FULL TEXT

Supreme Court's Reply to President's Reference

"Walkout and Boycott to be Construed as Absence"

In The Supreme Court of Bangladesh
Appellate Division

Present:
Mr. Justice A T M Afzal, Chief Justice
Mr. Justice Mustafa Kamal
Mr. Justice Latifur Rahman
Mr. Justice Muhammad Abdur Rouf
Mr. Justice Mohammad Ismailuddin Sarker.
Special Reference No 1 of 1995
(Under Article 106 of the Constitution)
Date of hearing: 16th July to 24th July 1995.

A T M Afzal CJ — This is a Reference, first of its kind and somewhat unique in character, under Article 106 of the Constitution of the People's Republic of Bangladesh by which the President has sought to obtain the opinion of the Supreme Court on some legal questions arising out of the continuous absence of some members of the Parliament consequent upon their walking out of the House first and then resorting to boycott of the Parliament.

Being first of its kind, it is necessary to begin from the beginning. Article 106 reads thus:

106. If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

So, the Article Contemplates a Reference to the Appellate Division of the Supreme Court.

The Supreme Court of Bangladesh (Appellate Division) Rules, 1988, in Part VI — Order XXVIII provide, inter alia, as follows:

1. On receipt by the Registrar of the order of the President referring as question of law to the Court, the Registrar shall give notice to the Attorney-General of Bangladesh to appear before the Court on day specified in the notice to take the directions of the Court as to the parties who shall be served with notice of the Special Reference, and the Court may, if it considers it desirable, order that notice of the Special Reference shall be served upon such parties as may be named in the order.

In the afternoon of the 4th July 1995 the Reference was received with a forwarding letter addressed to the Secretary of the Chief Justice and signed by the Secretary, Ministry of Law, Justice and Parliamentary Affairs with a request to place the Reference before the Chief Justice. The Reference could not be addressed in that manner because the Reference was not to be the Chief Justice in person but to the Court and the Registrar was the proper person to be addressed in such matter and it was for him to take the initial steps under the Rules as above. This we want to point out for future guidance of all concerned. However, I handed over the order of the President to the Registrar on the following morning and he gave notice to the learned Attorney General to remain present in Court on the next day i.e. 6th July to take the directions of the Court in the matter.

Having regard to the questions of law raised and the nature and context of the Reference and particularly our anxiety to keep the Court aloof from political controversies that are raging outside for long and the constraint of the time factor we decided to keep the hearing confined to the representative section of and constitutional experts at the Bar. In order that the Court may not be held responsible for prolonging and thereby adding to the "political crisis" by consuming a long time over the hearing, we decided to hear the matter with all expedition.

Accordingly, on the 6th we recorded the following order in presence of the learned Attorney General Mr Aminul Haq, since deceased.

"The reference is fixed for hearing on 16th July 1995. Besides the learned Attorney General, the Court desires to be assisted at the hearing by the President of the Supreme Court Bar Association, M/S. S R Pal, Asrarul Hossain, Syed Ishtiaq Ahmed, Dr Kamal Hossain, Khondkar Mahbubuddin Ahmed and Rafiqul Haq.

We have been informed just now by the learned Attorney General that Mr Asrarul Hossain has been given special assignment to represent the Government in this matter. The learned Attorney General has, however, offered that he will be available for any assistance that the Court may ask from him.

The Court will not entertain any statements of facts/affidavits of any party. The hearing of the matter will continue without any adjournment.

Let a copy of this order along with a copy of the letter of reference be served upon each of the learned Counsel mentioned above by special messenger."

It is a great pity that Mr. Aminul Haq suddenly died due to heart failure in his chamber in the Court premises on the following Thursday i. e. 13th July and his offer of assistance to this Court has sadly remained unfulfilled.

At the hearing of the matter, all the learned Counsel whose assistance was sought duly turned up and true to the highest tradition of the Bar took part in the deliberations characterised by their professional preparation, study and scholarship. The occasion was indeed momentous as Syed Ishtiaq Ahmed aptly made his opening remark that this Reference being the first under our Constitution marks the beginning of a history; also because the subject matter of the Reference — the question whether the opposition members of Parliament have lost their seats by walkout and boycott — is unprecedented in the known history. Dr Kamal Hossain was, however, skeptic about the Reference as he thought that the political situation alluded in the Reference suggested a life-threatening blockage in the Constitutional process in the country which needed an urgent political by-pass which could only be achieved by a political goodwill of the people concerned but the President has asked from the Supreme Court merely a cure for the political headache of the authority while the Constitutional process itself is in jeopardy. All the learned Counsel, however, made full submissions on the different aspects of the Reference. We wish to put on record our deep admiration for their ungrudging and valuable assistance.

