1962. The petitioner company prayed for a Writ of *Certiorari* or some other appropriate Writ from the High Court of West Pakistan on the grounds, inter alia, that the order in question had been passed by the Chief Controller of Imports and Exports without the petitioner being given an opportunity to show cause. The Chief Controller of Imports & Exports, it appears, acted on the basis of some reports, which he got against the petitioner in regard to some malpractices in carrying on trade. He, therefore, cancelled the certificates of the petitioner-company under clause (4) of the Order. The High Court, on a consideration of the provisions of the Order in question, came to the conclusion that there was no provision for giving a hearing under the Order and, therefore, the petitioner could not claim that the order is bad for denying it the right of hearing. The Supreme Court, however, came to the conclusion that, regard being had to the legal provisions the petitioner was entitled to a hearing before the impugned order was passed. It has further been found that the nature of the act determines whether the principles of natural justice will apply and that this principle is not confined merely to judicial procedures but extends to all proceeding by whosever held which may affect the person or property or other right of the parties concerned in the dispute, if the act is judicial in nature. It is therefore, clear that it cannot be argued nor has it been argued by the learned Advocate General or Mr. Asrarul Hussain that since the Syndicate is an Administrative body, the action taken by it under section 6 of the University Organization cannot be called inb question on the ground of non-observance of the principals of natural justice.....

We have given serious considerations to the decisions, reported in *AIR 1956. Allahabad 46 and 503 as well as A.I.R. 1957 II.P. 31*, but could not feel convinced by the reasons given therein for holding that in cases of indiscipline the principles of natural justice can have no application. From the standpoint of urgency of action cases of indiscipline may be categorized under two heads. The first head will comprise those cases in which action is called immediately in the interest of maintenance of discipline and the act of indiscipline is committed in presence of the person empowered to take action. In this class of cases, issuance of a show cause will be nothing more than a meaningless formality and may as such be dispensed with without any prejudice or violence to the principle of *audi alterm partem*. There is, however, the other class of casts where action is taken by the punishing authority the basis of information or evidence collected after the offending act has taken place. It is difficult to understand why in such causes notice to show cause should not be issued and how it can be said that observance of the aforementioned principle would be subversive of discipline.

18. In the same case, PLD 1965 (SC) 90 tC- Supreme Court of Pakistan observed:

This Court has already had occasion to point out in at least three cases, namely, in the cases of the Chief Commissioner, Karaclu V. Mrs. Dma Sohrab Katrak (1), Farid sons Limited V. Government of Pakistan (2) and Abdur Rahman V. Collector and Deputy Commissioner, Bahawalnagar and others (3) that in all preceding by whomsoever held whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might no suit in consequences affecting the person of property or other right of the panics concerned, 'This rule applies even though there may be no positive words in the statute or legal document whereby the power is vested to take such proceedings, for, in such cases this requirement 15 to be implied into it as the minimum requirement of fairness.

In the present case, as we have already pointed out, there is no dispute that action was proposed to be taken *ex post facto.* The confidential circular issued by the University on the 25th of March 1964, calling for reports itself stated that it was necessary "to find out who were actually responsible." There is also no dispute that not only was no hearing given to the respondent in the present case but that he was also not given any show cause notice or any other kind of opportunity to submit any explanation, written or oral, Indeed, the University in its counter- affidavit maintains that "there was no necessity of serving any show-cause notice to him, as he had no cause to show having himself committed the breach of discipline which was well known to him in the presence of all." This statement is, of course, not supported by the circular issued on the 25th of March for, there the position taken up is that information is required to find out who were responsible. Again, so far as the present respondent is concerned, he has been identified by only one of the 40 teachers as having participated in the disturbances, It is difficult, therefore, to appreciate how it can be said that the respondent concerned had committed the disturbances in the presence of all of them. In these Circumstances, two questions arise as to (1) whether the University acted properly in taking disciplinary action against the said respondent and (2) whether in doing so they were required to act with that degree of minimum fairness which is embodied in the principles of natural justice. From a careful review of the decisions cited before us it appears that whenever any person or body of persons is empowered to take decisions after *ex post facto* investigation into facts which would result in consequences affecting the person, property or other right of another person, then in the absence of any express words in the enactment giving such power excluding the application of the principles of natural justice, the Courts of law are inclined generally to imply that the power so given is coupled with the duty to act in accordance with such principles of natural justice as may be applicable in the facts and circumstances of a given case.

