

Dr Mohiuddin Farooque

v

**Secretary, Ministry of Commerce,
Government of the People's Republic of Bangladesh and Others**

**Supreme Court of Bangladesh, High Court Division
(Special Original Jurisdiction)**

Writ Petition No. 92 of 1996

Before: Kazi Ebadul Hoque, J., Amirul Kabir Chodhury, J.

Argued: 18 and 19 June 1996.

Decided: 1 July 1996

Kazi Ebadul Hoque. J.

This rule was issued at the instance of the Petitioner Dr Mohiuddin Farooque, directing the Respondents to show cause why they should not be directed not to release the skimmed milk powder imported under L.C. No. PB/CASH/238/94 dated 07.08.94 by Respondent No. 6 as mentioned in certificate dated 08.01.95 issued by the Bangladesh Atomic Energy Commission's Radiation Testing Laboratory, Chittagong (Annexure D). Facts leading to the issuance of this rule are as follows: Respondent No.6, Danish Condensed Milk Bangladesh Limited, opened L.C. dated 07.08.94 for importing 500 metric tons of skimmed milk powder from M/s Datraco B.V. Netherland (Holland). Out of 500 metric tons, 125 metric tons arrived on 17.10.94, 250 metric tons arrived on 10.11.94 and the remaining 125 metric tons arrived on 19.12.94 at Chittagong port. The earlier two consignments were duly cleared after completion of customs formalities and radiation test made by the Radiation Testing Laboratory, Chittagong. The last consignment had arrived at Chittagong port through M.V. Lanka Mahapola though the same was shipped from Rotterdam through M.V. Indira Gandhi.

On 20.11.94 one sample of the skimmed milk powder out of the said 125 metric tons was collected and sent for testing to the Radiation Testing Laboratory, in short R.T.L., Chittagong, of Respondent No.3, the Bangladesh Atomic Energy Commission. After testing the said sample in the R.T.L. Chittagong and the Health Physics Laboratory of Respondent No.3 in Dhaka, the Director, R.T.L. Chittagong, issued a certificate of radiation test on 08.01.95 (Annexure D) stating that he found 133 Bq radiation per kilogram which was above the maximum approved radiation level of 95 Bq. So he opined that the consignment in question should not be marketed in the public interest and requested to take action on an emergency basis.

Thereafter at the instance of S.G.S., a survey and pre-shipment agency, five samples from five containers containing the said 125 metric tons of skimmed milk powder were taken

on 28.01.95 and sent directly to Respondent No.3 in Dhaka for a further test, and one out of five samples was tested and the chief of the Health Physics Department, Dhaka, of Respondent No.3 sent a letter on 04.02.95 to S.G.S. (Annexure F) informing that the radiation level found in the said sample was 15 Bq per kilogram which is below the approved radiation level for Bangladesh.

Thereafter on 22.03.95 again five samples were collected from the five containers (vide Annexure K). Thereafter on 29.03.95 and 11.04.95 the Director, R.T.L. Chittagong, raised objection against the sending of the said samples for a further test. Thereafter on 05.04.95 Respondent No.4, the Collector of Customs, directed the importer, Respondent No.6 to send back the aforesaid milk powder to the exporter as the radiation level of the same was above the acceptable limit (Annexure J).

Thereafter on 20.04.95 the Secretary of Respondent No.3 informed Respondent No.4 that the Atomic Energy Commission decided that random sampling from each container of the relevant consignment should be collected in the presence of the Director, R.T.L. Chittagong. Thereafter on 19.06.95 the said Secretary asked Respondent No.2, the Secretary, Ministry of Science and Technology, to direct Respondent No.4 to take action as per his earlier letter dated 20.04.95. Thereafter the Senior Assistant Secretary of the said Ministry by letter dated 02.07.95 (Annexure P) informed Respondent No.3 that the atomic Energy Commission could take the following steps:-

- (a) R.T.L. Chittagong be asked to make a radiation test in conformity with their previous test;
- (b) on the basis of random sampling, a detailed test be made and thereafter a certificate be granted by the central office.

