

**14 SCOB [2020] HCD**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 7833 of 2016

**Dr. Nafia Farzana Chowdhury**

..... Petitioner

-Versus-

**Bangabandhu Sheikh Mujib Medical University (BSMMU), represented by its Vice Chancellor and others.**

..... Respondents

Mr. Ramzan Ali Sikder, Advocate with  
Mr. Zaman Akter, Advocate and  
Mr. Mir Shafiqul Islam, Advocate  
.... For the Petitioner

Mr. Tanjib-ul Alam, Advocate with  
Mr. M. Saquibuzzaman, Advocate and  
Mr. Kazi Ershadul Alam, Advocate  
..... For Respondent Nos. 1-5

Mr. Imtiaz Moinul Islam, Advocate  
..... For respondent No. 6

Date of Hearing : 27.06.2018,  
16.07.2018, 17.07.2018, 22.10.2018,  
23.10.2018, 24.10.2018 & 28.10.2018

Date of Judgment : 20.11.2018

**Present:**

**Mr. Justice Zubayer Rahman Chowdhury**

**And**

**Mr. Justice Sashanka Shekhar Sarkar**

**Equal protection of law in appointment;**

**If any particular case the selection committee abuse its power in violation of Article 31 of the Constitution, that may be a case for setting aside the result of a particular interview. ... (Para 51)**

**Unlawful Appointments not validated by rendering service;**

**If any appointment is given by the Authority in gross violation of the Rules, lapse of any period of time and rendering of service in the said post by the incumbent cannot clothe the said appointment with any legal validity. ... (Para 55)**

**JUDGMENT**

**Zubayer Rahman Chowdhury, J:**

1. By an application under Article 102(2)(a)(ii) of the Constitution of the Peoples Republic of Bangladesh, the petitioner has called in question the legality and propriety of the order dated 08.06.2016, issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, Bangabandhu Sheikh Mujib Medical University, Dhaka.

2. The Rule is being opposed by respondent nos. 1-5 and respondent no. 6, by filing affidavits-in-opposition. It is interesting to note that pursuant to issuance of Rule, respondent nos. 1-5 and respondent no. 6 had not only executed the Vokalatnama jointly, but also filed a

common affidavit-in-opposition dated 21.08.2016. When this issue was pointed out by the Court, respondent no. 6 filed a fresh power on her own behalf along with a separate affidavit-in-opposition. Respondent nos. 1-5 did likewise

3. Relevant facts leading to the issuance of the Rule are that the petitioner obtained MBBS degree from Sylhet MAG Osmani Medical College in 1999. She was appointed on 02.03.2006 as a Medical Officer of Bangabandhu Sheikh Mujib Medical University (briefly, BSMMU). Subsequently, the petitioner obtained Doctor of Medicine (MD) degree from BSMMU in 2011 and she was awarded the Prime Minister's Gold Medal.

4. Vide Memo No. বিএসএমএমইউ/২০১৩/১১১৮৫ dated 19.09.2013, applications were invited for appointment in various posts under different Departments of BSMMU. The petitioner, having the requisite qualification, applied for appointment in the post of Assistant Professor in the Department of Psychiatry, BSMMU (hereinafter referred to as the said post). Although appointments were made in various positions in some of the other Departments, the Authorities did not proceed with the process of appointment in the said post.

5. After a period of nearly two years, respondent no. 5 once again published an advertisement on 09.11.2015 inviting applications for appointment in the said post. Accordingly, the petitioner, along with some other candidates including respondent no. 6, applied in response to the advertisement. Upon taking interview of the candidates, the impugned order dated 08.06.2016 was issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, which has been challenged by the petitioner by filing the instant writ petition.

6. As noted earlier, the Rule is being opposed by respondent nos. 1-5 and respondent no. 6. The contesting respondents have opposed the Rule primarily on the ground that the petitioner has no locus standi to challenge the impugned order. It was also stated in the respective affidavits-in-opposition that respondent no. 6 was appointed in the said post as the Selection Board considered her to be the most suitable candidate amongst all the applicants. It was the further case of the contesting respondents that the petitioner, having participated in the selection process but having failed to obtain the appointment in the said post, cannot now challenge the very same process of selection to which she was a party. It was further stated that respondent no. 6 has long since joined in the said post and is discharging her duties at BSMMU.

7. Mr. Ramzan Ali Sikder, the learned Advocate appears along with Mr. Zaman Akter and Mr. Mir Shafiqul Islam, the learned Advocates on behalf of the petitioner, while Mr. Mr. Tanjib-ul Alam, the learned Advocate appears along with Mr. M. Saquibuzzaman and Mr. Kazi Ershadul Alam, the learned Advocates on behalf of respondent nos. 1-5. Mr. Imtiaz Moinul Islam, the learned Advocate appears on behalf of respondent no. 6.

8. Having placed the application and the supplementary affidavits filed on behalf of the petitioner together with the documents annexed thereto, Mr. Sikder submits that this is a case of malafide, pure and simple. Elaborating his submission, the learned Advocate submits that the Authority had earlier published an advertisement in 2013 inviting applications for appointment to the post of Assistant Professor in the Department of Psychiatry, pursuant to which four candidates including the petitioner applied. However, although appointments were made in several posts in the other Departments, for some unexplained and unknown reason, the Authority did not proceed with the process of appointment in the said post. He submits

that the Authority neither rejected the applications filed by the applicants nor provided any reason for withholding the process of appointment in respect of one particular post.

