

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha

Chief Justice

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NOS.602-606 OF 2016 WITH CIVIL PETITION
FOR LEAVE TO APPEAL NOS.3806-07 OF 2016.

(From the judgment and order dated 14.12.2010 passed by the High Court Division in Writ Petition No.78 of 2006.)

Dr. Khairun Nahar and others: Appellant.
(In C.A.No.602/16)

Dr. Md. Shaiful Hasan and others: Appellant.
(In C.A.No.603/16)

Dr. Nahida Parvin and others: Appellant.
(In C.A.No.604/16)

Dr. Rehana Razzak Khan and others: Appellant.
(In C.A.No.605/16)

Dr. Nurul Quamer Mahmuda Moni: Appellant.
(In C.A.No.606/16)

Dr. Shamsun Nahar: Petitioner.
(In C.P.No.3806/16)

Dr. Delwara Begum: Petitioner.
(In C.P.No.3807/16)

=Versus=

Professor Dr. Iqbal Arshalan & others: Respondents.
(In all the cases)

For the Appellants : Mr. Qumrul Huq Siddique,
(In C.A.Nos.602-603/16) Advocate instructed by Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.

For the Appellants: Dr. Kamal Hossain, Senior
(In C.A.Nos.604-606/16) Advocate, Mr. M. Amirul Islam, Senior Advocate (with Mr. Sharif Bhuiyan, Advocate) instructed by Mvi. Md. Wahidullah, Advocate-on-Record.

For the Petitioner: Mr. Jainul Abedin, Senior
(In C.P.No.3806/16) Advocate and Mr. Nitai Roy Chowdhury, Advocate instructed by Sataya Ranjan Mondal, Advocate-on-Record.

For the Petitioner : Mrs. Madhumaloti Chowdhury
(In C.P.No.3807/16) Barua, Advocate-on-Record.

For the Respondent : Mr. Mahbubey Alam, Senior
(In all the cases) Advocate (Mr. Tanjib-ul Alam, Advocate & Mr. Ekramul Huq, Advocate), instructed by Mr.

Md. Zainul Abedin, Advocate-
on-Record.

Respondents:
(In C.P.Nos.3806-3807/16)

Not represented.

Dates of hearing on : 09.05.2017 & 16.05.2017.

Date of judgment on : 21.05.2017

J U D G M E N T

Hasan Foez Siddique, J: The delay in filing Civil Petition is condoned.

The appeals being Civil Appeal Nos.602-606 of 2016 for review arose out of the judgment and order dated 22.02.2016 passed by this Division in Civil Petition for Leave to Appeal Nos.1898-99 and 1941 of 2011. Those Civil Petitions and Civil Petition Nos. 3806-3807 of 2016 arose out of the judgment and order dated 14.12.2010 passed by the High Court Division in Writ Petition No.78 of 2016 making the Rule absolute.

The writ petitioner-respondent No.1 filed Writ Petition No.78 of 2006 stating, inter alia, that by notification dated 03.04.2002 published in the "Daily Dinkal" on 01.05.2002 and, thereafter, by amended notification dated 13.10.2002 published in the "Dainik Dinkal" dated 14.10.2002, the Vice Chancellor of the Bangabondhu Sheikh Mujib Medical University (hereinafter refer to as "the University") illegally appointed a good number of Medical Officers in the University violating the provision of Section 14(10) of the Act 1 of 1998

only on political consideration. It was alleged that the Vice Chancellor, exercising his power vested under section 14 (12) of the Bangabondhu Sheikh Mujib Medical University Act (the Act), created innumerable posts including Medical Officers inasmuch as the said provision authorizes the Vice Chancellor for taking steps to meet the emergency situation and immediate action. Such power had not been applied earlier. The Vice Chancellor, though there were no vacant posts, appointed 600 Medical Officers which were in excess of the University's required capacity. The approved organogram of the University provides 89 sanctioned posts for Medical Officers. The annual report for the year 2003-2004 showed that the number of Medical Officers employed in the University were 583. Against one patient in one bed of the University five doctors were appointed. In ENT department for 24 beds there were 40 doctors including Professors and Medical Officers. The University Grants Commission (UGC) by letter dated 07.12.2005, addressing the registrar of the University, pointed out that within one year and 4 months 145 persons were appointed beyond the approved budget of the University. The Ministry of Health, by letter dated 21.12.2005, sought for a clarification from the University under what