In the meantime on 25.05.95 the said exporter M/s Datraco B.V. filed Other Class Suit No.49 of 1995 in the 3rd Court of Assistant Judge, Chittagong, impleading Respondents Nos. 1, 4 and 6 as defendants, praying for a declaration that the order of reshipment dated 05.04.95 on the basis of radiation test certificate dated 08.01.95 without re-examination of the goods as per letter dated 20.04.95 of the Bangladesh Atomic Energy Commission, Dhaka, was illegal, motivated and without jurisdiction. The plaintiff also prayed for a decree for mandatory injunction directing Respondent No.4 to re-test the goods as per letter dated 20.04.95. Thereafter on07.95 the prayer of the said plaintiff for temporary mandatory injunction was rejected by the Assistant Judge. Being aggrieved by the same, the said plaintiff filed Misc. Appeal No.195 of 1995 and by order dated 09.09.95 the learned District Judge allowed the appeal and directed Respondents Nos. 3, 4 and 6 to re-test and re-examine the milk powder in question.

In the meantime the Chief Metropolitan Magistrate, Chittagong, allowed the prayer of the police for seizure of the consignment in question on 19.06.95. Thereafter on 22.07.95 the Chief Metropolitan Magistrate allowed the prayer of the Police for destruction of the said goods. Thereafter on 02.08.95 the Chief Metropolitan Magistrate rescinded his order

dated 22.07.95 but maintained the order of seizure dated 19.06.95. In Criminal Motion No.767 of 1995 the Sessions Judge set aside the order of seizure dated 19.06.95. In pursuance of the aforesaid direction of the learned District Judge, the R.T.L. Chittagong on 15.05.95 informed the Collector of Customs that a sample would be collected on 22.10.95. But on 22.11.95 the importer requested for refixing of the date for collection of the sample. Thereafter on 04.12.95 samples were collected. After re-test the R.T.L. Chittagong found the level of radiation in the 5 samples collected from one container above the acceptable limit, and in the remaining samples, below the said limit. On the other hand, the Institute of Nuclear Science and Technology, Savar, or Respondent No.3 found the level of radiation in 10 samples collected from two containers above the acceptable limit and the remaining samples below such limit.

The Petitioner submitted that as Secretary-General of the Bangladesh Environmental Lawyers Association (BELA) he filed the Writ Petition in the public interest as consumption of imported food items containing a radiation level above the acceptable limit and injurious to public health is a threat to the life of the people of the country including himself who are potential consumers of such goods. Under Article 18(1) of the Constitution the State is bound to take measures to raise the level of nutrition and the improvement of public health, and under Article 21(2) persons in the service of the Republic have a duty to strive to serve the people. But the activities of the Government officers and officers of the Atomic Energy Commission in dealing with the consignment in question injurious to public health has threatened the life of the people. He therefore contended that under Articles 31 and 32 of the Constitution the right to life is a fundamental right, and the actions of those officers in not compelling the importer, Respondent No.6, to send back the imported milk powder in question injurious to public health has violated the aforesaid fundamental right to life, and as such the Respondents should be directed to take measures for sending back the said milk powder to the exporter.

Though the Rule was served on all the Respondents, except for Respondents Nos.3 and 6 no other Respondents appeared to contest the Rule.

The learned Advocate for Respondent No.6 submitted that after re-testing in Chittagong and Savar Laboratories of Respondent No.3 in compliance with the order of the learned District Judge, the radiation level in the entire consignment was not found above the acceptable limit and as such the entire consignment of imported milk powder cannot be directed to be send back. He further submitted that since the suit filed by the exporter is still pending, this Court in the exercise of its writ jurisdiction should not enter into the determination of questions of fact which should be left to the court below in which the suit is pending.