9. Mr. Sikder submits that the Authority once again published the advertisement in 2015 for giving appointment in the said post, following which the petitioner and some other candidates, including respondent no. 6, applied. Upon taking interview of the candidates, respondent no. 6 was selected by the Selection Board and appointed in the said post.

10. Mr. Sikder submits that all the other candidates including the petitioner had obtained the MD degree, which includes a mandatory 3 years academic study. On the other hand, respondent no. 6 obtained an FCPS (Fellow of the College of Physicians and Surgeons) degree, which is a four years training based degree requiring only a one year optional academic study. He acknowledges that although it was decided by the Government in 1998 that MD degree and FCPS degree would be deemed to be equivalent, yet, as the appointment in question relates to a teaching post in a Post-Graduate Research Medical Institute, it was imperative for the Authority to give due consideration to the academic qualifications of the respective candidates.

11. Referring to the appointment letter of respondent no. 6, Mr. Sikder contends that it is evident from the terms of the said appointment letter dated 22.01.011 that a person appointed as a Medical Officer in BSMMU cannot pursue any course or degree following the next two years of such appointment. He contends that in gross violation of the aforesaid term, respondent no. 6 pursued the FCPS course and completed the same in 2012 and the certificate was awarded in 2014. Making a pointed reference to the aforesaid two dates, i.e., the date on which respondent no. 6 completed her FCPS course and the date on which the certificate was awarded to her, the learned Advocate submits forcefully that respondent no. 6 was ineligible to apply as a candidate when the first advertisement was published in 2013, as the certificate of FCPS degree was not available until 2014. He argues forcefully that the concerned respondents, with a malafide motive, refrained from proceeding with the appointment in the said post in 2013, although several other highly qualified candidates had applied in response to the first advertisement. The learned Advocate submits that it is only after respondent no. 6 had obtained her FCPS degree in 2014 that the concerned respondents proceeded once again with the process of appointment in 2015. Therefore, the conduct of the respondents in not giving any appointment in 2013 in the said post despite receiving applications from competent and qualified candidates, but subsequently initiating the same process in 2015, once respondent no. 6 had obtained her FCPS degree, clearly demonstrates the bias and malafide on the part of the concerned respondents. The learned Advocate goes on to submit that it is now well settled through judicial pronouncements that malafide cuts at the very root of the case.

12. Mr. Sikder submits that as per provisions of the Ordinance of BSMMU (briefly, the Ordinance), if anyone intends to pursue a post-graduate degree or any other higher degree/course at BSMMU, he/she is required to obtain prior permission from the Authority. Referring to Annexure M of the affidavit-in-reply dated 07.08.2018, filed by the petitioner, Mr. Sikder submits that although the petitioner sought permission to pursue the second part of her MD course in Psychiatry, the Authority declined to grant such permission, as evident from the letter dated 30.07.2007. Referring to Annexure K (2) and L(2) of the supplementary affidavit dated 03.10.2018 filed on behalf of the petitioner, the learned Advocate submits that two other Doctors, working at BSMMU, were required to obtain permission for the FCPS second part and MD (Psychiatry) third part examination respectively. However, according to

Mr. Sikder, no such permission was obtained by respondent no. 6 nor has any document been produced before this Court by the contesting respondents to show that such permission was ever granted to respondent no. 6.

13. On the other hand, Mr. Tanjib-ul Alam, the learned Advocate appearing on behalf of respondent nos. 1-5 submits that as the appointment to the post of Assistant Professor in the Department of Psychiatry was made by the Syndicate following the recommendation made by the Selection Board, it cannot be said that the same was not in accordance with law and on that count, the Rule is liable to be discharged.

14. Mr. Alam contends that the allegation of malafide made by the petitioner will not invalidate the appointment of respondent no. 6. Referring to the decision of the Appellate Division, reported in 39 DLR (AD) (1987) 1, Mr. Alam submits forcefully that even if it is accepted, but not conceded, that there was malafide on the part of the Authority, that itself is a question of fact which cannot be decided under the writ jurisdiction and on that count also, the Rule is liable to be discharged. He further submits that merely alleging malafide is not enough, it has to be pleaded and proved by adducing documentary evidence. In support of his submission, Mr. Alam has also referred to the case of Professor Dr. Md. Younus Ali vs. The Chancellor of Rajshahi University, Rajshahi and others, reported in 18 BLD (1998) (AD) 291.

15. Replying to the contention advanced by Mr. Sikder, Mr. Alam submits that respondent no. 6 was not required to obtain any permission from the Authority as she was already pursuing the FCPS course prior to her appointment as a Medical Officer in BSMMU. According to Mr. Alam, prior permission from the Authority is required only when, after joining as a Medical Officer, a person intends to pursue a post-graduate course. However, Mr. Alam has not been able to refer to any law or rules in support of his contention.

16. Refuting the argument of Mr. Sikder with regard to the issue of bias on the part of the BSMMU Authority in appointing respondent no. 6 to the said post, Mr. Alam submits forcefully that mere assertion or apprehension of bias will not set aside an administrative action, there must be a real danger of bias. In support of his contention, Mr. Alam refers to the case of State of Punjab vs. V.K. Khanna and others, reported in AIR 2001 Supreme Court 343.

