

Law and Our Rights

Bangladesh Enters into A New Era of Public Interest Litigation

THE leading judgment was delivered by Mr Justice Mustafa Kamal with whom concurred the Chief Justice Mr Justice ATM Afjal and Mr Justice Mohammad Abdur Rouf, Mr Justice Latifur Rahman and Mr Justice Bimalendu Bikash Roy Chowdhury delivered separate judgments fully agreeing with Mr Mostafa Kamal. The judgment was delivered on July 25, 1996 but the full text of it was made public a few days ago. Following is the abridged version of the judgment of Mr Justice Mustafa Kamal.

The burning issue of locus standi which has become a focal point of attention for South Asian Superior Courts in the dying decades of the twentieth century in preparation for the twenty-first is the only question that has been raised and is to be resolved in this appeal by leave by the petitioner-appellant whose Writ Petition No 998 of 1994 was summarily rejected by a Division Bench of the High Court Division by its judgment and order dated 18-8-94 on the ground that the appellant is not 'any person aggrieved' within the meaning of Article 102 of the Constitution, basing its reasoning on a decision of this Court in the case of Bangladesh Sangbadpatri Parishad, represented by its Secretary General, Bangladesh Environmental Lawyers Association, shortly BELA, filed the writ petition both under Article 102(1) and Article 102(2) (a) of the Constitution praying for issuance of a Rule Nisi upon the respondents to show cause as to why all the activities and implementation of FAP-20 under taken in the District of Tangail should not be declared to have been taken without lawful authority and to be of no legal effect.

The cause which the appellant espoused in the writ petition is the apprehended environmental ill-effect of a Flood Control Plan affecting the life, property, livelihood, vocation and environmental security of more than a million people in the district of Tangail.

As to the locus standi of the petitioner-appellant it was stated that the appellant is the Secretary General of Bangladesh Environmental Lawyers Association, shortly BELA, an Association registered under the Societies Registration Act, 1860. It has been authorised by a resolution of the Executive Committee of BELA dated 16-6-94 to represent the Association and move the High Court Division under Article 102 of the Constitution and to do all other acts and things in connection therewith.

BELA has been active since 1991 as one of the leading organisations in the field of environment, ecology and relevant matters of public interest. It has studied policies, surveyed and examined legal, quasi-legal issues; institutional aspects and traditional issues on environment and ecology and actively participated in many government, non-government and independent national and regional/international activities and has gained widespread recognition both at home and abroad. BELA being an Association of Lawyers has been raising the legal issues involved in the project in the writ jurisdiction. It can claim a legal relationship with the Court in pursuance of its declared aims and objects as the right to form an association also embraces the right to pursue the association's lawful objects as well. Dr Farooque then referred to Article 21 (1) of the Constitution which is as follows:

"21. (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property."

He submits that if one has to require to do a thing, that is standing. He has to have an opportunity to do so. An association of lawyers dedicated to the protection of a healthy environment has a concern when it perceives and studies an environmental hazard which calls for prevention or rectification. As a concerned group it is very much a 'person aggrieved' and it must have an opportunity to put its concern at rest by approaching the Court for redress.

They alleged that they had no participation in the project and that they were not willing to be the subject of an experiment risking their lives and livelihood. The petitioner-appellant annexed copies of evidence of local complaints as Annexure-F series.

Dr Mohiuddin Farooque, learned Advocate appearing with the leave of the Court, has himself argued the appeal on behalf of the petitioner-appellant. He submits that the words 'any person aggrieved' occurring in Article 102 of the Constitution have to be read in the context of the entire Constitution, not isolated. Article 102 is an institutional vehicle for ventilating the rights and duties under the Constitution and not a mere procedural device. Article 38 of the Constitution confers on every citizen the right to form association and BELA has been registered as an association under the Societies Registration Act, 1860 with the aims and objects inter alia to organise legal measures to protect environmentally sensitive and fragile ecosystems. BELA devoted its time, energy and re-