In this Rule the Petitioner seeks enforcement of a fundamental right under Articles 31 and 32 of the Constitution on the allegation that the right to life of the people of the country including himself who are the potential consumers of the condensed milk prepared using the imported milk powder is under threat. The Petitioner claimed that he sought enforcement of the aforesaid fundamental right in the public interest. The Respondents do

not challenge such claim of the Petitioner. So we need not consider as to whether the Petitioner is entitled to the enforcement of such fundamental right in his own behalf or in the public interest.

Let us see what is the meaning of the right to life under Articles 31 and 32 of the Constitution of Bangladesh, and whether such right has been threatened as alleged by him, and whether he is entitled to the relief sought for, or to any other relief.

Articles 31 and 32 of the Constitution are as follows:-

“31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law,”

“32. No person shall be deprived of life or personal liberty save in accordance with law.”

Under Article 31 of the Constitution, no action detrimental to life, liberty, body, reputation or property of any person can be taken except in accordance with law and a person including a citizen is entitled to protection of law and entitled to be treated in accordance with law for the preservation of life, liberty, etc. Under Article 32, no person shall be deprived of his life or personal liberty save in accordance with law. Under both the above Articles, life cannot be endangered except in accordance with law. So the right to life is a fundamental right subject to the law of the land. Since the right to life has not been interpreted in our domain, we are to see what is the meaning of the right to life. In the absence of any such interpretation from our domain, we may see what meaning was given by the superior courts of other countries to the right to life.

The Fifth Amendment to the Constitution of the United States of America declares: “No person shall be deprived of his life, liberty or property without due process of law”. The Fourteenth Amendment also imposes a similar limitation on the states. In the case of *Munn vs Illinois* (1877) 94 U.S. 113, in his dissenting judgment Field J. interpreted “life” under the aforesaid provisions of the U.S. Constitution as follows: “Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.”:

Article 21 of the Constitution of India provides: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The Indian Supreme Court interpreted the right to life under the aforesaid Article 21 of the Indian Constitution, similar to our Article 32, in several cases.

In the case of Francis Coralie vs Union Territory of Delhi, reported in A.I.R. 1981 S.C. 746, the right to life under Article 21 of the Indian Constitution has been interpreted in the following words:

“But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to life with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

In the case of Bandua Mukti Morcha vs Union of India, reported in A.I.R. 1984 S.C. 803, the Supreme Court of India, while interpreting Article 21 of the Indian Constitution, further extended the meaning of right to life as made in the earlier case in the following words:

“.....It must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.”

In the case of Olga Tellis vs Bombay Municipal Corporation, reported in A.I.R. 1986 S.C. 180, the Supreme Court of India, while interpreting Article 21 of the Indian Constitution, further extended the meaning of the right to life in the following words:

“The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of a death sentence except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood, because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which alone makes life livable must be deemed to be an integral component of the right to life.”

In the case of Vincent vs Union of India, reported in A.I.R. 1987 S.C. 990, the learned Judge delivering the judgment in that case quoted with approval the interpretation of the right to life made by the Indian Supreme Court in the Bandua Mukti Morcha case and held:

“A healthy body is the very foundation for all human activities In a welfare state, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health maintenance and improvement of public health

have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society which the Constitution makers envisaged.”

In the case of *Vikram Deo Singh vs State of Bihar*, reported in A.I.R. 1988 S.C. 1982 it was further held that:

“We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to quality of life consistent with his human personality. The right to life with human dignity is the fundamental right of every Indian citizen.”

In the case of *Subash Kumar vs State of Bihar*, reported in A.I.R. 1991 S.C. 420, it was further held:

“The right to live is a fundamental right under Article 21 of the Constitution and it includes the right to the enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.”

From the above decisions it appears that the right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.

In the instant case before us the question is whether the alleged contaminated imported milk powder endangers or may endanger the life of the Petitioner and other people living in the country, violating the fundamental right of right to life. If the right to life under Articles 31 and 32 of the Constitution means the right to protection of health and normal longevity of an ordinary human being endangered by the use or possibility of use of any contaminated foods etc, then it can be said that the fundamental right to life of a person has been threatened or endangered.