What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases as was pointed out by the Judicial Committee in the Case of the University of Ceylon V. Fernando Tuker, L.J., said in Russet, V. Duke of Norfolk. (I) "the requirements of natural justice must depend on the Circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with, and so forth. Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant-statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice.' Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in the presence of the person accused or give him facility for cross-examining the witnesses against him, or even to serve a formal charge-sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be affected to correct or contradict any relevant statement prejudicial to him. In other words, "in order to act justly and to reach just ends by just means, the Courts insist that the person or authority should have adopted the above "elementary and essential

principles" unless the same had been expressly excluded by the enactment empowering him to so act."

19. In addition to the above, we are tempted to quote from *Byrne V. Kinernatograph Reuters Society Ltd. 1958 2 AER 579* wherein Harman, J., observed as follows:
What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

20. As early as 1911 in *Board of Education Vs. Rice 1911 AC. 179* Lord Loreburn laid down the following principle:
"It will, I suppose, usually be of an administrative kind; but sometimes it will invoke matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

21. In support of the applicability of the principles of 'audi alteran partem" to the case before us many other citations may be made but we only prefer to conclude by quoting an observation of Lord Jenkins in University of Ceylon Vs. Fernando 1960.
"It seems to their Lordships to follow that, inasmuch as the Vice-chancellor, when the alleged offence under cl. 8 was brought to his notice, was not bound to treat the matter as a trial but could obtain information about it in any way he thought best, it was open to him if he thought fit to question witnesses without inviting the plaintiff to be present.
But, while there was no objection to the Vice- chancellor informing himself in this way, it was undoubtedly necessary that, before any decision to report the plaintiff was reached, he should have complied with the vital condition postulated by LORD LOREBURN, which, adapted to the present case, may be stated as being to the effect that a fair opportunity must have been given to the plaintiff to correct or contradict any irrelevant statement to his prejudice."

22. Mr. Asrarul Hiossain, has not disputed the above principle of law and has not tried to argue in the instant case that the petitioner was not entitled to get an opportunity of being heard. We also do not see any reason to make any departure from the above well-established principle of law and we hold that in the instant case also the petitioner before us was entitled to get an opportunity of being heard by the University Authorities before being punished.

23. Mr. Asrarul Hossairm has, however, tried to fight his point on an absolutely separate footing trying to argue that the notice to show cause was served on the petitioner and as the petitioner failed to appear or show cause the impugned action by the Syndicate cannot be challenged on the principle of *'audi alteram partem."* In this connection, let us refer to the notices, which are alleged to have been dispatched to the petitioner. These are at Annexure W, W1 and W2. The first notice was dispatched by registered post on 7.9.87 and this notice is at Annexure W. It appears from the endorsement of the postal authorities on it dated 12.9.87 that it was sent back to the sender undelivered as the petitioner was not living at the address to which it has been sent at the relevant time. It appears that after receiving back the first notice, Annexure-W, a second notice, which was the exact copy of the first notice, was against dispatched to the petitioner but the date of this second notice is not available. This second notice is at Annexure-W1. The endorsement on the postal receipt dated 28.9.87 shows that the second notice was also sent back to the sender undelivered on

