

3 SCOB [2015] HCD 143**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 846 of 2012.

Md. Fazlul Hoque, son of late Munshi Karimul Hoque, Deputy Chief Planning Manager, Planning Cell, Code on. 10320, Bangladesh Inland Water Transport Corporation (BIWTC), 5 Dilkusha Commercial Area, Motijheel, Dhaka-1000
.....Petitioner.

Mr. Md. Ruhul Amin Bhuiyan, Advocate,
.....For the petitioner.

Mr. Kazi Mynul Hassan, Advocate
.....For the respondent No. 1.

Heard on: 11.08.2015, 18.08.2015
Judgment on: 25.08.2015.

-Versus-

Bangladesh Inland Water Transport Corporation (BIWTC), represented by its Chairman, 5 Dilkusha Commercial Area, Motijheel, Dhaka-1000 and others.

....Respondents.

Present:

Mr. Justice Tariq ul Hakim

And

Mr. Justice Md. Farid Ahmed Shibli

Constitution of Bangladesh**Article 102:**

Doctrine of the legitimate expectation ensures the circumstances in which, the expectation may be ensured or denied and among others the following grounds may also be taken in order to get a remedy under article 102 of the Constitution:- firstly there must be a promise or assurance from the employer or the authority that the incumbent would be assimilated at the end or during the tenure of his service; secondly - the past practice of ‘আস্বীকরণ’ for other persons of similar status has been followed consistently.

... (Para 17)

Judgment**Md. Farid Ahmed Shibli, J:**

1. This Rule Nisi was issued calling upon the respondents to show cause as to why the decision (Annexure-F) passed by the Board of Directors of the Bangladesh Inland Water Transport Corporation (hereinafter termed as “the Corporation”) in its 311th meeting held on 19.12.2011 and the Office Order dated 05.11.2012 issued under the signature of Respondent No. 8 purporting to cancel the Petitioner’s ‘আস্বীকরণ’ or ‘assimilation’ in the post of Deputy Chief Planning Manager and placing his service back to the Accounts Division (Annexure-G)

should not be declared as without lawful authority and is of no legal effect and pass such other order or orders as the Court may deem fit and proper.

2. Factual scores relevant for the purpose of disposal of this Writ Petition in essence are as follows:- On 10.06.1996 the Petitioner joined the Corporation as its Insurance Officer. He was then promoted to the post of Deputy Chief Accounts Officer and joined there on 16.06.2003. Subsequently he was transferred on deputation to the post of Deputy Chief Personnel Manager on 23.10.2007. By dint of the Office Order No. Ka: Be:-302/2008 dated 25.09.2008 (Annexure-D) his service was assimilated or 'আস্বীকরণকৃত' against the post of the Deputy Chief Personnel Manager giving a retrospective effect from 16.06.2003. After such assimilation he was transferred to the post of Deputy Chief Planning Manager on 16.08.2010 and since then he has been serving there. The Corporation, by its 311th meeting of the Board of Directors held on 19.12.2011 decided to cancel the order of 'assimilation' or 'আস্বীকরণ' of the Petitioner's service and issued the Office Order dated 05.01.2012 (Annexure-G) to that effect. During pendency of this Writ Petition, in compliance with a direction of this Court, the Petitioner made a fresh application to the Board of Directors pursuant to sections 49 and 50 of the Corporation's Karmochari Chakuri Probidhanmala, 1989 for reconsideration of the impugned decision cancelling the order of 'assimilation' or 'আস্বীকরণ', but the said application was not considered rather rejected in the 327th meeting of the Board of Directors held on 11.06.2013. As the Corporation without any lawful authority violating the Petitioner's indefeasible right guaranteed by the Constitution has cancelled his order of 'আস্বীকরণ' or 'assimilation', finding no other alternative he has filed the Writ Petition and obtained this Rule Nisi accordingly.