provision of law those appointments were given in the financial year 2004-2005. The writ respondent No.3 published notification dated 18.10.2005 in the "The News Today" inviting applications for appointment of Medical Officers without mentioning any definite number of the created posts or vacant posts against which appointments of medical officers were to be given. Earlier about 600 Medical Officers were appointed without having validly created posts by the Syndicate or against vacant posts. By filing supplementary affidavit, the writ petitioner further stated that the Parliamentary Standing Committee of the Ministry of Health and Family Welfare formed a Committee for holding inquiry regarding the recruitment process from 2001 to 2008 of the University and after thorough inquiry it submitted report of 246 pages. Thereafter, the Syndicate of the University in a meeting held on 15.05.2010 formed a 6(six) members Inquiry Committee to discuss, examine and scrutinize the recommendations given by the Sub-Committee-2 of the Parliamentary Standing Committee of the Ministry of Health and Family Welfare and the said committee, after holding inquiry, submitted report of 89 pages. The appointments were altogether illegal. The High Court Division issued Rule Nisi.

The writ respondent Nos.2 and 3 contested the writ petition by filing affidavit-in-opposition contending, inter alia, that Section 14(2) of the Act 1 of 1998 enable the Vice Chancellor of the University to take appropriate steps in case of emergency. Whether at the relevant time there was any emergency or not is a question of fact. The Vice Chancellor himself is the authority to determine the situation. The appointments, given pursuant to the employment notification might not have been published properly but since appointments had been approved by the Syndicate it could not be said that those were unlawful.

The writ petitioner in affidavit-in-reply to the affidavit-in-opposition filed by writ respondent Nos.2 and 3 denied the contention of the affidavit-in-opposition and stated that appointment could be made only against the sanctioned posts duly approved by the University authority . The process of appointment pursuant to the impugned advertisement was liable to be declared unlawful.

The High Court Division, hearing the parties, made the said Rule Nisi absolute declaring Statute 5(Uma) of the University Statute void and ultra vires the Act 1 of 1998 and the notification issued on 18.10.2005 published in the

"News Today" on 22.10.2005 for appointment of some medical Officers, without mentioning the number of vacant posts, was also declared to have been made unlawfully.

Against the said judgment and order of the High Court Division the appellants filed aforementioned civil petitions and this Division by the impugned judgment and order dismissed those civil petitions. Then the appellants filed review petitions under Article 105 of the Constitution and obtained leave. The petitioners of the civil petitions No.3806-3808 of 2016 also challenged the judgment and order of the High Court Division. All the appeals and civil petitions are heard together and disposed of by this common judgment.

Mr. Qumrul Huq Siddique, learned Counsel appeared for the appellants in Civil Appeal Nos.602-603 of 2016. Dr. Kamal Hossain and Mr. M. Amirul Islam, learned Senior Counsel appeared for the appellants in Civil Appeal Nos.604-606 of 2016 and Mr. Joinul Abedin, learned Senior Counsel appeared for the petitioners in C.P.Nos.3807 of 2016 and Mrs. Madhumaloti Chowdhury Barua, learned Advocate-on-Record appeared on behalf of the petitioner in C.P.No.3806 of 2006.

The learned Counsel for the appellants and petitioners submit that the appointments were made

following the provisions of University Act as well as related service statute. At the time of hearing the petitions, the papers relating to the minutes of the meetings of the syndicate in respect of creation of posts and some other important papers were not produced before this Division, so this Division failed to consider those papers. They submit that there were no illegality or irregularity in the process of appointments. They further submit that 200 posts were lawfully created and the syndicate of the University, by a resolution in its meeting dated 18.03.2008, confirmed the service of the appellants and petitioners. They submit that after getting appointments in 2006 and after confirmation of the service by the syndicate the appellants and petitioners had been serving in the University and those appointments were given after taking the permission from the High Court Division. After serving for more than 10 years, their appointments had been declared unlawful inasmuch as by the lapses of time they have acquired a valid right in serving their respective posts.