When the hearing was coming to a close some learned members of the Bar, namely, Dr Zahir, Mr Moksudur Rahman, Mr S S Halder, Mr Yar Ahmed and Mr A B M Nurul Islam appeared as interveners and sought permission to make some submission of their own in respect of the Reference which was allowed. Mr Rowshan Ali, another learned Counsel, also came, but very late, when Mr Asrarul Hossain was in the midst of giving his reply. Therefore, it was not possible to accommodate him but he had left a written submission for our consideration. We must thank all of them for their initiative and eagerness for being helpful to the Court in disposing of the Reference.

We may now set out the text of the Reference. For convenience of discussion we have put capital letters A, B, etc. against each paragraph which does not bear any number.

A. WHEREAS after a long and relentless struggle for about nine years by the freedom loving people of Bangladesh spearheaded by the main political parties for restoration of democracy and governance of the country adhering to democratic norms and principles, as opposed to autocratic rule, at last met with success and a general election was held on 27th February, 1991 under the Government headed by the Acting President Mr Justice Shahabuddin Ahmed which was widely acclaimed both at home and abroad as free and fair;

B. AND WHEREAS the Bangladesh Nationalist Party (BNP) secured highest number of seats in that election and after the election to thirty women seats, BNP secured majority seats in the Parliament and the Acting President being so satisfied, has required under the Constitution that BNP commands majority in the Parliament and Begum Khaleda Zia is the leader of the majority party appointed her Prime Minister on 20th March, 1991, on which date he also appointed other ministers;

C. AND WHEREAS the first meeting of the Parliament took place on 5th April, 1991 and the duration of Parliament is 5 (five) years since that date as provided in Article 72(3) of the Constitution;

D. AND WHEREAS Parliament comprised of members belonging to different political parties and elected as independent as noted below:

BNP	-	170
Awami League	-	92
Jatiya Party	-	35
Jamat-e-Islam	-	20
Communist Party	-	05
Ganatantri Party	-	01
Islami Oikya Jote	-	01
Jatiya Samaztantrik Dal	-	01
Workers Party	-	01
Nationalist Democratic Party	-	01
National Awami Party (M)	-	01
Independent	-	03

E. AND WHEREAS in deference to the wishes of all sections of the people of the country BNP Government with the support and cooperation of all other political parties represented in the Parliament, enacted the historic Twelfth Amendment Act, 1991 (Act XXVIII of 1991) on 18th September, 1991 thus switching over to the multi-party parliamentary system, thereby effecting significant changes which for obvious reasons necessitated wide ranging consequential amendments of the Constitution;

F. AND WHEREAS these amendments to the Constitution required, as provided in the Constitution, reference to be made to a referendum and accordingly the Acting President referred it to referendum and the voters enthusiastically participated in the referendum in large number and voted in favour of the amendments, thereby supporting the amendments passed by the Parliament and thus giving the Constitution its present shape;

Chief Justice ATM Afzal

G. AND WHEREAS from a reading of the Constitution, it appears that the basic concept as to the governance of the country is by the elected representatives of the people and transfer of power by one elected government to the next elected government has been clearly enshrined in the Constitution;

H. AND WHEREAS on 1st March, 1994 while there was a discussion in Parliament on call attention notice on the killings in Hebron, there was uproar over a part of the statement made by the then Information Minister and the Deputy Leader of the House requested the Deputy Speaker to expunge the relevant part of the statement from the proceedings of the House and the Information Minister himself expressed his regret and also sought expunction of the statement, yet Leader of the Opposition along with all members of the opposition except Mr Suranjit Sen Gupta staged a Walkout. The Deputy Speaker announced expunction of the statement of which opposition parties had taken exception but the opposition members did not return to the House. They also did not join the House on the following day and demanded that unless the Information Minister had tendered unconditional apology they would not return to Parliament;

I. AND WHEREAS the opposition members while so acting, by election to Magura constituency was held and the opposition parties made certain allegations to the Election Commission and the Election Commission after causing enquiry and having found the allegations not true declared the final result whereupon the opposition parties declared that unless fresh election was held in Magura by cancelling the result declared by the Election Commission, they would not return to Parliament;