3. Respondent No. 1 i.e. the Chairman of the Corporation (hereinafter termed as 'the Respondent-Corporation') has contested the Rule filing Affidavits-in-Opposition and making allegations that the Petitioner through a sort of persuasion violating the existing rules and regulations of the Corporation obtained the order for assimilation of his service against the post of Deputy Chief Personnel Manager, although there was no such provision for 'assimilation' or 'আস্বীকরণ' under the Corporation's Karmachari Chakuri Probidhanmala, 1989 (hereinafter termed as 'the Probidhanmala') applicable for its officers & employees. It is stated in the Affidavit-in-Opposition that Feeder Posts for the Deputy Chief Account's Officer and the Deputy Chief Personnel Manager are not the same and that is why there is a legal bar of assimilating the service of Petitioner in the Department of Accounts as its Deputy Chief Personnel Manager and the Board of Directors in its 311th meeting has legally cancelled the assimilation order of the Petitioner. According to the Respondent-Corporation, the Board of Directors has not committed any error of law or infringed any right of the Petitioner cancelling his 'আস্বীকরণ' or 'assimilation' order, so the Writ Petition is liable to be discharged with cost.

4. Mr. Ruhul Amin Bhuiyan, learned Advocate for the Petitioner and Mr. Kazi Mynul Hassan, learned Advocate for the Respondent-Corporation have entered their appearance and participated in the hearing of this Writ Petition.

5. At the time of hearing, Mr. Md. Ruhul Amin Bhuiyan, learned Advocate for the Petitioner contends that the Corporation passed the promotion order of the Petitioner for the post of Deputy Chief Accounts Officer evaluating his service performance and he was subsequently transferred to the post of Deputy Chief Personnel Manager on deputation and finally his service was assimilated thereat with effect from 16.06.2003. Mr. Bhuiyan further contends that prior to the Petitioner's assimilation some other Officers & employees had

similarly been assimilated in various Departments or Sections of the Corporation and still now they have been continuing services against their assimilated posts without any hindrance, whereas the Board of Directors in its 311th meeting took a discriminatory view cancelling the Petitioner's order of assimilation without any lawful authority and thereby infringed his fundamental right which is to be protected by this Court.

6. Mr. Bhuiyan has argued that the Corporation by issuing the assimilation order bearing No. Ka:Be-302/2008 (Annexure-D) created an indefeasible vested right in favour of the Petitioner, who by this time has acquired a clear eligibility for his promotion to the higher post. The learned Advocate has drawn our attention to the Office Orders (Annexure- H & I), on the basis of which some other officers and employees of the Corporation were assimilated and have been continuing their services against the assimilated posts without any question from any quarter. Narrating those circumstances, as contended by Mr. Bhuiyan, the assimilation of the Petitioner's service against the post of Deputy Chief Personnel Manager cannot be questioned or cancelled flouting consistent practice of the Corporation and violating settled principles of legitimate expectations.

7. Mr. Kazi Mynul Hassan, learned Advocate for the Respondent-Corporation opposes the above contention stating that there is no such rule or regulation for assimilation of service of any Officer or employee of the Corporation and the Petitioner making a sort of persuasion allegedly using names of them influential persons obtained the assimilation order (Annexure-D) giving its retrospective effect from around 5 years back and that was why the Board of Directors had sufficient cause and reason to take the impugned decision for cancellation of the Petitioner's assimilation. Mr. Hassan states that some employees and technical staff of the Corporation had earlier been promoted or inter-changed as a part of its administrative re-organization for better functioning of the office and to that effect some Office Orders like "Annexure-H, I" were issued, where the term 'আত্মীকরণ' had been employed quite inadvertently but that could in no way give rise to any legitimate expectation in the mind of Petitioner. The learned Advocate has drawn our attention to some unusual conduct of the Petitioner and argued that as he has not come to this Court with clean hands to get an equitable remedy available in the Writ jurisdiction, his Petition is, therefore, liable to be discharged with cost.