The denial of locus standi to such a group will be not only an unconstitutional bar to the performance of public duty but also a judicial condemnation of the association's dedicated efforts to perform its public duty. Besides, the Preamble of the Constitution, which is a pledge taken by the people of Bangladesh, declares that it shall be a fundamental aim of the State to realise a society in which amongst others 'the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens'. Dr Farooque quotes from the Bar Council Rules of Professional Etiquette for Lawyers and submits that the lawyers in general and the present association of lawyers in particular are committed to realise the rule of law in the country through Law Courts. The Preamble gives the association a standing. The Preamble and Article 8 also proclaim 'the principles of absolute trust and faith in the Almighty Allah' as a fundamental principle of the Constitution and as a Fundamental Principle of State Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect His creation and environment. The appellant is aggrieved, because Allah's creations and environment are in mortal danger of extinction and degradation. He then refers to Article 102 (4) of the Constitution which provides that the High Court Division will not grant an interim order until it is satisfied, upon reading the Attorney General, that the interim order is not likely to have the effect of being otherwise harmful to the 'public interest'. Under Article 106 of the Constitution, the President may refer a question of 'public importance' for the opinion of the Appellate Division. If the President, the Appellate Division, the High Court Division and the Attorney General can refer, assist, consider and decide issues of 'public interest' and 'public importance', then there is no reason why conversely an association of lawyers cannot feel aggrieved on an issue of public interest and why they cannot agitate the same before the Court. The Constitution cannot be so interpreted as to bestow the concern of 'public interest' and 'public importance' upon only the executive and judicial organs of the State. The vast multitude outside have also a say on matters of public interest and public importance. He further submits that the words 'any person' in Article 102 should be

read distinctively from the word 'aggrieved'. If so read the appellant is 'any person', because in Law Lexicon, 'any' means all, each, every, some amongst many. The Constitution uses the words 'any person aggrieved' both in Articles 102(1) and 102(2) (a), but the Bangla version of Article 102(1) is '.....' whereas the Bangla version of Article 102(2) (a) is '.....'. Under the proviso to Article 153(3), the Bangla version will prevail over the English version and the omission of the word 'any' in Article 102(1) is not without significance. It means in effect that those whose fundamental rights are being violated need not themselves invoke the jurisdiction under Article 102(1). Provided the persons aggrieved do not object, others espousing their cause can also invoke the jurisdiction under Article 102(2) (a). The appellant is espousing the cause of violation of Fundamental Rights of a large segment of the population in respect of their right to life, property and vocation. Dr Farooque also submits that the beneficiaries of this writ petition are not the members of BELA but the people, including the generation yet to be born for whom the present generation holds the environment as an inter-generational trust. BELA therefore represents not only the present generation but also the generation yet unborn. Every generation has a responsibility to the next to preserve that rhythm and harmony that their inherited environment bequeathed to them. BELA's performance of their obligation is therefore for ensurance of the protection of that right for the generation to come.

In reply Mr A W Bhuiyan, learned Additional Attorney General appearing on behalf of Government respondent Nos 1, 5 and 6 dourly maintains his submission that the appellant is not a person aggrieved. His submission echoes the traditional view of locus standi which found the first classical exposition in the hands of James, LJ in Ex parte Sidebotham (1880)14Ch. D 458, defining 'person aggrieved' as one 'who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something', a definition which was approved by Lord Esher, MR in Re Reed Bowen and Co (1887)19QBD174, and repeated in numerous cases thereafter including the case of Durayappah vs. Fernando. (1967) 2AC337. He found in our own case of Md Giasuddin Bhuiyan vs Bangladesh, 1 (1981) BCRAD181 a proper reflection of the traditional view and he relies upon the previously cited Sangbadpatri Parishad Case as well as upon the case of RV Secretary of State for the Environment, Ex parte Rose Theatre Trust Co. (QBD) (1990) 1 All ER 754 and Munizuma Committee vs. Director Katchi Ahadiyeh, Sindh, PLD1992 (Karachi)54. BELA as a registered Association, he submits, has the right to pursue its aims and objects through seminars, discussions etc., but it cannot maintain a writ petition unless its own interests are affected. The writ petition does not disclose that the appellant as an association has suffered any injury by FAP-20 activities. The words 'any person aggrieved' if

interpreted in the manner urged by the appellant, will be nothing short of legislation and an impermissible re-writing of the Constitution by the Court, he submits.