The Fundamental Principles of State Policy under Article 18(1) of the Constitution provides:

“18(1). The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes, as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health.:

Though the aforesaid provision cannot be enforced by the Court, it can be seen for interpreting the meaning of the right to life under Articles 31 and 32 of the Constitution. A man has a natural right to the enjoyment of healthy life and a longevity upto normal expectation of life in an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions. When a person is grievously hurt or injured by another, his life and longevity are threatened. Similarly, when a man consumes food, drink, etc, injurious to health, he suffers ailments and his life and normal expectation of longevity are threatened. The natural right of man to live free from all the man made hazards of life has been guaranteed under the aforesaid Articles 31 and 32 subject to the law of the land. Use of contaminated food, drink, etc, be it imported or locally produced, undoubtedly affects health and threatens life and longevity of the people. In a country like ours, where most of the people are illiterate, they are unable to distinguish between contaminated and contamination-free food, drinks, etc. In such circumstances, the marketing of contaminated food items is a potential danger to the health of the people, ultimately affecting their life and longevity, as most of the people are unable to avoid such food.

Even for an educated person it is difficult to distinguish between contaminated and contamination-free food, drink, etc. No one has the right to endanger the life of the people, which includes their health, and normal longevity of an ordinary healthy person by marketing in the country any food item injurious to the health of the people. We are therefore, of the view that the right to life under Article 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, the protection of health and normal longevity of an ordinary human being.

It is the primary obligation of the State to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc. Though that obligation under Article 18(1) of the Constitution cannot be enforced, the State is bound to protect the health and longevity of the people living in the country as the right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of the health and normal longevity of a man free from threats of man made hazards unless that threat is justified by law. The right to life under the aforesaid Articles of the Constitution being a fundamental right, it can be enforced by this Court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life. In the exercise of powers conferred by Sub-section (1) of Section 3 of the Imports and Exports (Control) Act 1950, Import Policy Order 1993-95 was published in the Bangladesh Gazette dated 06.10.93. Clause (a) of Article 10(11) of the said Order provides that a test of the radioactivity level of certain imported food items including milk food or milk products is mandatory, and in the said Article detailed provisions have been made for collection of samples and conducting of tests of such food items. Clause (o) of the said Article 10(11) provides that the acceptable limit of radioactivity of milk powder, milk food and milk products is 95 Bq of CS-137 per kilogram. Clause (e) of the said Article 10(11) provides that if, on a test of a sample taken from a consignment by the Bangladesh Atomic Energy Commission, it is found that the consignment contains a

radioactivity level above the acceptable limit, the consignment shall not be released and the concerned exporter/ supplier shall be bound to take it back at his own expense. Before publication of the Import Policy Order 1993-95 on 22.07.1993, the Nuclear Safety and Radiation Control Act 1993 (Act XXI of 1993) was enacted. Section 3(Ka) of the said Act provides that the Bangladesh Atomic Energy Commission may make rules and policy and give orders and directions for effectuating such rules and policy for nuclear safety and radiation control and disposal of radiated wastes. Section 3(Ja) of the said Act provides that the Commission shall determine the acceptable limit of radiation in the air, food and drink used by men and animals or on any other materials used in any other way. Sub-section (3) of Section 6 of the said Act provides that unless otherwise proved in a court of law, the report or test result sent by the laboratories maintained or approved by the Commission shall be accepted as evidence. Thus it appears that the Government is conscious about the threat to the life of the people of this country by the use of food items having a radiation level above the acceptable limit, and to prevent the import or use of such food items the above law and policy order have been made.

The grievance of the Petitioner is that due to the action and inaction of the Government functionaries, in spite of the detection of a high level of radioactivity in the imported milk powder in question, the same has not yet been sent back to the exporter though the exporter was bound under the terms and conditions of the letter of credit to take back the same after detection of a radioactivity level above the acceptable limit of 95 Bq.