8. We have considered the submission of the learned Advocates above and perused the documents filed by them along with the Petitions and Affidavits-in-Opposition. For proper appreciation of the points in dispute and attending circumstances to the case, let us have a peep into the relevant provision relating to the methods of appointment as laid down in Probidhi-3 of the Corporation's Karmochari Chakuri Probidhanmala, 1989:

৩। 'নিয়োগ পদ্ধতি'- (১) এই অধ্যায় এবং তফসিলের বিধানাবলী সাপেক্ষে, কোন পদে নিম্নবর্ণিত পদ্ধতিতে নিয়োগ দান করা যাইবে, যথাঃ-

- (ক) সরাসরি নিয়োগের মাধ্যমে;
- (খ) পদোন্নতির মাধ্যমে;
- (গ) প্রমোশনে;
- (ঘ) চুক্তিভিত্তিক'

9. Within the four-corners of the Probidhanmala, we do not find any provision for 'আত্মীকরণ' or assimilation of officers or employees of the Corporation from one department to another. Term 'আত্মীকরণ' means assimilation or to take in absorption. In other word, it can be said that 'আত্মীকরণ' or assimilation is a process by which surplus officers or employees instead of being thrown out are taken in or assimilated. In the service jurisprudence, the word

‘আত্মীকরণ’ or ‘assimilation’ means taking into the public service, who may, for various reasons have been found or declared to be a surplus. In this case, the Writ Petitioner was not declared as a “surplus” by the Accounts Department or any other Department of the Corporation. So the question poking our minds is- whether it was necessary for the petitioner to become assimilated in the Personnel Department or in any other Department of the Corporation?

10. On the above matter in reply to a query, Mr. Bhuiyan has informed us that the Petitioner has not acquired any higher status or drawn any enhanced financial benefit because of the assimilation because of the fact that his present and earlier parent posts are of equal rank and status. Had it been so, it seems to us mysterious as to why the Writ Petitioner has become so serious to retain his assimilated post i.e. the post of Deputy Chief Personnel Manager. In this context, Mr. Bhuiyan discloses the fact that albeit at this moment the Petitioner will not be able to savour any service benefit, but his assimilation might pave the way for his future promotion or better prospect.

11. Probidhi- 16 of the Corporation’s Regulations or the Probidhanmala has clearly provided 5 criteria for deciding the promotion matters of its officers and employees. It appears from the said Probidhi that mere seniority is not sufficient to create or secure any right for promotion, rather in some cases service parameters to be considered for promotion may be determined giving priority to other criteria like- merit, service or record and other efficiency of an incumbent. In this context, we are of the view that the promotion policy is a matter to be decided by concerned authority of the Corporation. At this point of time, the impugned order cancelling the Petitioner’s assimilation and his return to the parent post do not have any affect or impact on the present status or financial benefits. In a changing society, where modernization of the office-management and its reform process are the matters of paramount importance, the promotion policy of an Organization like the Corporation may be changed or revised from time to time in the public interest. Obviously the Corporation has the plenary authority to change its promotion policy for its better functioning and achieving an excellence in its office administration. So, it would be unwise for us to foresee the prospective effect of the Petitioner’s assimilation and to decide the matter in anticipation. In view of the facts above, we do not find any reason to declare the right or give any direction as prayed for in favour of the Writ Petitioner under article 102 of the Constitution merely anticipating his chance of promotion or career prospect.

12. Admittedly the Petitioner joined the Corporation as an Insurance Officer on 10.06.1996 and promoted to the post of Deputy Chief Accounts Officer on 16.06.2003. It is not disputed that on 23.10.2007 the Petitioner was transferred on deputation to the Personnel Department of the Corporation, where he joined as its Deputy Chief Personnel Manager, and subsequently his service was assimilated with effect from 16.06.2003 vide order dated 25.09.2008 (Annexure-D). In relevant Probidhanmala or Regulation of the Corporation there is no such provision for assimilation or ‘আত্মীকরণ’ of any officer or staff from one department to another. So, we are inclined to hold that the Petitioner’s order of assimilation to the post of Deputy Chief Personnel Manager cannot be held permissible legally.