J. AND WHEREAS negotiation between the parties were being held for resolving the problem, the opposition parties added yet a new demand, namely the ruling party must introduce a Bill in Parliament amending Constitution to provide for holding at least three future parliamentary elections under caretaker government;

K. AND WHEREAS to compel the ruling party to concede to their aforesaid demand they started boycotting sessions of Parliament;

L. AND WHEREAS the ruling party took the stand that it is against the very concept of democracy the minority members by resorting to boycott of the sessions should try to impose its decision upon the majority members and if such undemocratic demand was accepted it would destroy the basis structure of democracy and governance of the country would will never be possible through democratic process which is the expressed will of the people as stipulated in the Constitution;

M. AND WHEREAS the opposition parties continued boycott of the sessions of Parliament;

N. AND WHEREAS all negotiations to arrive at a settlement within the framework of constitutional provisions did not yield any fruitful result;

I. AND WHEREAS on 28-12-94 leaders of the three opposition parties, namely, Awami League; Jatiya Party and Jamat-e-Islam handed over three files purportedly containing resignation letters of members belonging to their parties to the Speaker;

P. AND WHEREAS the Speaker after examining these resignation letters found that all these were on the identical ground, namely, the failure of the ruling party to introduce a bill to the Parliament for amending the Constitution to provide for holding general elections to Parliament under neutral, non partisan government comprising nominated persons;

Q. AND WHEREAS on 23rd February, 1995 the Speaker informed the House that in his view en masse resignations on such ground is not contemplated by Article 67(2) of the Constitution as according to him the Constitution cannot contain any provision which will enable a member or members to frustrate the working of the Parliament and further that all the provisions of the Constitution require working in a manner to achieve the objects following the principles of democracy as setforth in the Constitution;

R. AND WHEREAS the members of the Opposition parties continued to boycott all the sessions of the Parliament as noted below with number of sittings in each session:

Session	Commencement of sitting date	Date of prorogation	Number of boycott days
13th	5th February 1994	7th March 1994	5
14th	4th May 1994	15th May 1994	6
15th	6th June 1994	11th July 1994	25
16th	30th June 1994	14th Sept. 1994	10
17th	12th November 1994	8th December 1994	21
18th	23rd January 1995	23rd February 1995	18
19th	24th April 1995	27th April 1995	4
20th	15th June 1995	3rd July 1995	12

S. AND WHEREAS as a result of the said boycott question has arisen whether this boycott is 'absent' from Parliament and what should be the basis of computing ninety consecutive sitting days occurring in Article 67 (1) (b);

T. AND WHEREAS in view of what is stated hereinbefore it appears to me that the following question of law has arisen and is of such nature and of such public importance that it is expedient that the opinion of the Appellate Division of the Supreme Court of Bangladesh should be obtained thereon;

U. AND WHEREAS, pursuant to the powers conferred on me by Article 106 of the Constitution, I, Abdur Rahman Biswas, President of the People's Republic of Bangladesh hereby refer the said questions to the Appellate Division of the Supreme Court of Bangladesh to report its opinion thereon, namely —

(I) Can the Walkout and the consequent period of non-return by all the opposition parties taking exception to a remark of a ruling party Minister be construed as 'absent' from Parliament without leave of Parliament occurring in Article 67(1) (b) of the constitution resulting in vacation of their seats in Parliament?

(2) Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67(1) (b) of the Constitution resulting in vacation of their seats in Parliament?

(3) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67(1) (b) read with the definition of 'sessions' and 'sittings' defined under Article 152(1) of the Constitution?

(4) Whether the Speaker or Parliament will compute and determine the period of absence?

Sd/- Abdur Rahman Biswas
4.7.95
President
People's Republic of Bangladesh.

The advisory jurisdiction of the Supreme Court has its origin in the Government of India Act 1935, section 213 of which is almost in the same terms as in Article 106 of our Constitution providing for Reference to the Federal Court by the Governor-General. Similar provision was there both in the Constitution of 1956 (Article 162) and of 1962 (Article 59) of the then Pakistan, Constitutions of India (Article 143), Pakistan (Article 186), Sri Lanka (Article 129) and Malaysia (Article 130) among other countries, bear more or less identical provisions.