17. Referring to Annexure 7 series of the supplementary affidavit dated 11.10.2018, filed on behalf of respondent nos. 1-5, Mr. Alam submits that amongst the four candidates who were interviewed, respondent no. 6 secured the highest mark and accordingly, on the basis of the recommendation of the Selection Board, the Syndicate made the appointment in question and therefore, the petitioner has no reason to be aggrieved and consequently, the Rule is liable to be discharged.

18. Mr. Imtiaz Moinul Islam, the learned Advocate appearing on behalf of respondent no. 6, having adopted the submission advanced by Mr. Alam, further submits that respondent no. 6, being a more qualified and competent candidate amongst all the other candidates, was appointed as Assistant Professor. He contends that without challenging the first advertisement, the petitioner cannot now question the appointment of respondent no. 6 which was made pursuant to the second advertisement.

19. We have perused the application together with the various supplementary affidavits filed by the petitioner along with the documents annexed thereto. We have also perused the affidavits-in-opposition along with the supplementary affidavits-in-opposition filed on behalf

of the contesting respondents. We have also considered the submission advanced at the Bar together with the decisions cited by the contending sides, to which we shall advert, if necessary.

20. In the instant case, it is the positive assertion of the petitioner that the respondents acted in an arbitrary and malafide manner and demonstrated bias in favour of respondent no. 6 while appointing her in the post of Assistant Professor, Department of Psychiatry. This positive assertion has been vehemently denied by the contesting respondents. The assertion and denial by the contesting sides necessitates a careful examination of the issue before us.

21. The petitioner, having obtained her MBBS degree, joined BSMMU as a Medical Officer in 2006. She applied to the Authority for pursuing her MD course, who refused to grant permission on the ground that she had not completed two years of service as a Medical Officer in BSMMU.

22. On the other hand, respondent no. 6, having obtained her MBBS degree in 2006, was appointed as a Medical Officer on 22.01.2011. The appointment letter, bearing number BSMMU/2011/1006 dated 22.01.2011, as reproduced in paragraph 3 of the supplementary affidavit dated 27.06.2016, contains the following stipulations :

“৬। যোগদানের তারিখ থেকে ০২ (দুই) বছরের মধ্যে কোন কোর্সে যোগদান করতে পারবেন না।

৭। .....

৮। .....

৯। এই নিয়োগ ০১-০২-২০১১ ইং তারিখ থেকে কার্যকর হবে।”

23. As respondent no. 6 obtained her FCPS degree in 2014, it is apparent that at the time of her appointment as a Medical Officer at BSMMU in 2011, she was still pursuing the FCPS course. There is no document on record to indicate that it was either intimated to the Authority that she was already pursuing the FCPS course or that the Authority had granted her permission to continue with the said course during the first two years of service as a Medical Officer at BSMMU. However, we have noticed from Annexures K, L and M of the supplementary affidavit dated 03.10.2018 filed by the petitioner, that in similar situations, some other Doctors who were pursuing the FCPS and MD courses in BSMMU, were required to obtain permission from the Authority before enrolling in the respective courses.

24. Let us now examine the provisions relating to leave (ছুটি), as contained in the BSMMU Ordinance. Clause 15 and 16 of the Ordinance reads as under :

“১৫। শিক্ষা ছুটি :

নিম্নলিখিত শর্তে শিক্ষক/চিকিৎসক/কর্মকর্তাগণকে শিক্ষা ছুটি মঞ্জুর করা যাইবে :

ক) স্নাতকোত্তর ডিগ্রী কার্সে ভর্তির প্রমাণপত্রসহ শিক্ষা ছুটিকালীন সময়ে প্রয়োজনীয় আর্থিক সহায়তাপ্রাপ্তির (যাহা দ্বারা ক্ষিা কার্যক্রম পরিচালনা ও অন্যান্য ব্যয় বহন করা সম্ভব হইবে) প্রমাণ জমাাদান সাপেক্ষে শিক্ষা ছুটি মঞ্জুর করা যাইবে।

খ) ন্যূনপক্ষে ২ (দুই) বৎসর নিয়মিত পদে স্থায়ী হিসাবে সক্রিয় চাকুরি করিবার পর সংশ্লিষ্ট শিক্ষক/কর্মকর্তাকে সবেতনে ছুটি মঞ্জুর করা যাইবে।

গ) .....

ঘ) শিক্ষা ছুটি মঞ্জুরির জন্য সংশ্লিষ্ট শিক্ষক/চিকিৎসক/কর্মকর্তাকে স্বপদে স্থায়ী হইতে হইবে। স্বপদে স্থায়ী না হইলে সংশ্লিষ্ট শিক্ষক/চিকিৎসক/কর্মকর্তা যদি বর্তমান পদের পূর্ববর্তী পদে স্থায়ী হন তবে তিনি পূর্ববর্তী স্থায়ী পদে আহরিত সর্বশেষ বেতন পাইবেন। ছুটি শেষে কর্তব্যে যোগদান এবং বর্তমান পদে স্থায়ী হওয়া সাপেক্ষে অবশিষ্ট বেতন ভাতা পরিশোধ করা যাইবে।”