the selfsame ground that the addressee did not live at the address at the relevant time. It further appears that before sending the above notices another notice, which is at Annexure W2 had been sent by hand to a certain person named Bashar through a delivery peon. It also appears that similar notices addressed to various persons were sent to the same person under the same peon book. According to the relevant entry in respect of the Petitioner, which is item No.4 in the peon book, one Bash appears to have received this notice at Annexure W2 on 10.9.87. Although the address of the petitioner in the notice appears to be "village Kritibasdi, Upazila Monohardi District-Narsingdi" it appears to have been delivered to one Bashar in the city of Dhaka. Similarly, many other letters bearing address different persons in different districts outside Dhaka were also delivered to the same person on the same date. It has not been explained to us who is the recipient of these letters. It is clear that the notice Annexer-W2 was not served on the petitioner. The notice Annexure-W was sent to the petitioner by post but it was sent back to the sender undelivered and the notice Annexure-W1 was also dispatched to the Petitioner by post but it was also sent back to the sender on the self-same ground. We have already found that the last notice, Annexurc-W-2, was not served on the petitioner. It has been stated in the Writ petition that the petitioner was taken into preventive custody on 12.9.87. It appears from the endorsement on the notice, Annexure-W that it was taken to the address mentioned on it on 12.9.87 and the next notice Annexure-W-l was taken by the postal peon to the address given on it on 28.9.87 when the petitioner was already under preventive detention at the Dhaka Central Jail. We fail to understand as to why the University Authorities did not send these notices to the Jail Authorities for service on the petitioner. Be that as it may, we are satisfied that the notices at Annexure-W, W-1 and W-2 were never served on the petitioner.

24. The petitioner was being held in custody at the Dhaka Central Jail under preventive detention with effect from 12.9.87. The Enquiry Committee submitted the Enquiry report on 1.9.87 and the Syndicate took the decision to expel the petitioner on 19.9. 87. There is nothing on record to show that apart from issuing the show cause notices Annexure-W, W-l and W-2 the petitioner was given any other opportunity of submitting his case either to the Disciplinary Board or to the Syndicate when it took its decision on 19.9.87. We are, therefore, satisfied that the petitioner did not get any opportunity of explaining his position before the Disciplinary Board or the Syndicate at any time and that he was condemned unheard although the proceedings against him were *ex post facto.* The impugned order of expulsion, therefore, violated the most elementary principle of natural justice and is, therefore, without Lawful authority and of no legal effect.

25. Mr. Asrarul Hossain has, last of all, contended that this Writ petition is not maintainable as an equally efficacious remedy is available to the petitioner by way of an appeal to the Chancellor under Article 52 of the Dhaka University Order, 1973 (President's Order No. 11 of 1973), which runs as follows:

"52 (1) An appeal against the order of any officer or authority of the University affecting any person are class of persons in the University, may be made petition to the Chancellor who shall send a cope on receipt of the petition thereof so the officer or authority an opportunity to show cause why the appeal should not be entertained.

(2) The Chancellor may reject any such appeal or may, if he thinks fit, appoint an Enquiry Commission consisting of such persons as are not officers of the University or member's of any authority thereof, to enquire into the matter and to submit to him a report thereon.

(3) The Chancellor shall, on receipt of the Enquiry Commission's report, send a copy thereof to the Syndicate and the Syndicate shall take the report into consideration and shall, within three months of the receipt thereof, pass a resolution thereon which shall be communicated to the Chancellor, who shall then take such action on the report of the Enquiry Commission and resolution of the Syndicate as he may think fit.

(4) An Enquiry Commission appointed under clause (2) may require any officer or authority of the University to furnish it with such papers or information as are, in the opinion of the Enquiry Commission, relevant to the matter under enquiry, and such officer or authority shall be bound to comply with such requisition."

26. In support of his contention 'Mr. Asrarui Hossain has placed reliance on *R. Vs. Dunsheath. a parte Meredith (1952) 4ER 741; S.B. Chaturvedi, Vs. G.C. Chattarjee and others, AIR 1959, Rajasthan 260 and Badrunnessa Vs. Vice-Chancellor, University of Dhaka and others,* Respondents *30 DLR (1978) 268.*

27. In R. Vs. Dunsheath, (1952) 2 AER 741, fifty members of convocation of the University of London served a requisition on the Chairman of Convocation to summon an extraordinary meeting of convocation to discuss certain matters and on the refusal of the Chairman to call the meeting, one of the members moved a motion before the Court for a writ of *mandamus.* The King's Bench Division while refusing the writ held that the matter being within the Visitatorial powers of his Majesty in Council remedy by way of *mandamus* was not available. Lord Goddard, while delivering the judgment of the Court observed in his speech as follows:

"It is important to remember that mandamus is neither a writ of course nor a Writ of right, hut that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided there is no more appropriate remedy. This Court has always refused to issue a *mandatnas* if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the Court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. I see no difference for this purpose between a college and a university. Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities, which deal with dictatorial powers and duties……'

28. In *S.B. Chaturvedj Vs. G.C. Chatterjee* and others AIR 1959 Rajasthan, 260, the appointment of the respondent, Sree G.C. Chatterjee as the Vice-Chancellor of the University of Rajputana for a second term was challenged by praying for a writ of *quo warranto* on ground that the appointment was not made in accordance with the provisions of the University of Rajputana Act, 1946. The Jaipur Bench of the High Court of Rajaahan while refusing the writ on various grounds also held that remedy being available by approaching the Visitor of the University writ proceedings were not permissible before approaching the visitor. Wanchoo, C.J., while delivering the judgment of the Court observed;
(4) We have considered the powers conferred on the Visitor by section 8A of the Act and are of opinion that generally speaking, the Visitor should not be approached for redress before a question like this concerning the University is agitated before the Courts and are in respectful agreement with the view taken in the above case. But it appears from the application that the applicant did approach the Visitor and that nothing came out of that. In the circumstances we are of opinion that the only remedy left to the applicant was to approach the Court.'

29. In that case, however, the applicant had approached the Visitor before approaching the Court but nothing came out of that. In *Badrunnessa, Vs. Vice-Chancellor, University of Dhaka and others, 30 DLR 268.* the petitioner approached this court for a writ under Article 102 of the Constitution against the University of Dhaka alleging certain irregularities in the publication of the results of Master's Degree examination and a Division Bench of this Court refused the writ on the ground that remedy being available under Article 52 of the Dhaka University Order, 1973, by way of an appeal to the Chancellor of the University, and the petitioner having not availed of the said remedy and there being no explanation for not so doing, the discretionary relief under Article 102 of the Constitution was not available. I quote the exact words of Afzal, J:

"……Secondly, the alleged infraction of rules pertaining to courses of study and holding of examinations should be determined by the highest authority in that field, namely, the Chancellor and lastly, the petitioner not having pursued her relief under Article 52 of the

Dhaka University Order, 1973 and there being no explanation for not so doing, we should refrain from exercising our discretionary jurisdiction in granting the declaration sought for."

30. While respectfully agreeing with the above principle that the discretionary powers with which this court is vested under Article 102 of the Constitution will not be exercised if an alternative remedy is available and the aggrieved person has not tried to avail of the said remedy before approaching this Court, we are of opinion that the said principle cannot be applied to the present case, because, it cannot be said that the petitioner did not try to avail of the alternative remedy of appealing to the Chancellor and that the said alternative remedy, even if available, can be as efficacious as a writ in the peculiar facts and circumstances of this case. The petitioner has averred in the Writ petition that he was taken into custody on 12.9.87 and while in custody he heard about the order of expulsion passed on 18.9.87. It has also been averred that he tried to secure the copies of the order, the charges against him and other connected papers through his wife, Farzana Huq, who swore the affidavits in this Writ petition, but could not secure these papers from the University Authorities. It has also been averred that he also tried to secure these papers by sending letter through his Advocate without any result. We have already referred to these letters written by his Advocate. In these letters Annexure B and D it was stated that those papers were urgently required for preferring appeal review against the order of expulsion before the appropriate authorities under the rules and regulations of the University. It is undisputed that these papers were not made available to the petitioner. There can not be any gainsaying that without these important papers it was impossible for the petitioner to prefer any appeal to the Chancellor under Article 52 of the Dhaka University Order, 1973. It is possible to file a writ petition without the papers but without those papers an appeal could not be prepared arid filed. We, therefore, find that the petitioner tried to file an appeal before the Chancellor against the impugned order but for circumstances beyond his control could not succeed. So, we are of opinion that the alternative remedy provided by Article 52 of the Dhaka University Order, 1973, was not available to the petitioner when he filed the Writ petition. As such, the principle formulated by Mr. Asrarul Hossam relying on the above decisions with which we are also in full agreement cannot be applied to frustrate the entitlement of the petitioner to maintain this Writ petition. We, accordingly, find that this petition is maintainable.

