

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 14344 OF 2017

IN THE MATTER OF:

An application under Article 102(2)(a) (ii) of the
Constitution of the People's Republic of
Bangladesh.

-And-

IN THE MATTER OF :

Md. Shahjamal Sardar and others

.....PETITIONERS

-Versus-

Govt. of Bangladesh, represented by the
Secretary, Ministry of Primary and Mass
Education, Bangladesh Secretariat, Ramna,
Dhaka and others.

...RESPONDENTS

Mr. Abdullah Mahmood Hasan with

Mr. Md. Hemait Ullah, Advocates

... For the Petitioners

Mr. Taufiq Sajawar Partho, AAG

... For the Respondent No. 4

Mr. A.K.M. Habibur Rahman, Advocate

... For the Respondent Nos. 8 & 9.

Heard on: 14.08.2018, 16.10.2018, 22.10.2018,
03.01.2019, 13.01.2019 & 17.02.2019

Judgment on: 11.03.2019

Present:

Ms. Justice Naima Haider

&

Mr. Justice Khizir Ahmed Choudhury

Naima Haider, J:

In this application under Article 102 of the Constitution, Rule Nisi
was issued in the following terms:

*Let a Rule Nisi be issued calling upon the respondents
to show cause as to why Rule 2(Ga) of অধিগ্রহণকৃত বেসরকারী
প্রাথমিক বিদ্যালয় শিক্ষক (চাকুরী শর্তাবলী নির্ধারণ) বিধিমালা, ২০১৩ deducting
50% Service Tenure of the Teachers of Registered Non*

Government Primary School (Now Nationalized) should not be declared to be ultra vires to the Constitution of the People's Republic of Bangladesh and why a direction should not be given upon the respondent to consider the entire service tenure of the respective petitioner from the date of enlisting the monthly pay order as a teacher of registered Non Government Primary School (New Nationalized) and why a direction should not be given upon the respondent Nos. 1-5 to take necessary steps for ensuring salary and other service benefits to the petitioner as Headmaster of Registered Government Primary School (New Nationalized) and/ or pass such other or further order or orders as to this Court may seem fit and proper.

Subsequently an Application for Addition of Party was filed. This Division allowed the said Application and the applicants were added as co-petitioners in the proceeding before us.

An Application for issuance of Supplementary Rule was also filed by the petitioners. The said Application was allowed and Supplementary Rule was issued in the following terms:

Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why Rule 9 of the অধিগ্রহণকৃত বেসরকারী প্রাথমিক বিদ্যালয় শিক্ষক (চাকুরীশর্তাদি নির্ধারণ) বিধিমালা, ২০১৩ shall not be declared to be unlawful and unconstitutional and violative of the fundamental right guaranteed under the Constitution and why the respondents should not be directed to treat the petitioners as Head Masters of their respective

school till their regular retirement age, unless otherwise disqualified and/ or pass such other or further order or orders as to this Court may seem fit and proper.

The relevant facts, in brief, are set out as follows: the petitioners are law abiding citizens of Bangladesh and are Head Masters of different schools. The petitioners joined their respective schools as teachers after obtaining the requisite educational qualifications. Subsequently, the petitioners had been promoted as Head Masters of their respective schools, further to the approvals of the concerned District Primary Education Officer. The petitioners have been discharging their functions to the full satisfaction of all concerned. Some of the petitioners were discharging the functions as Head Master from as early as 1990. Though the petitioners had been performing the functions as Head Master, unfortunately, the petitioners did not obtain Pay Scale relevant to the post of Head Masters. The petitioners nevertheless continued to serve as Head Masters of their respective schools. The Government decided to nationalize certain schools. All the schools in which the petitioners are Head Masters had been nationalized. The Government also framed the অধিগ্রহণকৃত বেসরকারি প্রাথমিক বিদ্যালয়ের শিক্ষক (চাকুরীশর্তাদি নির্ধারণ) বিধিমালা, ২০১৩ (“the 2013 Rules”) which sets out the terms and conditions of the service of the nationalized teachers, including the petitioners. The 2013 Rules was framed by the Government without taking suggestions from the different stake holders, though such consultation process was required. When the 2013 Rules were available, it transpired that certain provisions cause extreme prejudice to the petitioners and takes away the vested rights. Being aggrieved, the petitioners moved this Division and obtained the Rule. Subsequently, the petitioners filed an

Application for Issuance of Supplementary Rule and the said Application was allowed.