Mr Tofailur Rahman, learned Advocate appearing for respondent Nos 2-4, adopts the arguments of the learned Additional Attorney General and submits additionally that a liberalization of locus standi will open the floodgates to litigation which is least desirable.

In Bangladesh an unnoticed but quiet revolution took place on the question of locus standi after the introduction of the Constitution of the People's Republic of Bangladesh in 1972 in the case of Kazi Mukhlesur Rahman vs Bangladesh, 26DLR(SC)44, decided on September 3, 1974 and hereinafter referred to as Kazi Mukhlesur Rahman's Case. The appellant challenged the Delhi Treaty signed on the 16th May, 1974 by the Prime Ministers of the Government of Bangladesh and the Republic of India providing therein inter alia that India will retain the southern half of south Berubari Union No 12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The ground of challenge was that the agreement involved cession of Bangladesh territory and was entered into without lawful authority by the executive head of government. The High Court Division summarily dismissed the writ petition holding that the appellant had no locus standi. At the hearing of the appellate appeal before the Appellate Division it was urged by the appellant that since the remedies available under Article 102(2) of our Constitution are discretionary, the words 'any person aggrieved' should be construed liberally and given a wide meaning, although in the facts and circumstances of a particular case the Court may regard the personal interest pleaded by a petitioner as being slight or too remote.

This Court, therefore, settled seven general principles in Kazi Mukhlesur Rahman's case viz. — (1) The High Court Division does not suffer from any lack of jurisdiction under Article 102 to hear a person. (2) The High Court Division will grant locus standi to a person who agitates a question affecting a constitutional issue of grave importance, posing a threat to his fundamental rights which extend and extend to the entire territory of Bangladesh. (3) If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others. (4) In interpreting the words 'any person aggrieved', consideration of 'Fundamental Rights' in Part III of the Constitution is a relevant one. (5) It is the competency of the person to claim a hearing which is at the heart of the interpretation of the words 'any person aggrieved'. (6) It is a question of exercise of discretion by the High Court Division as to whether it will treat that person as a person aggrieved or not. (7) The High Court Division will exercise that jurisdiction upon due consideration of the facts and circumstances of each case.

The Sangbadpatri Parishad Case was not an authority for the proposition that an environmental lawyers' association is not a person aggrieved. It

is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purposes of the Constitution. And its interpretation is inextricably linked with the emergence of Bangladesh and framing of its Constitution. (ii) The Preamble and Article 7 of the Constitution bestow the powers of the Republic with the people shall be effected only under and by the authority of the Constitution. Article 7 does not contain empty phrases. It means that all the legislative, executive and judicial powers conferred on the Parliament, the Executive and the Judiciary respectively are constitutionally the powers of the people themselves and the various functionaries and institutions created by the Constitution exercise not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution. The people, again, is the repository of all power under Article 7.

As to (iii) above, it is wrong to view our Constitution as just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition. This Constitution of ours is not the outcome to a negotiated settlement with a former colonial power. It was not drawn upon the consent, concurrence or approval of any external sovereign power. Nor is it the last of an off-replaced and ousted substituted Constitution after several Constitutions were tried and failed, although as many as 13 amendments have so far been made to it. It is the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class part from other Constitutions of comparable description. It is a Constitution in which the people features as the dominant actor. It

was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called 'the People's power'. The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.

As for (iv), Part III of the Constitution bestows Fundamental Rights on the citizens and other residents of Bangladesh. Article 44(1) guarantees the right to move the High Court Division in accordance with Article 102(1) for the enforcement of these rights. Article 102(1) is therefore a mechanism for the enforcement of Fundamental Rights which can be enjoyed by an individual alone in so far as his individual rights are concerned and others when the rights pervade and extend to the entire population and territory. Article 102(1) especially cannot be divorced from Part III of the Constitution.

As for (v), the other provisions of the Constitution which will very from case to case may also come to play a role in interpreting Article 102 of the Constitution.

Article 102 therefore is an instrumentality and a mechanism, containing both substantive and procedural provisions, by means of which the people as a collective personality, and not merely as a conglomerate of individuals, have devised for themselves a method and manner to realize the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution.