13. On scrutiny of the Office Order dated 25.09.2008 and the Note-Sheet enclosed as “Annexure-D” to the Writ Petition, it transpires that the service of Petitioner was decided to be assimilated with effect from 16.06.2003 showing the cause that there was no such bar for assimilation. Mr. Hassan has taken us through Para-5 of the Affidavit-in-Opposition dated 14.10.2012 and photo-copy of the Petitioner’s application dated 02.04.2006 enclosed as “Annexure-VIII” to the Affidavit-in-Opposition dated 04.02.2013. It is noted that on

02.04.2006 the Petitioner had earlier prayed for assimilation expressing some apprehension of his career prospect, but at that time the concerned authority instead of allowing that prayer just transferred him on deputation against the post of Deputy Chief Personnel Manager. In such a situation, it is not understood as to why and how did the Petitioner subsequently obtain his order of assimilation claiming its retrospective effect from 16.06.2003 ?

14. On 16.06.2003 the Writ Petitioner was promoted to the post of Deputy Chief Accounts Officer and stayed there till 23.10.2007, on which he was transferred to the post of Deputy Chief Personnel Manager. It is thus clear like anything that prior to 23.10.2007, the Petitioner had no kind of nexus with any responsibility of the post of Deputy Chief Personnel Manager or with any other post of the Personnel Department. Whereas on the basis of the assimilation order dated 25.09.2008 (Annexure-D), the Petitioner has been claiming his status and seniority as Deputy Chief Personnel Manager with effect from 16.06.2003. Regarding such incongruent process and issuance of the assimilation order, Mr. Bhuiyan cannot give any plausible explanation before us. Taking such a topsy-turvy situation of the matter into account, it seems hardly possible for us to hold that the order of assimilation in question has created any vested right to the petitioner with effect from 16.06.2003 when he had been working at his parent post in the Accounts Department.

15. It is noted that that the very decision of the Petitioner's assimilation was not taken in a regular meeting of the Board of Directors, rather obtained through a shortcut process of by-circulation of a proposal, where the Directors of the Board could not participate in the deliberations proceedings to the decision. In the instant case, as it transpire from the Note-sheet enclosed with 'Annexure-D', the decision of the Petitioner's assimilation was taken so hastily that anyone may question the fairness of its process. Whether official proceedings including issuance of the assimilation order (Annexure-D) had been free from any fatal flaw or not- those things are the questions of facts and beyond the writ jurisdiction of this Court. In this regard, relying on the decision of Oriental Bank –Vs- A.B Siddiq reported in (2008) 13 BLC(AD) 144, Mr. Hassan has contended that as remedy available in the writ jurisdiction is equitable in nature, the Petitioner must come with clean hands and his questionable conduct as manifested through obtaining a fishy decision of his assimilation has clearly disentitled the Petitioner from getting the remedy as prayed for. We find strong force in the contention above and like to hold that the Writ Petitioner cannot get any declaratory order or remedy under article 102 of the Constitution depending on an office order regarding propriety of which there is a serious dispute between the parties.

16. After holding a threadbare discussion on the matter above and considering opinions of the concerned Ministries in the Government, the Board of Directors have decided to cancel the Petitioner's order of assimilation (Annexure-D). Minutes of the 311th and the 327th meetings of the Board of Directors (Annexure-F & X- 9) have unfolded a detail account of facts with reasons as to why, how and on the basis of which some other officers or employees were transferred or assimilated or promoted in other departments of the Corporation. It has been stated that in the process of an internal administrative re-organization and due to inclusion of a new set-up for the IT-Department some employees having adequate knowledge and expertise on Computer literacy have been transferred or inter-changed and at that time one Inland Master Officer was promoted to the post of Assistant Marine Officer using the term 'আস্বীকরণ' in their Office Orders (Annexure-H & I). Making reference to the recital of those minutes of the meetings, Mr. Hassan submits that the term 'আস্বীকরণ' was inadvertently used in those Office Orders in place of পদোল্লভি /বদলী¹ Now the question is- does the presence of a term like-'আস্বীকরণ' in some transfer or promotion orders having no significance or

consequential implication would arouse any legitimate expectation to the Writ Petitioner? We are of the view that the legitimate expectation must be based on some clear facts and circumstances, which are reasonable and fair and they should lead the mind of the incumbent to a definite expectation not a mere anticipation or speculation.