The petitioners filed two separate Supplementary Affidavits, annexing certain documents to show, among others, that the process of appointment and fixation of the salary of the petitioners had completed been through the respondents.

The Rule is opposed. The respondent No.4 filed an Affidavit in Opposition. With regard to the Rule issuing order, the respondent No.4 states that Rule 2(Ga) of the 2013 Rules is legal; the petitioners had voluntarily joined knowing that their service tenure would be reduced and therefore, the petitioners are estopped from raising this issue. Furthermore, since the 2013 Rules were framed in accordance with the procedure laid down under the Primary School (Taking Over) Act 1974, there is no scope for this Division to interfere. In the Affidavit in Opposition, it is stated that the promotion to the post of Head Master can be made if the person has the requisite qualification. Furthermore, to be eligible for promotion to the post of Head Master, the person must be working as Assistant Teacher for 7 years from the date of enlistment in the MPO. After nationalization, the Government issued an order which states that there is no scope to promote Assistant Teachers to Head Masters. Through the Affidavit, it is pointed out that the documents submitted by the petitioners are under challenge and questionable and therefore, this Division should not intervene. Through the Affidavit, the respondent No.4 also points out *“That the petitioners claim that they are discharging their duties and Headmaster is not true and hence denied”*. The respondent No.4 refers to the order passed by the Full Bench of the Hon’ble Appellate Division in Civil Petition for Leave to

Appeal No. 4014 of 2018. The Full Bench of the Hon'ble Appellate Division confirmed the order of stay passed by the Hon'ble Judge in Chamber and directed disposal on merit. The learned Counsel, referring to his order of the Full Bench of the Hon'ble Appellate Division submits that the interim order passed by this Division had been stayed by the Hon'ble Judge in Chamber and this indicates that there is no merit in the Rule. On these, among other counts, the learned Counsel submits that the Rule and the Supplementary Rule should be discharged.

The Rule is also opposed by the respondent Nos. 8-10. In the Affidavit in Opposition, it is stated that the 2013 Rule was framed in accordance with law and therefore, interference by this Division is not warranted. In the Affidavit in Opposition, it is stated that under the 2013 Rules, the direct appointees shall have preference over those who were nationalized and therefore, the direct appointees should be made Head Masters. It is also pointed out that on similar matters, the petitioners filed series of writ petition but there was no disclosure and therefore, the Rule and the Supplementary Rule should be discharged. Through the Affidavit in Opposition, the maintainability of the instant writ petition was also questioned.

The learned Counsel appearing for the petitioners at the outset takes us through the 2013 Rules. He submits that if the effective service period is reduced, as has been done by Rule 2(Ga) of the 2013 Rules, the petitioners' entitlement under the 2013 Rules would be detrimentally affected. The learned Counsel submits that delegated legislations are framed to further the objective of the parent legislation. The learned Counsel in support refers to certain decisions of the Supreme Court of India. Taking us

through these decisions, the learned Counsel submits that Rule 2(Ga) of the 2013 Rules, reducing the “effective service period by half” does not have objective basis and therefore, should be struck down. The learned Counsel referring to Rule 9(1) of the 2013 Rules, submit that due to the operation of Rule 9(1), the seniority of the petitioners would be affected seriously; the petitioners would always remain junior to whoever is appointed directly. This, the learned Counsel submits, is manifestly arbitrary and absurd. Since after nationalization, there is only scope for direct recruitment, the interpretation of Rule 9(1) would be that the petitioners would never be senior to the junior most appointee. The petitioners, as Headmasters, serving for more than 20 years would remain junior to any teacher directly recruited. According to the learned Counsel, if under the 2013 Rules, the effective service is reduced to half, then the revised service period should be taken into account; if that is taken into account, Rule 9(1) of the 2013 Rules cannot stand because this has the effect of “continuous reduction of length of service”. According to the learned Counsel, Rule 9(1) of the 2013 Rules is manifestly unreasonable, takes away the petitioners’ vested rights and is vague; thus Rule 9(1) should be struck. The learned Counsel submits that for the reasons set out aforesaid, the Rule should be made absolute with appropriate direction upon the respondents.