“১৬। শিক্ষা ছুটির জন্য বিশ্ববিদ্যালয়ের সঙ্গে চুক্তি :

শিক্ষা ছুটি মঞ্জুরকৃত শিক্ষক/চিকিৎসক/কর্মকর্তা/কর্মচারীকে বিশ্ববিদ্যালয়ের সিডিকেট কর্তৃক অনুমোদিত চুক্তিপত্রে (পরিশিষ্ট-ক) স্বাক্ষর করিতে হইবে। উক্ত চুক্তি ভঙ্গকারী শিক্ষক/চিকিৎসক/কর্মকর্তা/কর্মচারী বিশ্ববিদ্যালয়ের দক্ষতা ও শৃঙ্খলা অধ্যাদেশের আওতায় অসদাচরণকারী হিসাবে গণ্য হইবেন।”

25. It appears that clause 15 and clause 16 of the Ordinance stipulates that a person can obtain study leave upon completion of at least two years of service in a regular post and he/she is also required to execute an agreement approved by the Syndicate. However, from the supplementary affidavit dated 17.07.2018, it appears that respondent no. 6 has attempted to explain the position in the following manner :

“That, FCPS is a professional course of 2 parts and 4 years residency training in Psychiatry in the institutes recognized by the Bangladesh College of Physicians and Surgeons (BCPS) is a mandatory requirement for achieving FCPS degree; the respondent no. 6 completed her 1 year training in Dhaka Medical College Hospital (DMCH) from 01.01.2008 to 31.12.2008. Then the respondent no. 6 completed her 1.5 year training in National Institute of Mental Health (NIMH) from 01.01.2009 to 30.06.2010. Lastly, the respondent no. 6 completed her 1.5 year training in BSMMU from 01.02.2011 to 31.07.2012; thus completing 4 years for residency training as required for FCPS degree. The paid job in BSMMU as medical officer is not in conflict with FCPS course rather that paid job considered as “training” and was a part the FCPS degree of the respondent no. 6;

26. This is corroborated by the statement made by respondent nos. 1-5 in the supplementary affidavit dated 28.10.2018 in the following terms :

“That the respondent No. 6 at the relevant time was undergoing a 4 (four) years clinical FCPS in Psychiatry which did not require her to be enrolled in any taught course and hence no permission from the BSMMU was required.”

27. By the 4<sup>th</sup> supplementary affidavit dated 13.08.2018, respondent no. 6 stated that she had finished the 4 years training course “with the express consent of BSMMU and BSMMU administration gave a training certificate, only then BCPS allowed the respondent no. 6 to sit for the Final Exam of FCPS and these facts are evident from the application of the respondent no. 6 to BCPS seeking permission to sit for Final exam of Part 2”. In support of this statement, respondent no. 6 has annexed a document, marked as Annexure 15. A perusal of the said document indicates that it is a receipt of the Enrolment fee issued by Bangladesh College of Physicians and Surgeons (briefly, BCPS). By no stretch of imagination can this document be taken to be the consent granted by BSMMU, as claimed by respondent no. 6.

28. In the affidavit-in-opposition dated 05.08.2018, respondent no. 6 stated at paragraph 11 as under :

“The terms of employment are prerogatives of the BSMMU and its employees and if such terms are varied by BSMMU and any restriction is waived, then it cannot be challenged to be a violation of employment terms;”

29. It is, therefore, evident from the affidavits-in-opposition filed by the contesting respondents that whilst serving as a Medical Officer at BSMMU, respondent no. 6 also continued with her FCPS during the very same period. In other words, there was total non-compliance with the provisions of clauses 15 and 16 of the Ordinance by respondent no. 6. Therefore, in our view, there was a clear departure from the rules, not to mention the gross violation of the condition of employment on the part of respondent no. 6 in failing to obtain permission from the Authority before continuing with the FCPS course. However, despite the position as aforesaid, the Authority did not take any action against respondent no. 6, although there were required to do so as per the terms of the appointment letter dated 22.01.2011, which contains the following stipulation :

৮। কোন তথ্য গোপনের প্রমাণ পাওয়া গেলে তৎক্ষণিক চাকুরী থেকে অব্যাহতি দিয়ে বিভাগীয় ব্যবস্থা নেওয়া হবে।

30. In the affidavit-in-opposition dated 21.08.2016, jointly filed by respondent nos. 1, 2, 3, 4, 5 and 6, all the respondents have attempted to explain the reason for not proceeding with the process of appointment in the said post in 2013 in the following manner :

“It is submitted that it was an administrative decision not to proceed any further with the said appointment process since none of the applicants met the criteria for such appointment at the relevant time. Therefore, the appointment process was cancelled in compliance with the applicable Rules and Regulations.”

31. Once again, it is pertinent to note that although the issue concerns only respondent no. 1-5, yet, respondent no. 6, who had no role, far less any authority, in taking any “administrative decision”, also endorsed the said statement. Nevertheless, in view of the explanation provided by all contesting respondents, and that too in one voice, that “none of the applicants met the criteria for such appointment at the relevant time”, we are called upon to examine the qualifications of each of the four applicants who had applied in response to the first advertisement published in 2013.