31. Before parting with this case, we would like to observe that ordinarily the courts should from interfering with the actions, which the educational institutions take to maintain discipline among their students unless, of course, there is gross illegality occasioning a failure of justice. In the present case, we have decided to interfere, because we are satisfied that the judiciary principle focus that a person should not be condemned unheard has been disregarded. In the result, the Rule is made absolute.

32. The impugned order of expulsion of petitioner and declaring the petitioner as undesirable contained in letter No. 20208 dated 23.9.1987 signed by the Registrar of the University of Dhaka communicated under Memo No. 20225-30 dated 23.9.1987 along with the resolution of the Syndicate adopted on 19.9.87 so far as it relates only to imposition of the aforesaid punishment on the petitioner is declared to be without lawful authority of no legal effect.

33. The University Authorities will, how be at liberty to take action on the basis of the of the Enquiry Committee in the manner indicated this judgment if it is still of the view that it should be taken against the petitioner.
In the circumstances of the case, the parties are directed to bear their respective costs. (42 DLR, 1990. pp. 262)

COURT CASE - 8

Chittagong University
Vs.
Md.Abdul Quyyum, S/o Dr.M.A.Karim
The Chittagong University Ordinance, 1973. Chapter XXXI, Clause 29(a)

Judgment
This Rule obtained by defendant No1 petitioner on an application under section 115 of the Code of Civil procedure is directed against the order being order No. 8 dated 14-1-76 passed by the learned Subordinate judge 3rd Court, Chittagong in other suit No. 173 of 1975 disallowing the prayer of the petitioner to reject the plaint under Order VII, rule 11 of the Code of Civil Procedure.

2. The plaintiff-opposite party filed a suit stating as follows: He appeared at the B. Com. (pass) Examination for the year 1974 held in June-July 1975 as a regular student of the Government College of Commerce, Chittagong. The minimum aggregate marks for passing the B. Com (pass) examination has been fixed by the University at 360 marks 1000 in 10 papers and the pass mark in each paper is 33 marks. Although the plaintiff gave satisfactory answers to question is all the 10 papers in the said B. Com. (pass) examination, he was shocked to find that his Roll No.9640 did not find place in the list of successful candidates announced by the defendant No. 1. The Chittagong University on 22-10-75 and plaintiff applied for mark sheet by depositing the usual fees and defendant No.3 the Controller of Examination supplied the mark sheet, which reads as follows:

SL.NO	Subject	Marks obtained	Full marks
1	Commercial English	37	100
2	Economics paper-I	35	100
3	Economics paper-II	33	100
4	Economics paper-III	34	100
5	Management paper-I	33	100
6	Management paper-II	40	100
7	Management paper-III	33	100
8	Advanced Accounting paper-I	21	100
9	Advanced Accounting paper-II	36	100
10	Advanced Accounting paper-III	36	100
Total marks		338	1000

It thus appears that he failed in Advanced Accounting and his total marks was short of 22 marks of the minimum marks required for being declared as ‘passed’ in the said mark-sheet. The plaintiff found that he had been given very poor marks in comparison with the very good and satisfactory answers given by the plaintiff to the questions answered by him. It, his answers were given just, proper and fair marks, the plaintiff would have secured 50% to 60% marks in his estimation. The plaintiff applied to the University Authority through the Principal of his College on 31-10-75 for re-examination of all the 10 papers by depositing on 3-11-75 a fee of Tk. 200/00 at the rate of Tk. 20/00 for per paper for re-examination. While forwarding the plaintiff’s application for re-examination the Principal of the College noted:
“Forwarded for necessary action and improvement is expected”
On 5-11-75 defendant No, 3 the Controller of Examination sent the following reply.
“Subject-Application for re-scrutinizing answers scripts.