We have heard the learned Counsels at length. We have also perused the pleading and the documents annexed therein.

Article 65 of the Constitution provides that the legislative powers shall be vested in the Parliament and notwithstanding the same, Parliament may delegate power to make orders, regulations and other instruments having legislative effect. This Division in exercise of powers under Article

102 of the Constitution can review the constitutionality of a primary legislation. If this can be done, the legality of a delegated legislation can always be subject to judicial scrutiny. This is the principle settled by the Hon'ble Appellate Division in series of cases. Delegated legislation can be struck down if: (a) the delegated legislation is void because the delegating statute is unconstitutional, (b) the delegated legislation offends the constitutional provisions, (c) the delegated legislation is ultra vires the delegating statute, or (d) the delegated legislation is arbitrary, unreasonable or contrary to any other statutory provisions. A delegated legislation or any provision therein may also be struck down if it is so vague that a reasonable interpretation is not possible.

The purpose of subordinate legislation is to carry into effect the existing law and not to change it. Therefore, when Parliament delegates legislative functions to the administrative agencies to make rules or regulations, Parliament cannot be said to have permitted the delegate to make arbitrary and unreasonable rules; an unreasonable delegated legislation, in our view, does not carry into effect the parent law. While there are various tests which are applied in determining whether a delegated legislation is unreasonable, in our view, an appropriate test is *“whether the delegated legislation is so unreasonable that Parliament cannot be taken as having authorized it to be made under the Act in question”*.

The issue before this Division is whether Rule 2(Ga) and Rule 9(1) of the 2013 Rules should be struck down. The relevant provisions are set out below for ease of reference:

Rule 2(Ga) of the 2013 Rules

“কার্যকর চাকুরীকাল” অর্থ কোন শিক্ষক অধিগ্রহণের পূর্বে একাদিক্রমে যে মেয়াদে চাকুরী করিয়াছেন উহার ৫০%।

তবে শর্ত থাকে যে, কোন শিক্ষক অধিগ্রহণের অব্যবহিত পূর্বে একাদিক্রমে ৪ (চার) বৎসরের কম চাকুরী করিয়া থাকিলে উক্ত চাকুরীকাল হিসাবে গণ্য হইবে না;

Rule 9(1) of the 2013 Rules

৯। শিক্ষকদের জ্যেষ্ঠতা, পদোন্নতি, ইত্যাদি।- (১) বিধি ৪ এর অধীন কোন শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকরচাকুরী কালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে এবং উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে।

(২) নিয়োগপ্রদানের পর শিক্ষকগণের পারস্পরিক জ্যেষ্ঠতা তাহাদের স্ব-স্ব কার্যকরচাকুরী কালের ভিত্তিতে নির্ধারণ করিতে হইবে এবং কার্যকরচাকুরীকাল একই বা সমান হইলে তাহাদের নূন্যতম শিক্ষাগত যোগ্যতা অর্জনের বৎসরের এবং উক্ত বৎসর একই হইলে বয়সের ভিত্তিতে জ্যেষ্ঠতা নির্ধারিত হইবে।

(৩) নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হইবেন।

The effect of Rule 2(Ga) is that if a teacher renders, say 10 years of service prior to nationalization, his effective service period under the 2013 shall be 50% thereof, i.e. 5 years. However, if the particular teacher's term of service is less than 4 years, then his previous service years shall not be counted after the nationalization. The issue is whether this provision, should be struck down.

This provision is strange but not unreasonable. The respondents did not offer any explanation on the rationale of Rule 2(Ga) of the 2013 Rules. Regardless, our understanding is as follows: the teachers who are nationalized, shall cease to be private employees and shall be treated as Government employees. They shall be entitled to different Government facilities, including but not limited to pension benefits. We are mindful of the fact that the Government has nationalized hundreds of schools and in the process, affirmed the status of the employees and teachers of those schools as Government employees entitled to pension benefits and other benefits. If Rule 2(Ga) is was drafted differently to take account of the

entire period of service prior to nationalization, then it would have had severe financial implications on the Government. Rule 2(Ga) of the 2013 Rules is therefore, in our view, the mechanism used to reduce the financial exposure and at the same time, provide benefits to the teachers. The learned Counsel for the petitioners submits that as a result of Rule 2(Ga) of the 2013 Rules, the petitioners' "rights and entitlements" have been affected to their prejudice and therefore, Rule 2(Ga) should be struck down. Yes, it can be argued that the effect of Rule 2(Ga) is that the petitioners' expectation to service benefits is affected; however, expectation is not synonymous to "rights and entitlement". Loss of expectation of the petitioners cannot be a ground to strike down Rule 2(Ga) of the 2013 Rules.