32. From Annexure 5 series of the supplementary affidavit dated 05.08.2018 filed by respondent nos. 1-5, it appears that one of the applicants namely, Dr. Helal Uddin Ahmed had an MD degree in Psychiatry with as many as 43 (Forty three) publications to his credit, out of which he is the first author in 10 publications.

33. The next applicant Dr. Ashique Selim, in addition to his MBBS degree, also had an MRCPsych degree from the United Kingdom. He has three publications, being the first author in two of them, published in International Journals.

34. The third applicant Washima Rahman also had an MD in Psychiatry along with eight publications, out of which she is the first author in four publications.

35. The last applicant, the present petitioner, having an MD degree in Psychiatry, has ten publications to her credit, one of which was published in an Indexed International Journal from Kings College, London, UK.

36. It is, therefore, apparent that the explanation provided by the respondents is not only misleading, but grossly incorrect and untrue, being contrary to the documents on record. We fail to understand as to how such grossly misleading and incorrect statement could have been made before a Court of law, and that too on oath, by a statutory Authority like BSMMU. Needless to observe that the assertion of malafide and bias made by the petitioner gains ground in view of the conduct demonstrated by the respondents. We are not only surprised,

but also dismayed, to say the least, as to how the four candidates, who had applied in response to the first advertisement published in 2013, despite being highly qualified, were not even called for an interview.

37. When a Statutory Authority publishes an advertisement inviting applications from prospective candidates, for giving appointment in certain post(s), a duty is cast upon them either to call the candidates for an interview or to reject the applications on the ground that the applicants do not possess the requisite qualification for the advertised post(s). In any event, the Authority is under a legal duty/obligation to inform the applicants as to the fate of their applications. They cannot sit over the matter and remain silent. In our view, such inaction of the Authority infringes the Fundamental Rights of the applicants, as guaranteed by Article 29 of the Constitution which provides for “equality of opportunity for all citizens in respect of employment in the service of the Republic”. In this context, we may profitably refer to the case of Shanbarsan Dash vs Union of India, reported in AIR 1991 Supreme Court 1612, where the Court observed as under:

“Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the state has a license to act in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons.

38. It is perhaps pertinent, at this juncture, to examine the very process of appointment to the post of Assistant Professor, Department of Psychiatry. In the supplementary affidavit dated 11.10.2018, respondent nos. 1-5 have stated as under:

“The appointments in different Departments of Bangabandhu Sheikh Mujib Medical University (BSMMU) in the post of Assistant Professor, pursuant to the appointment Notification dated 19.09.2013 were made pursuant to 53<sup>rd</sup> and 54<sup>th</sup> Meeting of the Syndicate of BSMMU and the relevant excerpt of meetings are annexed hereto and marked as Annexure- “6” and “6-a”.

39. A careful scrutiny of Annexure 6, which relates to the proceedings of the 54<sup>th</sup> Meeting of the Syndicate held on 29.06.2014 (“সিডিকেটের ৫৪তম সভার কার্যবিবরণী”) reveals that the deliberations of the Syndicate relate to the appointments made in the other posts under different Departments and not to the post of Assistant Professor, Department of Psychiatry. It is to be noted that despite being directed to do so, respondent nos. 1-5 were unable to produce the document relating to the deliberations of the Syndicate leading to the appointment of respondent no. 6.

40. In the aforesaid supplementary affidavit, it was also stated as under:

“That the deliberation and the final recommendation dated 15.03.2016 of the Selection Board on the basis of which the Syndicate approved the appointment of respondent no. 6 in the post of Assistant Professor in the Department of Psychiatry, BSMMU is annexed thereto and marked as Annexure “7” series.”

41. In view of the categorical statement of respondent nos. 1-5 that the deliberation and final recommendation was made by the Selection Board on 15.03.2016 and it is on the basis of such recommendation that the Syndicate approved the appointment of respondent no. 6 in the post of Assistant Professor, Department of Psychiatry, we are now called upon to examine the relevant annexures.

“The deliberation and the final recommendation” of the Selection Board is evidenced by Annexure 7 series, which reads as under :



“মনরোগ বিদ্যা বিভাগের সহকারী অধ্যাপক শূন্য পদে নিয়োগদান এর নম্বরপত্র প্রসঙ্গে

১	২	৩		৪	৫	৬
		এসএসসি ও এইচএসসি(১০)	এমবিবিএস ও স্নাতকোত্তর (১০)			
ক্রমিক নং	নাম ও পদবী (ঠিকানা সহ)	শিক্ষাগত যোগ্যতা		প্রকাশনা ও অভিজ্ঞতা (৩০)	মৌখিক (৫০)	মোট প্রাপ্ত নম্বর (১০০)
১.	ডাঃ সৈয়দ ফাহীম সামস্ ৩১৫/১, ধানমন্ডি, রো-১৫(পশ্চিম) ঢাকা(১২০৯	১০	১০	১৫	২০	৫৫
২.	ডাঃ ওয়াসিমা রহমান ১৭/৫, ইস্কাটন গার্ডেন রোডশ থানাঃ রমনা, ঢাকা- ১০০০।	১০	১০	১৮	২১	৫৯
৩.	ডাঃ সিফাত-ই-সাদ্দিদ ফ্ল্যাট নং- এইচ-১শ বাড়ী নং- ১২, রোড নং- ০৫, ধানমন্ডি, ঢাকা।	১০	১০	২০	৩৫	৭৫
৪.	ডাঃ নাফিয়া ফারজানা চৌধুরী মেডিকেল অফিসার মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা।	১০	১০	১৯	২০	৫৯