17. Doctrine of the legitimate expectation ensures the circumstances in which, the expectation may be ensured or denied and among others the following grounds may also be taken in order to get a remedy under article 102 of the Constitution:- firstly there must be a promise or assurance from the employer or the authority that the incumbent would be assimilated at the end or during the tenure of his service; secondly - the past practice of 'আত্মীকরণ' for other persons of similar status has been followed consistently.

18. In this case, the Writ Petitioner could not show even a scrap of paper to prove that there was any written promise or assurance by the Board of Directors or the authority of the Corporation for his assimilation. It has not been stated by the Petitioner that any authority of the Corporation even verbally made any such promise to assimilate his service to the Personal Department. Rather he was transferred simply on deputation to the Personnel Department without any such promise or assurance.

19. Let us see whether there was any past practice of 'আত্মীকরণ', as contended, from one department to another within the Corporation. On analysis of the Office Orders enclosed as Annexures- H & I, it is found that some of the officers and employees have been assimilated or promoted or transferred to other departments on several dates. The Respondent-Corporation has expressed that term 'আত্মীকরণ' has been employed in those Office Orders inadvertently, although none of them was assimilated in true sense. Mr. Hassan has taken us with him through Minutes of the 327th meeting of the Board, wherein an explanation has been given that because of some internal administrative re-organizations and inclusion of a new set-up for the Computer Department those orders were made for public interest without any such intention of assimilation or 'আত্মীকরণ'.

20. Be that as it may, the Probidhanmala or the Regulations of the Corporation do not have any such provision of 'আত্মীকরণ' or assimilation, and the Board of Directors has already decided to remain adherent to the existing Rules and Regulations of the Corporation, so we are inclined to endorse the decision taken by the Board of Directors cancelling the Petitioner's order of assimilation as the Deputy Chief Personnel Manager of the Corporation.

21. It is to be ascertained as to whether by the Office Orders (Annexures - H, I) or otherwise any officer or employee of the Corporation has been assimilated receiving benefits like- promotion, seniority etc. or not. According to article 29 of the Constitution, being a citizen the Petitioner cannot be subjected to any sort of discrimination and he is entitled to equality of opportunity in respect of his service in the Corporation.

22. In view of the above facts, we are of the opinion that the Corporation should take immediate steps to hold an enquiry to ascertain whether any other officer or employee of the Corporation has been assimilated or has received any service benefit including seniority, promotion, etc. by dint of any decision taken or order passed by the Corporation or its Board or not. It is, therefore, directed that the Respondent-Corporation shall within 1(one) month from the date of receipt of this judgment nominate a person not below the rank or status of a Director of the Corporation to hold an inquiry on the matter as referred to above. All proceedings of the inquiry including the preparation & submission of the Report should be

completed within 3(three) months from the date of receiving the assignment by the inquiry officer.

23. On holding inquiry, if anyone be found assimilated from one department of the Corporation to another in that case such Officer or employee should be sent back or reverted, as the case may be, to his parent department or post pursuant to existing rules, regulations and orders applicable to them. At the same time a person found responsible for ominous use of term ‘আস্বীকরণ’ in Office Orders issued by the Corporation from time to time shall be brought to books as per rules and regulations.

24. In view of what have been discussed on legal aspects of the matter and attending facts and circumstances to the case, we are of the opinion that the Writ Petitioner has failed to substantiate his claim and right to remain in his assimilated post or department and the Board of Directors in its meetings held on 19.12.2011 and 11.06.2013 respectively have not committed any error or mistake of law by cancelling the Petitioner’s order of assimilation dated 05.01.2012 (Annexure-G).

25. In the result, the Rule is discharged with direction to the Respondent-Corporation for holding an inquiry on the matter above and takes immediate steps in view of the guide-lines stated in the body of the judgment. Parties are to bear their respective costs.

26. Let a copy of this judgment be transmitted to the Chairman, the Director (Administration) and the Secretary of the Corporation for compliance and necessary action.