Mr. Mahbubey Alam, learned Senior Counsel along with Mr. Tanjib-ul Alam, learned Counsel appearing for the University in their submissions contended that in the posts, in which the

appellants were appointed, were not created following the provisions of law. The appellants were firstly appointed on contract basis and, thereafter, they were appointed pursuant to an advertisement which was not given following the service statute. This Division rightly dismissed the civil petitions and there was no error of law apparent on the face of the record to review the judgment and order of this Division.

The foremost requirement is that the judgment, against which review is sought, suffers from any error apparent on the face of the record and permitting the judgment to be reviewed to stand will lead to failure of justice, or any other sufficient reason. Discovery of new and important materials, which after the exercise of due diligence, were not within the knowledge of the review seekers and could not be produced by them is also an important ground for review.

It appears from the materials produced in the review petitions that the Syndicate of the BSMMU, the post creating authority, in its meeting dated 26.05.2005 created 200 posts of Medical Officers to meet up urgent requirements. In the said meeting it was decided, "বিশ্ববিদ্যালয়ে বর্তমানে ৩৭টি বিভাগে ১১৯ টি ইউনিট আছে। এছাড়া বিশ্ববিদ্যালয় হাসপাতালে শয্যা সংখ্যা প্রায় ১১০০। বিশ্ববিদ্যালয়ে নিয়োজিত

শিক্ষকগন হাসপাতালের বিভিন্ন রুগী সেবা ছাড়াও বিশ্ববিদ্যালয়ে প্রচলিত স্নাতকোত্তর কোর্সে শিক্ষাদান ও গবেষণা কর্মে নিয়োজিত থাকেন। এক্ষেত্রে মেডিক্যাল অফিসারগনকেই রুগীদের সেবায় নিয়োজিত থাকতে হয়। সুতরাং ৩৭টি বিভাগ এবং প্রায় ১১০০ শয্যা বিশিষ্ট হাসপাতালের জন্য ৩৯৩ জন মেডিক্যাল অফিসার একেবারেই অপ্রতুল এবং এই কারণে বিভিন্ন সময় রুগীর চিকিৎসায় সমস্যা দেখা দিচ্ছে বলে জানা গেল।

সুতরাং বিশ্ববিদ্যালয় হাসপাতালে চিকিৎসা কার্যক্রম সুষ্ঠুভাবে পরিচালনার স্বার্থে ২০০ (দুইশত)টি মেডিক্যাল অফিসার এর পদ সৃষ্টি করা হল।” The decision regarding creation of 200 posts of Medical Officers was confirmed by the Syndicate of the University in its 21st meeting dated 13.08.2005. Pursuant to the said decision of the Syndicate the University issued employment notification dated 28.10.2005 which was published in the “Daily News Today” on 22.10.2005.

It further appears from the materials on record that in response to the notification dated 18.10.2005 a total number of 1250 applications were filed for the posts of Medical Officers and, accordingly, interview cards were issued. Interview Board, taking interview of the candidates, prepared a list according to merit. In the meantime, the respondent No.1 filed writ petition and obtained Rule.

The High Court Division initially passed an order restraining the University authority from appointing anyone but by a subsequent order on the

basis of application made by the University authority vacated the order of injunction. Thereafter, complying all the process of appointment, the list, prepared on merit, was placed before the Syndicate for consideration and the Syndicate approved the merit list prepared by the interview board. Thereafter, in due course 200 Medical Officers were appointed on 01.03.2006. Of them, 194 Medical Officers joined in the service on 02.03.2006 and 3 of them joined on 08.03.2006, one on 27.03.2006 and two on 30.03.2006. Thereafter, considering their efficiency in service, the proposal of their confirmation were placed before the syndicate and the syndicate in its 23rd meeting dated 27.06.2006 confirmed the service of the appellants and leave petitioners. Finally, on 28.03.2008 the reconstituted Syndicate, where the writ petitioner-respondent No.1 was one of the members, approved the decision of the syndicate dated 27.06.2006. Accordingly, the appellants and leave petitioners became the permanent employees of the BSMMU. At the time of hearing, the appellants failed to produce the papers relating to creation of posts, papers relating to selection, merit lists, decisions of the syndicate regarding approval of merit list, decisions for appointment and subsequent