মন্তব্য/সুপারিশঃ

ডাঃ সিফাত-ই-সাদ্দিদ কে সহকারী অধ্যাপক পদে নিয়োগ প্রদান করা হোল।

স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)	স্বাঃ (অস্পষ্ট)
অধ্যাপক ডাঃ কামরুল হাসান খান ভাইস-চ্যান্সেলর, সভাপতি	অধ্যাপক মোঃ রুহুল আমিন প্রো-ভাইস চ্যান্সেলর, শিক্ষা, বিএসএমএমইউ, ঢাকা।	অধ্যাপক মোঃ শহীদুল্লাহ সিকদার, প্রো-ভাইস চ্যান্সেলর (গবেষণা ও উন্নয়ন), বিএসএমএমইউ, ঢাকা।	অধ্যাপক মোঃ শারফুদ্দিন আহমেদ, প্রো-ভাইস চ্যান্সেলর (প্রশাসন), বিএসএমএমইউ, ঢাকা।	অধ্যাপক বুনু শামসুন নাহার, চেয়ারম্যান, মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা। (মাননীয় ভাইস-চ্যান্সেলর কর্তৃক মনোনীত)	অধ্যাপক গোলাম রাব্বানী, ফ্ল্যাট-বি-১২, স্কাইটাচ টাওয়ার, বাড়ী নং- ২১, রোড নং-০৭, ধানমন্ডি আ/এ, ঢাকা- ১২০৫। (সিডিকেট কর্তৃক মনোনীত)	অধ্যাপক মোঃ আব্দুর রহিম, চেয়ারম্যান, মেডিসিন বিভাগ, বিএসএমএমইউ, ঢাকা।	অধ্যাপক এম এস আই মল্লিক, মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা (সিডিকেট কর্তৃক মনোনীত)	অধ্যাপক মোঃ এবিএম আব্দুল হাম্মান, রেজিস্ট্রার ও সচিব, সংশ্লিষ্ট নিয়োগ নির্বাচনী বোর্ড, বিএসএমএমইউ, ঢাকা

42. We have carefully examined this particular document. It appears that out of the four candidates, respondent no. 6 secured the highest marks. With regard to the allocation of marks, it is to be noted that all the candidates received 20 marks for their educational qualifications and decrees and 15-20 marks for their publications and experience out of the total 30 marks. However, in the oral examination comprising of 50 marks, although the other three candidates including the petitioner were awarded 20, 21, 20 marks respectively, respondent no. 6 secured 35 marks out of 50.

43. In the left-hand side column, the words “মন্তব্য/সুপারিশ” is written. The Selection Board was required to recommend or record a comment with regard to each of the candidates. Astonishingly, instead of doing so, what the Selection Board did was to give the appointment directly to respondent no. 6 in the following terms :

“ডঃ সিফাত বিন সাইদকে সহকারী অধ্যাপক পদে নিয়োগ প্রদান করা হল।”

44. It is, therefore, evident that the Selection Board, having taken the interview and having awarded the highest marks to respondent no. 6, did not stop there. Exceeding their authority, they proceeded to give the appointment to respondent no. 6 in the post of Assistant Professor, thereby usurping the role and function, not to mention the authority, of the Syndicate, which is clearly arbitrary and, no doubt, without lawful authority as well.

45. In this context, we may profitably refer to the case of Abdul Rouf –vs- Abdul Hakim, reported in 17 DLR (SC) (1965) 515, where the Supreme Court of Pakistan held:

“A malafide act is by its nature an act without jurisdiction.”

46. The aforesaid decision was quoted, with approval, by the Appellate Division in the case of Nur Mohammad –vs- M. Ahmed, reported in 39 DLR (AD) (1987) 1.

47. The conduct of the Selection Board, particularly its members, leads us to conclude that the allegation made by the petitioner with regard to malafide and bias now manifests itself through this particular document, which has been issued by the concerned respondents themselves.

48. It has been persistently argued by Mr. Alam that the decision to appointment respondent no. 6 was taken by the Syndicate following the recommendation of the Selection Board. From the proceedings of the Syndicate, it appears that the deliberation of the Syndicate is summed up in two lines, as evident from Annexure 1(a) of the affidavit-in-opposition dated 21.08.2016, jointly filed by respondent nos. 1-5 and respondent no. 6 under the caption “২৮/০৫/২০১৬ তারিখ (শনিবার) সকাল ১১ঃ০০ ঘটিকায় অনুষ্ঠিত সিডিকেট এর ৬০তম সভার আলোচ্যসূচীঃ”.