We have heard some argument from Dr Kamal Hossain as to jurisprudential objection to the advisory jurisdiction of Courts entertained by some jurists, text-book writers and judges in the American and English jurisdictions mainly on the ground of inexpediency, inconvenience, embarrassment and prejudice to the rights of future litigants. The objection, it seems, touched a very sympathetic chord with (Sir) Zafrulla Khan J of the then Federal Court who in his minority opinion in re. Ref under S 213 Govt of India, Act, AIR (31) 1944 Federal Court 73, set out the best brief and the leading authorities on the subject. Professor Felix, Franfurter's (later on a Judge of the Supreme Court of the United States) article (in 37 Harvard Law Review pp 1005-1008) was quoted partly wherein the author concluded:

"It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay."

The Supreme Court of the United States has consistently refused to pronounce advisory opinions upon abstract questions of law on the ground that to do so would be incompatible with the position that it occupies in the constitution of the United States. There is no provision for advisory opinion in the Constitutions of the United States of America and the Commonwealth of Australia and accordingly the American Supreme Court and the High Court of Australia declined to give advisory opinions to the executive and legislative branches of the State on the principle that the jurisdiction and powers of the Court extend only to the decision of concrete cases coming before it.

Section 4, Judicial Committee Act, 1833, (3 and 4 William IV, c.41), provides:

"It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing and consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear and consider the same; and shall advise His Majesty thereon in manner aforesaid."

Inspite of such provision, the Judicial Committee mostly expressed disfavour for advisory opinion. In Attorney-General for Ontario v. The Hamilton Street Railway Company, 1903 AC 524 the Judicial Committee in an appeal from Canada declined to answer certain questions with the following observations:

"They are questions proper to be considered in concrete cases only, and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinion on hypothetical questions. It would be contrary to principle inconvenient, and inexpedient that opinions should be upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it." It will be seen, however, that such bias notwithstanding the Privy Council did give opinion in all cases except for good and compelling reasons. Lord Haldane in the House of Lords debate (70 H L Deb 5 st. Col 629-30) said.

"The Dominion of Canada got into the habit many years ago, before my time, of passing acts submitting abstract questions for the opinion of the Supreme Court of Canada, and then, by a special clause, to the Privy Council here. The Privy Council was not bound to hear those questions, and said so: but the Privy Council, from the desire to be helpful, did get into the practice of entertaining them, and the King in Council pronounces upon them when they come. I have had a long experience of these questions. I have decided scores and scores of them, and anything more unsatisfactory and more mischievous I do not know.

In Re MacManaway (1951) AC 161 the Judicial Committee gave opinion on the eligibility of a person to sit and vote in the House of Commons and in re Parliamentary Privilege Act 1770, (1958) AC 331, the Judicial Committee again gave opinion in a matter relating to the privilege of the House of Commons. Zafrulla Khan J himself in the aforesaid case did not decline to answer but found the Reference difficult to answer "in state of the materials made available."

The theoretical objection against Court's consultative function is to-day academic for us, because, as Syed Ishtiaq Ahmed has rightly contended that, when the Constitution provides for advisory opinion, it is not for the Court to refuse to entertain any Reference on the ground of jurisprudential inexpediency. The makers of the Constitution must be deemed to have considered and rejected the objection against the conferment and exercise of advisory jurisdiction. Spena CJ. In the aforesaid Federal Court case observed that when Parliament has thought it fit to enact s. 213, Constitution Act, it is not for the Court to insist on the inexpediency of the advisory jurisdiction. Even Zafrulla Khan J ultimately said in that case:

"Nevertheless, in 1935 Parliament thought it wise to incorporate S 213 in the Constitution Act. We must take it therefore that in the opinion of Parliament, the criticism to which provisions of this nature has been subjected, it was desirable that the Governor-General should be enable to refer to the Court questions of law which in his opinion were of such a nature and of such public importance that it was considered expedient to obtain its opinion upon them."

From the logic of inexpediency, however, certain principles have emerged which the Courts have since followed in the exercise of advisory jurisdiction as "it is a Jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution."