confirmation of their service which are new and important documents and the appellants could not produce those papers even after the exercise of due diligence and that those documents were in the custody of the University authority so the appellants did not have a fair opportunity of producing those papers. Recently the appellants have been able to collect those papers.

It is to be mentioned here that almost all the appellants were earlier appointed either on contractual or adhoc basis. In the advertisement dated 18.10.2005 the then University authority in a most unclean manner stated "পদের সংখ্যা কিছু সংখ্যক " which clearly indicated that the then authority of the University did not proceed with the appointment process properly. Moreso, in order to give special privilege to the candidates who had been serving on contract or adhoc basis, the University authority provided special opportunity to the applicants. It was mentioned in the advertisement that, "বিশ্ববিদ্যালয়ে চুক্তিভিত্তিক কর্মরত চিকিৎসকগণকে অগ্রাধিকার দেয়া হবে।" Giving such privilege the authority selected the appellants for appointment. Question is, why should the University would depart from the normal rule and indulge such process. Whenever, a selection is to be made on the basis of merit

performance involving competition and possession of any additional qualification or factor is envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic work or proven inter see merit and suitability, duty assessed by the authority. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered. This Court always insisted the Government and autonomous bodies for making regular and proper recruitments and not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. Article 29 of the Constitution guarantees equality of opportunity for all citizens in matters relating to employment or appointment to the office of the Republic. The University authority must obey its rules and not to flaw its own rules and would confer undue benefits on a few at the cost of many waiting to compete. Though learned Counsel for the respondent University brought those irregularities in the notice of this Court but in the High Court

Division the then authority of the University in its affidavit-in-opposition supported those appointments. It is desirable and this Division repeatedly observed that every appointment in any post under the Government or autonomous body can only be made after a proper advertisement inviting applications from eligible candidates and holding of selection following rules and by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter see merit of the candidates who have applied in response to the advertisement made. Unless the appointment is made in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If the services of the appointees who had put in few years of service are to be terminated, the authority shall follow the principles: (a) satisfaction in regard to the sufficiency of the materials collected so as to enable the University authority to arrive at its satisfaction that the selection process was tainted; (b) determine the question that the illegalities committed go to the root of the matter which vitiate the entire selection process; (c) whether the sufficient

materials present enable the authority to arrive at satisfaction that the officers in majority have been found to be part of the fraudulent purpose or the system itself was corrupt. Satisfaction as to the sufficiency of materials are required to be gathered by reasons of a thorough investigation in a fair and transparent manner. In the case in hand the University authority did not do so. A professor of the University filed Writ Petition challenging the appointments. But finally as Syndicate member he approved the decision for confirmation of the services of the appointees. On the other hand, in the High Court Division the University supported the appointee-appellants.

Considering the facts and circumstances and new papers produced in this Court which were not produced and considered by this Court earlier and that from the new materials produced in this Court it appears that in those papers the University authority and the writ petitioner approved the decision for confirmation of services of the appellants, we are of the view that the appellants are entitled to get relief because error has crept in earlier decision.

Accordingly, all the appeals are allowed. The Civil Petitions are disposed of. The judgment and

order of this Division dated 22.02.2016 passed in Civil Petition for Leave to Appeal Nos.1898-99 and 1941 of 2011 are reviewed and set aside and the judgment and order of the High Court Division passed in Writ Petition No.78 of 2006 is also set aside. The authority of Bangabondhu Sheikh Mujib Medical University is directed to reinstate all the appellants and the leave petitioners to their respective posts and allow the continuity of their services. However, the period, they were out of service, shall be treated as leave without pay.

C. J.

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The 21st May, 2017.

M.N.S./words- /