“With reference to this application dated 31-10-75 Md. Abdul Quyyum is hereby informed that his scripts in Accounting paper-I, paper-II and paper-III have been re-scrutinized and no discrepancy in marks has been found. The marks have correctly been recorded”

The Examiner concerned has given very poor marks in paper-I of Advanced Accounting although the plaintiff thinks that he answered all the five questions correctly. The action of the University Authority in grossly under-marking the plaintiff answer script of the said paper No.1 of Advanced Accounting is absolutely illegal, arbitrary, whimsical and malafide. The plaintiff was required to answer two questions from Group-A and 3 questions from Group-B of the said paper-I of the Advanced Accounting and the plaintiff having answered all the five questions fro both the groups correctly, the Examiner concerned acted wrongly, arbitrarily and in a malafide manner in giving only 21 marks for 5 questions answered by the plaintiff. In paper II and paper III in Advanced Accounting the plaintiff similarly answered satisfactorily all the questions required to be answered. But the Examiner concerned gave only 36 marks in each of these two papers. Had the University re-examined plaintiff's answer scripts of paper-I, paper-II and paper-III of Advanced Accounting by an impartial Examiner, the plaintiff could have obtained about 50% marks in these papers in plaintiff's opinion. The University Authority, defendant No.1 in the matter of examination the answer scripts and publication of results of the examination held under their supervision on according to the plaintiff, is legally bound to give by the examinee and they are not entitled to act whimsically and arbitrarily in the matter of giving marks to the answers according to their sweet will and the examinee is legally entitled to challenge such whimsical, arbitrary malafide and biased marking of the examiner. The University Authority cannot refuse to give proper, just and adequate marks in the name of strictness and the so-called strictness at the cost of justice should not be permitted.

3. The action of defendant No.3, the Controller of Examinations, and defendant No.1, the Chittagong University in the matter of dealing with plaintiff's application for examination of the answer scripts has been according to the plaintiff, highly illegal arbitrary and malafide. The plaintiff applied for re-examination on 31-10-75 and deposited the necessary fees on 3-11-75 and within 48 hours defendant no.3 the Controller of Examinations gave a reply that his answer scripts in Advanced Accounting have been re-scrutinized and no discrepancy in marks has been found and that the marks have been correctly recorded. According to the plaintiff, it shows that defendant No.1 Chittagong University defendant No. 3 the Controller of Examinations did not at all apply their minds and merely sent a formal reply filling the blank space of a cyclostyled proforma. The Chittagong University the defendant No. 1, acted illegally in denying the plaintiff his legal right to get his answer scripts re-examined by any other impartial examiner and consequently the plaintiff has sustained substantial loss and injury by the arbitrary, illegal and malafide actions of the Chittagong University defendant No. 1 in as much as he has been shown as plucked although he is entitled to succeed in the B. Com. Examination, had his papers been re-examining marked properly by another examiner?

4. The plaintiff prayed that the plaintiff be declared by a decree of the Court that he has passed the B.Com. (pass) examination held under the auspices of defendant No. 1 for the year 1974 on re-examination of the answer scripts of paper No. I Advanced and paper No. II of Advanced Accounting by any other examiner appointed by Court at the cost of the plaintiff.

5. The defendants filed a petition for rejection of the plaint under clause (a) and (d) of Order VII rule 11 of the Code of Civil procedure on the grounds that the plaint does not disclose any cause of action, in as much as, there is no provision in the University Statutes. Regulations or Ordinance for re-examination of any answer script or scripts of an individual candidate by appointment of a special examiner, that the cause of action as alleged and described in the plaint is fictitious and imaginary, that the failure of the examiner to pass examination cannot be the cause of action against the defendants and that the suit is barred by section 42 of the Specific Relief Act and by the University Statutes, Regulations and Ordinance. The defendants further submitted that the plaintiff in his application substituted

the word “re-scrutinisation” for the word “ re-examination” realising that the University Ordinance provides for re-scrutinizing of scripts of individual candidates and does not provide for re-examination of the answer scripts of the individual candidate.

