

## Chapter 4

### CERTIORARI

#### 4.1 Scope and application

When any authority or administrative authority acts illegally and there is an error on the proceeding which has been taken by said authority or on the ground that there is a jurisdictional error by the lower court, and the person whose fundamental rights infringed he/she may move to the High Court Division to establish his/her rights under article 102 of the Constitution. In study of various writ petitions, from 1972 to 2008, it has been proved that the following circumstances the petitioner can move to the High Court Division for remedy; i.e. the decision violates fundamental rights, the decision was invalid, the decision is against natural justice, perverse or based on non-application of mind. A certiorari applicant must have a sufficient interest in the subject-matter of the proceeding sought to be impugned in order to move the court for certiorari.

#### 4.2 Development of Certiorari

An application under article 102 to scrutinize the function of the republic or any local authority.<sup>1</sup> An application under article 102 (2) (a) (ii) filed by Bangladesh National Women Lawyers Association (BNWLA) represented by its executive director Salma Ali. The petitioner has given brief description from work places and educational institutions (i.e. garments sector, media, non-government organization and academia) on sexual harassment.

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<sup>1</sup> The term local authority has been defined in sec. 3(28) of *the General Clauses Act, 1897*.

In the case of *Apparel Export Promotion Council v. A. K. Chopra*,<sup>2</sup> the Court has given definition on ‘sexual harassment’ which is as follows:

Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favors and other verbal or physical unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

In *Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh*,<sup>3</sup> the petitioner has failed to taken into consideration that which clause will be relevant with article 102 of the Bangladesh Constitution. In judgment Justice Syed Mahmud Hossain has given guidelines and directions which are within the definition of ‘writ of mandamus’ relevant with article 102 (2) (a) (i) of the Constitution, but unfortunately both the parties as well as High Court Division has failed to identified which clause will be relevant. In the said writ petition, the High Court Division has given direction which are in the nature of mandamus, but the petitioner written an application in the cover page under article 102 (2) (a) (ii) of the Constitution which are within the definition of certiorari.

In 1981, *Dr. Nurul Islam v. Bangladesh and others*,<sup>4</sup> the appellant Dr. Nurul Islam, Prof. of Medicine and Research, filed a writ petition challenging the government order retiring him from service on the basis of powers conferred by sub-section 2 of section 9 of Public Servant (Retirement) Act 1974. The Appellate Division verdict that section 9 (2) of the Act was itself ultra vires being violative of articles 27 and 29 of the Constitution which mentioned for the fundamental rights of equality before law and equality in opportunity in public employment.

In *Chittagong Chemical Complex v. the Chairman Labour Court*,<sup>5</sup> the High Court Division dismisses the writ petition on the ground that the case of the first party was proved and accordingly gave the impugned decision. Even if some materials are not considered by the Labour Court it may be on illegality or irregularity but it cannot be a ground for interfering with the decision under article 102 of the Constitution. On appeal, the Appellate Division

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<sup>2</sup> AIR 1999 SC 625.

<sup>3</sup> Judgment on 14.5.2009, Writ Petition No. 5916 of 2008.

<sup>4</sup> 1BLD (1981) AD 240.

<sup>5</sup> 46 DLR (1994) AD 182.

verdict that the High Court Division cannot be sustained. Before passing a judgment *ex parte*, in absence of the second party, the employer, the Labour Court ought to have examined at least the employee's papers to see whether the case was proved and High Court Division without assessing and considering the material law points dismissed the writ petition. After hearing, the appeal is allowed by Appellate Division and declared that the complaint case was passed without any lawful authority.

In *Ali Absan v. Rajshahi University*,<sup>6</sup> the High Court Division held that the service of the petitioner was under a development budget and Act 12 of 1974 is not applicable for a person serving under development budget; as such Board of Governors took a wrong and illegal decision.

In *Seacom Shipping Ltd. v. Commission of Customs and Others*,<sup>7</sup> the Court verdict that ends of justice would be best served if the petitioner is allowed to prefer the appeal with 100% Bank Guarantee instead of 50% deposit in cash.

In *Abdul Halim Gazi v. Afzal Hossain & Others*,<sup>8</sup> regarding question of loan default the Appellate Division verdict that the High Court division committed error of law in holding that that the writ respondent no. 7 (Appellant) is a bank defaulter. We are rather of the view that the matter is pending before the Appellate Division and so it has not reached its finality and therefore the decision arrived at by the High Court Division declaring the appellant as Bank Loan defaulter, at this stage, is premature and erroneous.

In *Sk. Ali Ahmed v. Secretary*,<sup>9</sup> in the instant leave to appeal to interpret the provision of section 18 of the Arms Act 1879 which deals with the subject of cancellation and suspension of license of fire-items. An appeal as to question whether the appellant was entitled to a hearing before the decision to cancel his license. Appeal was granted to consider several contentions but the appeal was pressed mainly on the ground that the High Court Division was not justified in upholding the order of cancellation and confiscation,

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<sup>6</sup> 60 DLR (2008) 475.

<sup>7</sup> 6 BLC 516.

<sup>8</sup> 16 BLT (AD) 195.

<sup>9</sup> 40 DLR 1988 (AD) 170.

which was passed by the minister without recording any reason and without affording an opportunity to the appellant to refute the allegations based on which the license was cancelled. The Appellate Division verdict that the instant appeal is allowed on the ground that “no one should be condemned unheard” is a settled principle of law which is embodied in the maxim *audi alteram partem*.