With the power of the people looming large behind the constitutional horizon it is difficult to conceive of Article 102 as a vehicle or mechanism for realising exclusively individual rights upon individual complaints. The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context interpreting the words 'any person aggrieved' meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. There is no question of enlarging locus standi or legislation by court.

It is, therefore, the cause that the citizen-applicant or the indigenous and native association espouses which will determine whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.

The High Court Division will exercise some rules of caution in each case. It will see that the applicant is in fact espousing a public cause, that his interest in the subjectmatter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting bona fide, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.

As to the apprehension of floodgate, the people as a whole is no doubt a flood and the Constitution is the sluice-gate through which the people controls its own entry. Our Courts will be prudent enough to recognize the people when the people appears through an applicant as also those who masquerade, under the name of the people, taking up the people's causes at the expense of his own is a rare phenomenon, not a commonplace occurrence.

We hold therefore that the association-appellant was wrongly held by the High Court Division not to be a 'person aggrieved' in the facts and circumstances of the case and we hold further that the appellant is 'any person aggrieved' within the meaning of both Article 102(1) and Article 102(2) (a) of the Constitution.

It is a Constitution in which the people features as the dominant actor. It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called 'the People's power'. The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.

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The Daily Star Entertainment Guide

Sunday 10th November
(All programmes are in local time. There may be changes in the programmes.)

BTV

3:00 Opening Announcement Al-Quran Programme Summary
3:10 Sangbad 3:15 Song
3:20 Recitation from the Bible 3:25 Cartoon: Woody Woodpecker 3:50 Weekly Drama 4:50 Marami 5:00 News
Week 6:25 Sports Programme 6:30 News in Bangla 6:30 Maaeder Janyoti 6:50 Open University 7:00 The News 7:25 Barta Probaho 8:00 News in Bangla 8:25 Parliamentary News 9:00 Film Series: Akbar The Great 10:00

News in English 10:30 Parliamentary News 11:00 Unnayan Sanglap 11:30 News in Bangla 11:35 Monday's programme 11:40 Close down

BBC

6:00am BBC World News 6:30 India Business Report 7:00 BBC World News 7:25 This Week 8:00 BBC World News 8:30 India Business Report 9:00 BBC World News 9:25 This Week 10:00 BBC World News 10:05 World Focus: Horizon 11:00 BBC World News 11:25 India Business Report 12:00am BBC World News 12:20 Earth Report 1:00 BBC World News 1:20 This Week 2:00 BBC World News

lines 2:05 World Focus: BBC Global Report 3:00 BBC World News 3:30 Time Out: Holiday 9:00 BBC World Headlines 9:05 World Focus: Horizon 10:00 BBC World News 10:20 Earth Report 10:30 Time Out: Film '96 11:00 BBC World News 11:30 Time Out: Jeremy Clarkson's Motorworld 12:00am BBC World News 12:20

On The Record 1:00 BBC World News 1:20 Window On Europe 2:00 BBC World Headlines 2:05 World Focus: Wheeler On America 3:00 BBC World News 3:30 Time Out: Tomorrow's World 4:00 BBC World Report inc World Business Report/24 Hours

CHANNEL V

6:00am Frame by Frame 7:00 Rewind VJ Sophia 8:00 Frame by Frame 9:00 Big Bang Weekend 10:30 Soul Curry 11:00 BPL Oye! 12:00 Manga Hai 12:30 First Day First Show 1:00 Rewind VJ Sophia 1:30 Speak Easy 2:00 Videocon Flashback 3:00 Asian Top 20 VJ Trex 5:00 The

Vibe Weekend VJ Luke 7:00 Fashion Police 8:00 The Indian Top 10 9:00 Launch Pad VJ Sophia 10:00 Awards Special VJ Ruby 10:30 House Of Noise 11:00 Rewind VJ Sophia 12:00 Big Bang VJ Alessandra 1:00 The Ride VJ Trex 2:00 Demand VJ Trex 3:00 Big Bang VJ Alessandra