Now we may look at the scope and ambit of the Article 106. This Article is couched in widen terms which provides that any question of law may be referred by the President for consideration of the Appellate Division if at any time it appears to him that such a questions has arisen, or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it. It is essentially for the President to decide that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. The discretion is entirely his which cannot be doubted or questioned. The expediency, or the motive political or otherwise, or bonafides of making the Reference cannot be gone into by Court. The President's satisfaction that a question of law has arisen, or is likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme Court justifies a Reference at all times under the Article. The Appellate Division may, after such hearing as it thinks fit, report its opinion thereon to the President. The giving of opinion, however, is not obligatory as it is under the Judicial Committee Act, 1833 or under the Canadian Supreme Court Act, 1906 or as under the Pakistan Constitution 1962. But though it is not obligatory upon the Court to give an opinion, it will be unwilling to decline a reference except for good reasons.

The last proposition find support in Reallocation of Lands and Buildings AIR 1943 FC 13; In re-Presidential Election 1974, AIR 1974 (SC) 1682. Some broad principles have emerged from Judicial pronouncements as regards exercise of advisory jurisdiction which may be taken to be well-established. Some of them have been indicated above and some other may be briefly referred to here:

(1) The expediency, bonafides, and motive for making a Reference is not Justiciable (In re-Special Courts Bill, 1978, AIR 1979 (SC) 478; AIR 1974 (SC) 1682 (Supra).

(2) The Court is bound by the recitals in the order of Reference and must accept the statement of facts in the Reference as they are. The truth or otherwise of the facts cannot be gone into. The Court or the parties appearing in the Reference cannot go behind the Reference (AIR 1974 SC 1682).

(3) The President is not bound by the opinion on the Reference but the advisory opinion is entitled to due weight and the opinion may have great persuance force (AIR 1979 (SC) 478).

(4) The opinion is not binding on the Court rendering the opinion in the Reference. In Umayal Achi Lakshmi Achi AIR 1945 FC 25 the Federal Court said this:

"That opinion is not binding on this Court. Any opinion of this Court given upon a reference under S. 213 can properly be reconsidered at any time by this Court in any litigation coming before it and should be so reconsidered on the proper request of any party, however much respect for the learned Judges responsible for an opinion and a desire to secure continuity and certainty in the pronouncements of this Court may make a member of this Court hesitate to differ." (Page 36)

(5) The advisory opinion is not "law declared" and is therefore not binding on the High Court Division or Subordinate Courts, but nevertheless it is entitled to due weight and respect and normally to be followed. However, in India this question has been left open in the opinion rendered in A I R 1992 S C 522, para 31 at page 558. Then sequence in which Articles 106 and 111 appear in the Constitution cannot be regarded as a crucial consideration in favour of holding that an opinion given by the Supreme Court has the status of a "law declared". Nothing turns on the scheme or the arrangement of the sequence of the articles. See, A K Brohi, Fundamental Law of Pakistan, 691 and Umayal Achi, AIR 1945 F C 25 at page 36.

The principles governing the Court's discretion to decline to answer a Reference generally are:

1. When the manner in which the question is framed, e g broad and general and vague terms, or when it is beyond the power of the Court to decide it, it is not possible to answer (In re Special Courts Bill, 1978, AIR 1979 S C 478 para: 20).

2. Speculative opinion on hypothetical question cannot be given (Hamilton Street Rly [1903] A C 529).

3. Court should decline to answer abstract questions [1898] A C 700 (711) referred to in AIR 1979 S C 478 para 28).

4. Reference as to the validity of an entire Act wholesale should be avoided AIR 1979 SC 478.

5. The court may refuse to express its advisory opinion if it is satisfied that it should not express its opinion having regard to the nature of the questions forwarded to it and having regard to the other relevant facts and circumstances; if it finds for valid reason that the question is incapable of being answered. Relying on AIR 1965, SC 745 and AIR 1979 SC 478 it was held in M Ismail Faruqui vs. Union of India (popularly known as Babri Masjid case) AIR 1995 SC 605 that Court is entitled to decline to answer at question if it considers that it is not proper or possible to do so, but it must indicate its reasons.

Among the learned Counsel, only Dr Kamal Hossain and Syed Ishtiaq Ahmed have raised question as to the maintainability and inappropriateness of the present Reference. There main objection is that the matter under Reference is essentially one between the Parliament and its members and the opinion asked for eminently lies within the domain of the Parliament. The Reference raises a political question rather than legal which the Court generally eschews. Dr Hossain argued that the logic and consideration of the principle underlying the refusal to render an advisory opinion was extended to develop the doctrine of Judicial restraint in dealing with certain types of questions.

The different types of cases in which the Court would exercise such restraint and decline to adjudicate are

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