49. The relevant decision reads as under :

“মনরোগ বিদ্যা বিভাগ ঃ নিম্নলিখিত নিয়োগ নির্বাচনী বোর্ড সর্বসম্মতিএকমে মনরোগ বিদ্যা বিভাগের বিজ্ঞাপিত ‘সহকারী অধ্যাপক’ ডাঃ সিফাত-ই-সাইদ কে নিয়োগ দেয়ার সুপারিশ করেছে। অনুমোদনের জন্য পেশকৃত।

১.	অধ্যাপক ডাঃ কামরুল হাসান খান ভাইস-চ্যান্সেলর, সভাপতি, বিএসএমএমইউ, ঢাকা।	সভাপতি
২.	অধ্যাপক মোঃ রুহুল আমিন মিয়া প্রো-ভাইস চ্যান্সেলর, (শিক্ষা), বিএসএমএমইউ, ঢাকা।	সদস্য
৩.	অধ্যাপক মোঃ শহীদুল্লাহ সিকদার, প্রো-ভাইস- চ্যান্সেলর (গবেষণা ও উন্নয়ন), বিএসএমএমইউ, ঢাকা।	সদস্য
৪.	অধ্যাপক মোঃ শারফুদ্দিন আহমেদ,	সদস্য

	প্রো-ভাইস চ্যান্সেলর (প্রশাসন), বিএসএমএমইউ, ঢাকা।	
৫.	অধ্যাপক বুনু শামসুন নাহার, চেয়ারম্যান, মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা। (মাননীয় ভাইস-চ্যান্সেলর কর্তৃক মনোনীত)	সদস্য
৬.	অধ্যাপক গোলাম রাব্বানী ফ্লাট-বি-১২, স্কাইটাচ টাওয়ার, বাড়ী নং- ২১, রোড নং-০৭, ধানমন্ডি, ঢাকা-১২০৫। (সিডিকিট কর্তৃক মনোনীত)	সদস্য
৭.	অধ্যাপক মোঃ আব্দুর রহিম, চেয়ারম্যান, ইন্টারন্যাশনাল মেডিসিন বিভাগ, বিএসএমএমইউ, ঢাকা।	সদস্য
৮.	অধ্যাপক এম এস আই মল্লিক, মনোরোগ বিদ্যা বিভাগ, বিএসএমএমইউ, ঢাকা (সিডিকিট কর্তৃক মনোনীত)	সদস্য
৯.	অধ্যাপক মোঃ এবিএম আব্দুল হাম্মান, রেজিস্ট্রার, বিএসএমএমইউ, ঢাকা	সচিব

”

50. However, as noted earlier, there is nothing on record to substantiate the respondents contention that the Selection Board had made any “সুপারিশ” (recommendation). Rather, what we do find is that the Selection Board itself gave the appointment to respondent no. 6.

51. More than half a century ago, the Supreme Court of India dealt with a similar issue in the case of R. Chitrlekha and another vs. The State of Mysore, reported in AIR 1964 Supreme Court 1823, where the Court held as under :

“If any particular case the selection committee abuse its power in violation of Article 14 of the Constitution, that may be a case for setting aside the result of a particular interview.”

52. It is pertinent to note that Art 14 of the Constitution of India corresponds to Article 31 of our Constitution, which provides for equal protection of law.

53. It has also been argued on behalf of the contesting respondents that the petitioner having applied for appointment in the said post under the first advertisement published in 2013 and thereafter, having applied again for appointment in the said post in 2015, she had given a go bye to her right, if any, and was, therefore, estopped by waiver and acquiescence from challenging the process of selection. In our view, the argument is misconceived for the simple reason that it is not the subsequent “advertisement” that the petitioner has challenged by filing the instant writ petition. What she has challenged is the appointment of respondent no. 6 in the post of Assistant Professor in the Department of Psychiatry.

54. It has also been argued on behalf of the respondents that the petitioner had an alternative remedy under section 55 of the BSMMU Ordinance. However, without availing the said alternative remedy, she approached this Court and filed the writ petition and on that ground, the Rule is liable to be discharged. It has also been argued on behalf of the contesting respondents that by now, respondent no. 6 has already served in the said post for a period of two years and therefore, she has acquired a vested right and in that view of the matter, the present Rule has also become infructuous.

55. We are not convinced with the aforesaid argument, to say the least. If any appointment is given by the Authority in gross violation of the Rules, lapse of any period of time and rendering of service in the said post by the incumbent cannot clothe the said appointment with any legal validity. I am fortified in my view, yet again, by the decision of

the Supreme Court of India in the case of Krishna Yadav vs. State of Haryana, reported in AIR 1994 Supreme Court 2166, where the appointment of as many as 96 Tax Inspectors was set aside long four years after their appointment in the said posts on the ground of “fraud” and “arbitrariness” committed by the Authority in making the said appointments.

56. The duties and function of the Selection Board and the Syndicate are distinct and separate ; the former is entrusted with duty to take Interview/oral examination of the applicants and thereafter make the recommendation to the Syndicate who, in turn, will give approval and make the appointment. However, the process of giving approval and making the appointment is not an idle formality. The Syndicate, being the highest academic body, is not expected to simply endorse the recommendation of the Board, but is required to deliberate about the qualifications of the candidates so recommended by the Board, more so, when the appointment relates to an academic post in the most renowned and respected post-graduate medical research Institute of the country.

57. From the foregoing discussion, it can reasonably be inferred that the entire process of appointment in the post of Assistant Professor in the Department of Psychiatry, BSMMU, commencing from the very first publication of the advertisement in 2013 and culminating with the issuance of the appointment letter on 08.06.2016 in favour of respondent no. 6 is tainted with arbitrariness and malafide.

58. In the case of Mahesh Chandra v. Regional Manager, U.P. Financial Corporation, reported in AIR 1993 Supreme Court 937, the Court held as under:

“That which is not fair and just in unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires”.