STAR PLUS

6:30 Volttron 7:00 Aerobics 8:30 Tara Rum Rum 9:30 Chana Main Main 11:00 Kaladoscope 11:30 Amul India Show 12:30 The Road Show 12:30 India Business Week 1:30 Star Trak 2:30 Hindi Classic Film

Madhumati 6:00 Chitra 7:00 The Simpsons 8:00 The Adams Family 8:30 Lifeline 9:00 Reporter 9:30 Countdown Plus 10:30 Star Week 11:30 Dynasty 12:30 India Business Week 1:30 Amul India Show 2:00 BBC Documentary 'All Our Children' 3:00 Movie Classic: The Outlaw 5:00 Thelma & Louise

STAR SPORTS

6:30am Live NBA Game Of The Week Washington 9:00 World Wrestling Federation Blast Off 10:30 Asia Sports Show 10:30 Futbol Mundial 11:00 Live Singer Champions Trophy '96 New Zealand vs Pakistan, 1:30 Sunday Classic

2:30 Sports India 3:00 Live Singer Champions Trophy '96 New Zealand vs Pakistan 7:00 Gulf Cup Match II Teams TBC 8:30 Prime Boxing 10:30 History of the Macau Grand Prix 12:00 NBA Game Of The Week Washington 1:30 Asian Classic Snooker H/Ls 2:30 Gulf Cup Match II Oman vs UAE 4:00 Zillate World Spot Special

STAR MOVIES

7:30am Adventure: The Count of Monte Cristo (Hindi Subtitles) 9:30 Comedy: Father and Scout 15 (Hindi Subtitles) 11:30 Family: Andy Cloby's Incredibly Awesome Adventure (Arabic Subtitles) 1:30 Sunday Classic

Western: The Price Of Power 15 (Hindi Subtitles) 3:30 Sunday Show Time: Pee-wee's Playhouse (PG) 4:30 Sunday Show Time: The Directors: Robert Wise 5:30 Sunday Family Double Feature: Dream Date 15 (Hindi Subtitles) 7:30 Sunday Family Double Feature: David (Hindi Subtitles) 9:15 Film '96 9:30 Gold Love, Cheat & Steal 11:30 True Story: Hear My Song 18 (Arabic Subtitles) 1:30 Thriller: Blind Vision 18 3:30 Film Club: Sam and Me 18 (Arabic Subtitles) 5:30 Western Barbarosa 18 (Arabic Subtitles)

ZEE TV

6:00 News 6:30 Jagran 7:00 Bhajans 7:30 Maa 8:00 Mythological

Hindi Film 10:30 Aap Ki Adalat 11:00 Siyaram's Cine Magic 11:30 Lakme Khoo-surat 12:00 Beji Ke PG 12:30 Bourvita Quiz Contest 1:00 Namaste India 1:30 Asian Star Shop 2:30 HFF 5:00 Gane Anjane 7:30 Ad Mad Show 8:00 Casper Kya Scene Hai 8:30 Suno Suno Tring Tring 9:00 Nirma Aahaa 9:30 9:30 Malabar Hill 10:00 The Zee Horror Show 10:30 News 11:00 India 11:30 Phillips Top Ten 12:30 Gopalje 1:00 Mr Minto 1:30 Umeed 2:00 Zee Arabia 2:30 Zee Arabia Infotainment TMM 5:30 Zee Arabia Infotainment TMM

SONY ET

5:30 New Game Jaane Maane 10:00am Jai Bir Hanuman 10:30 Buddha 11:00 Taj Mahal Tak Dina Dhin 11:30 Sunday Ki Sunday 12:00 Hamse Barker Koun 12:30 Pehli Mulakat 1:00 Good Shot 1:30 Pehchan 2:00 Hum Se Barker Gung 2:30 RAVEN 3:30 Gaane Jaane Maane 4:00 Dekh Tamasa Dekh 4:30 O'Maria 5:00 Jane Kaha Mera Jigar Gaya Ji 5:30 Ghaav 6:00 Dekh Tamasa Dekh 6:30 Aahat 7:00 Binda Bole 7:30 Cine Classics Hindi Feature Film 11:00 The Young And The Restless 12:00 Ghaav 12:30 Aahaat 1:00 Faslee 1:30 Surf-Wheel Of Fortune