6. The plaintiff-opposite party opposed the petition of the defendants under Order VII rule 11 by filing written objection and on 5-1-75 filed affidavit stating that he applied for re-examination of all his scripts in a typed application and did not score out the work re-examination and substitute the word “re-scrutinizing” for the word “re-examination” and that there has been some interpolation in his application without his knowledge. The plaintiff opposite party further opposed this application of the defendants under Order 7, rule 11 of the Code of Civil Procedure by reiterating that the plaintiff’s cause of action has been clearly stated in the plaint, that the action of the defendants in the matter of dealing with the plaintiff is motivated and as such without jurisdiction, that the Civil Court has every right to see whether a statutory body has acted in accordance with law, that in the plaint the plaintiff has alleged illegality, arbitrariness and malafide which are matter of evidence and as such the prayer for rejection of the plaint at such a preliminary stage of a suit is not tenable.
The learned Subordinate Judge disallowed the prayer of the defendants for rejection of the plaint under Order VII, role 11 of the Code of Civil Procedure.

7. Mr, Altaf Hossain, the learned advocate appearing for the petitioner mainly argues that the learned Court below acted illegally and with material irregularity in misreading and misinterpreting clauses 21 and 29 (a) of Chapter XXXI of the University Ordinance. The learned Advocate Mr, Altar Hossain for the petitioner further argues that the suit is barred by the provisions of section 42 of the Specific Relief Act, that the plaintiff has no legal character to bring the suit and that the Civil Court has no jurisdiction to entertain such suit.

8. Mr. Mozammel Huq, the learned Advocate appearing for the plaintiff opposite party has argued that the merit of the suit cannot be gone into at this stage and that the court at the time of trial will have to enquire into the malafide of the examiners of the papers in Advanced Accounting.

9. It appears that the learned Subordinate Judge has misread the provisions of clause 29(a) of Chapter XXXI of the University Ordinance. Clause 29(a) of Chapter XXXI of the said University Ordinance reads as follows:-
“29(a) If the Chairman of any degree pass and subsidiary Examination Committee has reason to think that the scripts of any paper, have not been properly examined, he may with the previous approval of the Vice-Chancellor, arrange for the re-examination of all the scripts in the paper, a heady examined by the particular examiner, but in no circumstances shall individual script be re-examined and the marks allotted by the Second Examiner should be taken as final.”
It will thus appear that the said clause 29(a) puts a total prohibition of re-examination of any individual script by appointment of a special examiner. What is contemplated in the said clause is that where the Chairman of the Examination Committee thinks that a particular examiner has not properly examined the scripts of any paper, he may with the approval of the Vice-Chancellor arrange for re-examination of all the scripts of that paper. Here the description of re-examination of all the papers already examined by a particular examiner is left with the Chairman and no individual candidate has a right to ask for re-examination of any answer script or scripts. The learned Subordinate Judge has misread the said provisions and has committed an error, which has led him to the wrong conclusion.

10. Clause 21 of Chapter XXXI of the University Ordinance provides as follows:
“21. The answer books candidates at University Examinations will not be re-examined on their merits but the script of candidates for the pass Degree of Bachelor of Arts, Science and Commerce may be scrutinized for the verification of the correctness of the total marks recorded; such scrutiny will be made on receiving a formal application for the purpose

together with the prescribed fee of Rupees Ten (Rs.10/-) per paper and a certificate from the Principle of the college or the head of the department to which the student belongs, stating that he is convinced that there are strong and sufficient grounds for such scrutiny. No application for scrutiny will be accepted unless it reaches the office of the Controller of Examinations within one month of the date of the publication of the examination results in question.
"On receipt of the application together with the requisite certificate and fee as mentioned in paragraph one, the scrutiny shall ordinarily be made by the Controller of Examination"

Above quoted clause 21 also prohibits re-examination of any answer books in its merit and permits only scrutiny for the verification of the correctness of the total marks recorded in any answer book or books.

11. In view of the said provisions of clause 21 and 29(a) there could bon be any question of re-examination in the sense of re-evaluation of any answer book or books of any individual examinee and that why the plaintiff opposite party corrected his application by substituting the word " re-scrutiny" for the word " re-examination". It is obviously not necessary that the scrutiny of the answer books will take a long time. Under the said clause 21, the Controller of Examinations is authorized to make scrutiny himself and in this case he did the scrutiny within two days and sent a reply. The question of application of mind of the Controller of Examinations or the University dose not arise as it is merely a question of verification of the answer scripts concerned.