It has already been noticed that on 08.01.95 the Director, RTL Chittagong, in his certificate stated that the radioactivity level in the sample of milk powder examined was 133 Bq per kilogram which is much above the acceptable limit of 95 Bq per kilogram, and as such he requested not to market the milk powder in question so that the same did not come within the reach of the people. Before granting the said certificate, the said office on 31.11.94 informed Respondent No. 4 that a certificate could not be granted before completion of the test of the sample in question in the different laboratories of Respondent No.3. Thereafter on 05.01.95 the said officer received a letter from the Director, Bangladesh Atomic Energy Commission, Dhaka, informing him that no certificate can be issued for releasing the said milk powder as the radiation level was above the permissible limit of 95Bq per kilogram, and with the said letter a copy of the test result conducted by Mr. Fazlay Karim Mia on 31.12.94 stating that radiation level was $145.6 + 17.7(1)$ Bq per kilogram of 137 CS. The very officer Mr. Fazlay Karim Mia on 04.02.95 sent a letter of SGS (Bangladesh) Limited stating that on examination of one sample of milk powder he found a radiation level of 15 Bq in 137 CS which is below the acceptable limit. In spite of the same, Respondent No.4 on 04.05.95 directed the importer, Respondent No.6, to send back the imported milk powder to the exporter on the basis of the certificate dated 08.01.95 earlier issued by the Director, RTL Chittagong, who issued the same on the basis of the letter dated 05.01.95 sent by the Director, Atomic Energy Commission, Dhaka. But thereafter on 20.04.95 the Secretary of Respondent No.3 requested Respondent No.4 to collect random samples in the presence of the Director, RTL Chittagong, for testing the same at Chittagong and at the Institute of Nuclear Science and Technology, Savar. He did not rest there and also requested the secretary, Ministry of Science and Technology, to direct Respondent No.4 to take action

on the basis of his letter dated 20.04.95, and thereafter on 02.07.95 the Senior Assistant Secretary directed Respondent No.3 for collecting random samples and for testing the same.

It is not understood under what authority the said officers took the decision for re-testing fresh samples of the imported milk powder in question after a certificate was issued by the Director, RTL Chittagong, with the approval of the Director of Respondent No.3 on the basis of a further test held by Mr. Fazlay Karim Mia, Chief Scientific Officer of Respondent No.3. It is curious to note that Mr. Fazlay Karim Mia subsequently on 04.02.95 informed SGS (Bangladesh) Limited that after testing one sample of milk powder he found the radiation level per kilogram at 15 Bq which is contrary to his earlier test result dated 31.12.94. These activities of the officers of Respondents Nos. 1-4 rightly created an apprehension in the mind of the Petitioner that attempts were being made to release the milk powder in question, though no such certificate was officially issued by Respondent No.3 and sent to Respondent No.4 as required under the Import Policy Order 1993-95.

The riddle created by such contradictory test reports can be solved if we examine the test reports sent by the Secretary of Respondent No.3 to the District Judge, Chittagong, on 21.01.96 (Annexure VI) after examining 50 sets of samples. It appears from the said reports that out of 50 sets of samples, 25 sets were tested at the RTL, Chittagong, and the remaining sets were tested at the Institute of Nuclear Science and Technology, Savar, separately. It appears from the test report of RTL, Chittagong, dated 05.12.95 annexed to that letter, that 5 samples were collected from each of the 5 containers and in total the 25 samples thus collected from 5 containers were examined by the RTL, Chittagong, and the said laboratory found the radioactivity level in five samples collected from container No. GSTU 621695 (0) of Estonia origin between 126 and 166Bq per kilogram and radioactivity level in the remaining 20 samples collected from 4 other containers was found below the acceptable limit. It further appears from the test report dated 14.01.96 of the Institute of Nuclear Science and Technology, Savar, that it also examined 25 samples collected from 5 containers in the above manner, and it found the radioactivity level in the 5 samples collected from container No. GSTU 708944 (3) of Estonia origin between 124 and 177 Bq per kilogram, and in the five samples collected from container No. GSTU 621695 (0) of Estonia origin between 244 and 362 Bq per kilogram, and found the radioactivity level in the remaining 15 samples collected from the remaining 3 containers below the acceptable limit.