Now, let us consider the legality of Rule 9 of the 2013 Rules. The 2013 Rules apply in respect of the teachers of the nationalized institutions. After nationalization in 2013, the teachers of the newly nationalized schools were absorbed into Government service. The "কার্যকর চাকুরীকাল" of the nationalized teachers would be অধিগ্রহণের পূর্বে একাদিক্রমে যে মেয়াদে চাকুরী করিয়াছেন উহার ৫০%. So, if a teacher was teaching for say, 10 years, in a the school which was nationalized, his "কার্যকর চাকুরীকাল" would be deemed to be 5 years. Rule 9(1) provides that the seniority shall be counted by reference to কার্যকরচাকুরী কালের ভিত্তিতে. We were informed by the learned Counsels for the respondents that after nationalization, appointments can be made directly only. The new direct recruit would not, immediately after his appointment, have চাকুরীকাল of 5 years; the direct appointee must serve as a teacher for 5 years for him to have tenure of service of 5 years. In the meantime, the teacher who was nationalized would be working for 5 more

years, as nationalized teacher and his total tenure would be 10 years. However, under Rule 9(1) of the 2013 Rules, the direct appointee shall be senior to the teacher who has been nationalized under the 2013 Rules despite the fact that his tenure of service is less than the tenure of service of the nationalized teacher. This is manifestly absurd, particularly when the teachers directly recruited and nationalized teachers are treated at par. Furthermore, Rule 9(1) of the 2013 Rules provide সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে। We fail to understand the logic behind this. This means that the teacher who has been nationalized, irrespective of his service as nationalized teacher, would never be senior to the direct appointees, irrespective of the date of appointment. (emphasis added)

There is an alternative interpretation of Rule 9(1) of the 2013 Rules. The interpretation is that a nationalized teacher would not be junior to the direct appointee, irrespective of the date of appointment of the latter; the nationalized teacher would be junior to the direct appointee who was appointed immediately prior to the appointment of the nationalized teacher. On the face of it, this interpretation seems sound; he who is appointed first should be senior. The problem arises because previous tenure of service in the private schools is recognized by the 2013 Rules. On the date when a nationalized teacher is appointed, he carries forward a deemed tenure of service. Under this interpretation, the deemed tenure of service recognized by first part of Rule 9(1) would cease to be recognized by the second part of Rule 9(1). The problem is illustrated by the following example. Y is a nationalized teacher with work experience of 10 years prior to his appointment under the 2013 Rules in say, 2014. His deemed length of

service in 2014 i.e. on the date of his appointment, would be 5 years. Z is a direct appointee. Z is appointed immediately before Y. Z's appointment is in 2013, exactly one year before Y's appointment. In 2014, on the date of Y's appointment, Z's tenure of service would be 1 year. However, because of Rule 9(1) of the 2013 Rules, Y will be deemed to have been in service for 5 years and yet, Y will be regarded as junior to Z because of the following “উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে। The quoted part of Rule 9(1) of the 2013 Rules, in our view, renders the first part of the Rule 9(1) being “শিক্ষকের নিয়োগ প্রদানের তারিখ হইতে কার্যকরচাকুরী কালের ভিত্তিতে শিক্ষক পদে তাহার জ্যেষ্ঠতা গণনা করা হইবে”, redundant.