12. The plaintiff opposite party has altered arbitrariness, capriciousness, malafide and bias of the examiners in examining his answer scripts in Advanced According. Even the names of the Examiners have not been divulged and there is no specific allegation of personal grudge or any other elements of malafild against the examiners concerned or any of the defendants concerned.

The Examiners are in full charge of marking of the answer scripts. It is to be presumed that the examiner marked an answer script bonafide without bias and properly unless there are materials to show that the examiner is not a qualified one or that he bore any personal grudge against the examinee or that there was nay other elements of malafide in such examiner. In the circumstances, having failed to make any specific case of malafide the plaintiff's allegations are vague and deserves no consideration.

13. As per clause 25 of the University Ordinance the plaintiff opposite party signed the examination entry from on the following terms:
"I agree that in any matter arising out of my candidature at this examination, I will accept the decision of the Syndicate or of any office authorized by them to deal with the matter, as final."

14. This was the understanding between the parties. The plaintiff opposite party has no inherent right to get the answer scripts re-examined by another examiner and be declared to have passed the B. Com. (pass) examination of 1974. The court has also no authority under the provisions of the Code to appoint any examiner and get these answer scripts re-examined in view of the bar placed under the clauses 21 and 29(a) of Chapter XXXI of the University Ordinance. The plaint as such does not disclose any cause of action. In this connection reference may be made to the decision of a Division Bench of the then Dacca High Court in the case of Burmah Eastern Ltd. Burmah Eastern Employees' Union, reported in PLD 1967 Dec. 190 where Morshed, C.J. observed as follows:
"The first question that strikes one is that although under Order VII, rule II, of the Code of Civil Procedure, it is the duty of the Court to reject the plaintiff, on a perusal therefore, it appears that the suit is incompetent, the parties to the suit are at liberty to draw Court's attention to the same by way of an application. The Court can, and, in most cases, does hear

lawyers on the points involved in the application. In fact, this is what has happened in the present case."

"The principles involved are two fold: In the first place, it contemplates that a still born suit should be properly buried, at its inception, so that no further time is consumed on a fruitless litigation. Secondly, it gives plaintiff a chance to retrace his steps. At the earliest possible moments, so that, if permissible under law, the way, found a properly constituted case."

15. Mr. Altaf Hossain, the learned Advocate for the petitioner has argued that in the present suit the plaintiff opposite party has no right to get a declaration of his legal character within the meaning of section 42 of the Specific Relief Act. In the aforesaid decision of Murshed, C.J. it has been observed:

The expression "legal character" has been understood as synonymous with the expression "status". Section 42 of the Specific Relief Act…….does not permit an unrestricted right of instituting all kinds of declaratory suits at the will and pleasure of parties. The right is strictly limited. This is patent. Plaintiff does not allege any infringements of a right to property. Is the plaintiff then asking to establish a "legal character" within the meaning of section 42? Clearly not ….The expression "legal character" or "status" denotes a character or status conferred by law on an individual or a number of individuals, viewed as a unit of society and not shared by the generality of the community but only by individuals, placed in the same category of character. The character itself must be conferred by law on persons viewed from the standpoint of membership of the community. It is a "status" or "character" conferred by law".

From the prayer made by the plaintiff in the plaint which has already been quoted it will appear that he has asked for re-examination of the answer scripts of Paper-I and Paper-II of Advanced Accounting by another examiner appointed by court at the cost of the plaintiff. This right has not been conferred on him by any law. On the contrary, the aforesaid clause 21 and clause 29(a) of Chapter XXXI of the University Ordinance are against that right. It is thus clear that the plaintiff has got no right to file the suit under section 42 of the Specific Relief Act.

In the result, this Rule is made absolute and the suit being other suit No. 173 of 1975 pending before the learned Subordinate Judge, 3rd Court, Chittagong is rejected under Order VII, rule 11 of the Code of Civil Procedure. There will be no order as to costs. (28 DLR, 1976. pp. 328)