59. In the case of A.L. Kalra v. P & E Corporation of India Ltd., reported in AIR 1984 Supreme Court, 1361, the Court held :

“Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art, 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.”

60. We agree with Mr. Tanjib-ul Alam’s contention that malafide cannot simply be pleaded, it has to be proved through documentary evidence. This is precisely what has been done in the instant case, however, not by the petitioner, by the respondents themselves. From Annexures 6 and 7 series, being the deliberation of the Syndicate and the recommendation (appointment) issued by the Selection Board, it is palpably clear that the concerned respondents acted in a malafide and arbitrary manner, not to mention without any lawful authority, in giving appointment to respondent no. 6.

61. Mr. Tanjib-ul Alam has also attempted to argue that the endorsement made by the Selection Board by writing the word “appointment” in place of the word “recommendation” was a mere omission, which could not strike down the appointment of respondent no. 6.

62. In the 5<sup>th</sup> supplementary affidavit dated 04.11.2018 filed on behalf of respondent no. 6, it has been stated in paragraph 4 as under :

“That, as it seems, the number sheet prepared by the BSMMU authority has 2 remarks being “comment” and “recommendation”. It seems to be an innocent mistake in the said sheet as “decision” has not been included there. A simple mistake in the form cannot

terminate the appointment of the respondent no. 6 as she has acquired vested right and moreover she cannot be punished for the mistake of the appointing authority (54 DLR (2002) 318.”

63. We are certainly not inclined to accept the argument. It is not a frivolous matter, which can be ignored or taken lightly. The Selection Board comprised of nine highly qualified and experienced individuals, holding responsible positions at BSMMU. Given their educational background and experience, they are not expected to act in such a negligent, callous and slip shod manner. Such conduct on the part of persons holding positions of responsibility, and that too in the most prestigious and renowned medical research Institute of the country is both unwarranted and unacceptable.

64. In this context, I may profitably refer to the case of V. Hundumal –vs- State of Modhya Pradesh, reported in AIR 1981 Supreme Court 1636, where the Supreme Court of India observed :

“When discrimination is glaring the State cannot take recourse to inadvertence in its action resulting in discrimination.”

65. In that case, it was further observed :

“Equality before the law or equal protection of law within the meaning of Article 14 of the Constitution of India means absence of any arbitrary discrimination by the law or in their administration. No undue favour to one or hostile discrimination to another be shown.”

(per D.A. Desai, J)

66. In recent times, the concept of administrative fairness has gained considerable significance and importance. It requires an administrative body to apply its mind while taking a decision on a matter which affects a person’s right. The “duty to act fairly” is being increasingly endorsed and applied by the Courts all over the world in deciding issues involving executive actions. Noted authors A.W. Bradley and K.D. Ewing, in their text ‘Administrative and Constitutional law (14<sup>th</sup> edition, at page 746) have commented as under :

“The rules of natural Justice has developed what is now in effect a universal rule that public authorities must act fairly in making decisions”

67. In the case of D.K. Yadav vs. J.M.A. Industries Ltd., reported in (1993) 3 Supreme Court Cases 259, it was held :

“Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

68. In our view, the impugned action of the respondents suffers from the vice of arbitrariness warranting interference of this Court. As has been so aptly stated, once again by the Supreme Court of India, in the case of Netai Bag vs State of West Bengal, reported in AIR 2000 Supreme Court 3313:

“The Courts are not concerned with the ultimate decision but only with the fairness of the decision making process.”

69. Be that as it may, in view of the foregoing discussion and in due deference to the decisions referred to above, we are inclined to hold that the instant Rule merits positive consideration.

70. In the result, the Rule is made absolute.

71. The impugned order dated 08.06.2016, issued by respondent no. 5, appointing respondent no. 6 as Assistant Professor in the Department of Psychiatry, BSMMU, Dhaka is declared to have been issued without lawful authority and consequently, the same is set aside.

72. The respondents are directed to publish an advertisement, afresh, inviting applications for appointment to the post of Assistant Professor in the Department of Psychiatry, BSMMU.

73. The petitioner and respondent no. 6 shall both be eligible to apply for selection. However, should respondent no. 6 apply, she must first refund the monetary benefits that she has received while serving in the post of Assistant Professor in the Department of Pshchiatry, from the date of her appointment in that post till date. Respondent no. 6 must comply with Court's order first and make the aforesaid refund to BSMMU and thereafter apply for selection.

74. In the event of failure of respondent no. 6 to make the refund, as directed by this Court, the Authorities shall recover the same from her, in accordance with law.

75. Before parting with the matter, we wish to put on record own utter dissatisfaction regarding the conduct demonstrated by the BSMMU Authority. Each and every member of the Selection Board, who conducted the oral examination on 08.06.2016, is reminded that they are not rendering free, voluntary service and can act in any manner they like, as they have regrettably done in the instant case. They are warned to be more sincere, diligent and cautious in discharging their duties in future.

76. The learned Advocate appearing for respondent nos. 1-5 is directed to personally serve a copy of this judgment to each and every member of the Selection Board for their information.

77. Although the Court was inclined to award exemplary cost against all the respondents, we refrain from doing so.

78. The office is directed to communicate the order.