It appears that the teachers who are nationalized are affected because their seniority would not be properly recognized. This is irrespective of how we interpret Rule 9(10) of the 2013 Rules. This in turn would affect their পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল because under Rule 9(3) of the 2013 Rules নিয়োগ বিধির শর্ত পূরণ সাপেক্ষে, উপ-বিধি (১) ও (২) এর অধীন জ্যেষ্ঠতার ভিত্তিতে শিক্ষকগণ পদোন্নতি, সিলেকশন গ্রেড এবং প্রযোজ্য টাইম স্কেল প্রাপ্য হইবেন। (emphasis added)

We have carefully reviewed the Affidavit in Oppositions filed. Though the legality of Rule 9 was challenged, the respondents did not provide any cogent justification as to why we should not interfere. The respondents also did not set out the rationale behind Rule 9(1) of the 2013 Rules. Even when we pointed out that Rule 9(1) is manifestly absurd for the reasons we have set out aforesaid, the learned Counsels for the respondents could not provide any interpretation, alternative to our interpretations.

The learned Counsels pointed out that the 2013 Rules was duly framed under Primary Schools (Taking Over) Act 1974. This is neither here nor there. The executives were empowered by the Primary Schools (Taking Over) Act 1974 to frame Rules and in exercise of the powers so conferred, the respondents framed the 2013 Rules. In the instant case, we are not dealing with any issue relating to procedural irregularity/illegality committed at the time of framing of the 2013 Rules. We are dealing with the issue whether Rule 9(1) and Rule 2(Ga) of the 2013 Rules should be struck down as being unreasonable. We have concluded that Rule 9(1) of the 2013 Rules is manifestly unreasonable and self contradictory and therefore, is liable to be struck down.

Before we part with the judgment, we would wish to address three more issues. First, the learned Counsels for the respondents submit that the petitioners are not qualified. However, no documents are annexed in support of the contentions. Even assuming they are not qualified, the 2013 Rules permit the petitioners to gain the requisite qualifications. Rule 4 (1)(kha) reads as follows: কোন শিক্ষকের দফা (ক) তে উল্লিখিত অন্যান্য যোগ্যতা থাকা সত্ত্বেও কেবল প্রয়োজনীয় যোগ্যতা না থাকিলে, আইনের Section 3 এর Sub Section (1) এর অধীন অধিগ্রহণকৃত সংশ্লিষ্ট বিদ্যালয়ের অধিগ্রহণের তারিখ হইতে পরবর্তী ৩ (তিন) বৎসরের মধ্যে উক্ত যোগ্যতা অর্জনের শর্তে নিয়োগ প্রদান করিয়া প্রয়োজনীয় আদেশ জারি করিবে। In the context of Rule 4(1) (kha), প্রয়োজনীয় যোগ্যতা means educational qualification [Rule 2 (cha)].

Secondly, the learned Counsels for the respondents submit that the petitioners preferred series of writ petitions on the same issue. We have reviewed the judgments passed in those writ petitions. The issues raised in

those writ petitions are not the same as those raised in the instant writ petition.

Thirdly, the learned Counsels submit that the Rule is not maintainable since the petitioners, as Government employees, should have subjected themselves to the jurisdiction of Administrative Tribunal. This argument is devoid of any merit. The petitioners have, in the instant writ petition, challenged among others, the legality of Rule 2(Ga) and Rule 9 (1) of the 2013. This is not a matter for Administrative Tribunal.

In view of the above, we are inclined to hold that there is merit in the Rule. The Rule is made absolute in part.

It is declared that:

- (i) Rule 2(Ga) of the 2013 Rule is not illegal; and
- (ii) The following in Rule 9(1), being এবং উক্ত তারিখের অব্যবহিত পূর্বে নিয়োগবিধির অধীন শিক্ষক পদে সরাসরি নিয়োগপ্রাপ্ত সর্বশেষ ব্যক্তির নিম্নে উক্ত শিক্ষকের অবস্থান নির্ধারিত হইবে is illegal and without lawful authority.

In light of the above, the respondents directed to confer seniority to the petitioners and henceforth determine the seniority and benefits payable to them by reference to “কার্যকর চাকুরীকাল” as defined in Rule 2 (Ga) of the 2013 Rules. With respect to those petitioners who are Headmasters, the respondents are further directed to treat them and not the junior direct appointees as Headmasters and publish appropriate orders(s) if necessary, through official gazette.

Communicate the Judgment and Order at once for immediate compliance.

Khizir Ahmed Choudhury, J:

I agree.