It has been asserted by Respondent No.6 in his affidavit-in-opposition that the first sample collected on 20.12.94 and tested by the RTL, Chittagong, was taken from container No. GSTU 621695(0). But there is no statement from which container a sample was tested by Mr. Fazlay Karim Mia at the instance of SGS was taken. From the above admission of Respondent No.6 and the last test result, it appears that the Director, RTL, Chittagong, on both occasions found a radiation level in the sample collected from container No. GSTU 621696(0) above the acceptable limit and the same was confirmed by the test report dated 31.12.94 of the said Mr. Fazlay Karim Mia and test result dated 14.01.96 of the Institute of Nuclear Science and Technology, Savar. So it can safely be

concluded that the test report mentioned by Mr. Fazlay Karim Mia in his letter dated 04.02.95 must have been on the basis of the sample collected from one of the other 3 containers in which the radiation level was found below the acceptable limit in the final tests made by both the RTL, Chittagong, and INST, Savar.

It has already been noticed that the exporter of the milk powder in question filed Other Class Suit No.49 of 1995 in the 3rd Court of the Assistant Judge, Chittagong, on 28.05.95 praying for the two reliefs already noted above. Out of the two reliefs, the prayer for a mandatory injunction for re-examination of the goods in question on the basis of letter dated 20.04.95 of the Secretary of Respondent No.3 has already been indirectly granted by allowing the prayer for temporary mandatory injunction by the District Judge in Misc. Appeal No.195 of 1995. Now the remaining prayer for a declaration that letter dated 05.04.95 issued by Respondent No.3 for sending back the imported milk powder in question is illegal and without jurisdiction is pending decision in that suit. In that view of the matter we do not think it advisable to give any direction to the Respondents to send back the milk powder in question as the same is sub judice before a subordinate court. It appears that the expiry date of the milk powder of Lithuania origin is 01.08.96 and that of Estonia origin is 13.09.96 and 14.09.96. In the supplementary affidavit filed on behalf of Respondent No.6 it has been stated that if condensed milk is prepared using milk powder within the expiry date, then the life of the condensed milk is extended. Since we have left the matter to be decided by the court below, this question may be raised there. Article 10(11) of the Import Policy Order 1993-95 made detailed provisions for testing of radioactivity levels of imported food items including milk powder and also for sending back the food items containing a radioactivity level above the acceptable limit. It appears that Respondent No.4 who is the defendant No.1 in the said suit contested the prayer for temporary injunction but it is not known whether the suit is also being contested or not by filing a written statement. None appeared in this Rule to represent Respondent No.4 as well as the Government Respondents Nos.1 and 2. Only Respondent No.3 appeared and filed affidavit-in-opposition.

We have already indicated that we are not deciding this rule on merit as the relief sought by the Petitioner in this rule is sub judice before the court below. But we have found that the right to life is an important fundamental right guaranteed under Articles 31 and 32 of the Constitution. We have also found that the Government by enacting the aforesaid Act XXI of 1993 and also publication of Import Policy Order 1993-95 imposed restrictions on the import of food items including milk powder containing a radioactivity level above 95 Bq per kilogram injurious to public health, to protect the life of the people of this country from the hazards likely to be created by the consumption of such injurious food items. But actions taken by the officers of Government and the Atomic Energy Commission created confusion and a situation likely to lead to litigation.

On consideration of the material on record we have noticed the anomaly in the collection of samples of the imported milk powder for radioactivity testing. Nothing has been produced before us to show that either the Collector of Customs or the Atomic Energy Commission can arrange for the collection of samples repeatedly and make several tests. It has also been found that after collection of a sample the same is tested by the RTL,

Chittagong, which is a laboratory of Respondent No.3, the Bangladesh Atomic Energy Commission, and if a radioactivity level is found by the said laboratory above the acceptable limit then it sends the remaining quantity of the sample tested by RTL for a further test in other laboratories maintained by Respondent No.3. But no rule or regulation or instructions of the Atomic Energy Commission made under the Provisions of Act XXI of 1993 has been produced before us to show whether there is any provision for a further test collecting further samples. It appears from office Memo 7288 dated 07.02.88 issued by the Assistant Secretary, Ministry of Commerce, that only one sample should be collected for examination of radio-activity level of milk foods and milk products etc, imported from the same source and country under the same brand name by one ship under the same L.C., though under different invoices and bills of lading. Sub-clause (03) of Clause (d) of Article 10(11) of the Import Policy Order 1993-95 also provided for collection of samples of different food items in respect of which radioactivity level is to be tested, and on arrival of the ship carrying such items, in the presence of the importers representatives, master of the ship or representative of the port authority, as the case might be, samples of such food items are collected for testing radioactivity level. There is nothing in the said provision or anywhere else that samples can be collected more than once. It appears from the said provision that a sample so collected shall be handed over to the officer of the Bangladesh Atomic Energy Commission for testing, and the laboratory of the Bangladesh Atomic Energy Commission shall within 24 hours send the test report to the sample room of the Collector of Customs from where the sample was received. Though there is no mention in the said provision about the Radiation Test Laboratory (RTL) Chittagong, it appears that such a laboratory was in the view of the makers of the Import Policy Order from the time limit of 24 hours fixed for sending the test report.

In the above facts circumstances and law, we are of the view that to avoid confusion, anomaly and litigation and to ensure enforcement of the fundamental right of right to life, some directions should be given to Respondents Nos. 1 to 4 for the better implementation of the Import Policy Order for the control of imported food items injurious to public health in respect of the collection of samples and testing the same for determination of radioactivity level, so that in future injurious food items cannot enter into the country to adversely affect the health of the people, jeopardising their life, longevity and normal life expectancy by the consumption of such injurious food items. We shudder to think that the exporter who assured that the milk powder in question was within the acceptable limit of radioactivity level as per certificate issued by the S.G.S could contain a portion having a radioactivity level much above the acceptable limit, and in the final test made in the two laboratories of Respondent No.3 the radioactivity level of the samples collected from two out of five containers could be found much above the acceptable limit. Had the sample been collected from one of the remaining three containers at the very inception and tested, then the high radioactivity level in the two containers would not have been detected and such contaminated food items would have entered the market and affected the health, life and longevity of the people. Nobody knows how many such injurious food items have been imported into this country taking advantage of the existing system of collection and testing of one sample only. So in the fitness of things, it is necessary to

formulate a fool proof method of collection of samples and testing the same so that contaminated food etc, injurious to health cannot enter into the country.

Till such foolproof effective methods are evolved by the authorities, we direct Respondent No.4, the Collector of Customs, to collect more than one sample if the cargo in question subject to testing is brought in through more than one container (i.e. one sample from each of the containers containing the cargo in question) and to send the same for testing to the Director RTL, Chittagong, and not to send any samples to the Atomic Energy Commission, Dhaka, for further testing in any other laboratory under it after receipt of the report of the test from the Director, RTL. We also direct Respondent No.3, the Bangladesh Atomic Energy commission, not to receive any sample or samples for test direct from the Collector of Customs unless sent through the Director, RTL, so long as contrary rules are not made or issued by the Commission in the exercise of its powers under Sections 3 and 16 of Act XXI of 1993.

The Respondent Government and the Collector of Customs who are defendants Nos.1 and 2 in the aforesaid suit are directed to contest the said suit by filing written statements, if not already filed, and to take all steps for production of evidence and relevant materials before the court below, to enable it to adjudicate the matter in accordance with law and evidence so that the plaintiff cannot obtain an ex-parte decree by the default of the said defendants.

The court below will be at liberty to decide the case in accordance with law and evidence adduced before it, free from the opinions expressed and observations made in this judgment.

In the result, the Rule is made absolute in part without any order as to costs, with the above directions to Respondents Nos. 1 to 4. Let a copy of the judgment be sent to Respondents Nos. 1 to 4.

K.E. Hoque

I agree.

Amirul Kabir Chowdhury