

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaul Islam

CIVIL APPEAL NO. 412 OF 2019

(Arising out of C.P No. 2657 of 2018)

The Government of Bangladesh Appellants
represented by the Secretary, Ministry
of Law, Justice and Parliamentary
Affairs and others

-Versus-

Md. Saiful Islam and others Respondents

For the Appellants : Mr. Sk. Morshed, Adl. AG
instructed by Mr. Haridas Paul,
Advocate-on-record

For Respondent No. 1 : Mr. Momtazuddin Fakir, Senior
Advocate with Mr. Sk. Saifuzzaman,
Advocate instructed by Mr. Md.
Zahirul Islam, Advocate-on-record

For Respondent Nos. : Not represented
2-30

For Respondent Nos. : Mr. Satya Ronjon Mondall,
31-62 Advocate-on-record

Date of Hearing : 29.08.2023

Date of Judgment : 30.08.2023

J U D G M E N T

Md. Ashfaul Islam, J: This civil appeal by leave is directed
against the judgment and order dated 05.02.2017 passed by
the High Court Division in Writ Petition Nos. 13783 and
13784 of 2015 making both the Rules absolute and thereby
directing the writ-respondents to regularize the services
of the writ-petitioners in the post of Extra Moharar

under the revenue setup of the Department of Registration with continuity of service with attending benefits.

The short facts are that the present respondent Nos. 1-30 as petitioners filed the aforesaid writ petitions seeking a direction upon the writ-respondents to regularize their service in the post of Extra Moharar under the revenue setup of the Department of Registration with continuity of service and all other benefits contending inter alia that the terms and conditions of the Extra Moharars are governed by the provisions of Chapter 16 of the Registration Manual. As per the provision of rule 310(a) of Volume-VI of the Registration Manual, Extra Moharar is a permanent post under the office of the Registration. Earlier the services of many Extra Moharars were confirmed/regularized. But the Department of Registration denied to give the same benefits to the present Extra Moharars. Extra Moharars of West Bengal, India were also confirmed/regularized as Government Employees and were also granted their entitled scales.

At one point of time Bangladesh Extra Moharar (copyist) Association started movement seeking their

confirmation/regularization in service. After long lapse of time, the Department of Registration had recommended to constitute a committee headed by a Joint Secretary (Admin) on 04.02.2013 and ultimately a 6 member committee headed by the Joint Secretary (Admin) of Ministry of Law, Justice and Parliamentary Affairs was constituted to look into the demands of the Extra Moharars. On 22.07.2013, the committee had held its meeting and recommended to appoint the Extra Moharars in Grade-19 of the National Pay Scale of 2009 prescribing the maximum age limit as 19 years.

On 24.09.2013, the Ministry of Public Administration sought consent to create required number of permanent posts of the Extra Moharars in order to absorb them. On 12.12.2013, the Ministry of Public Administration had made some queries and asked writ-respondent No.1, Ministry of Law, Justice and Parliamentary Affairs to send a copy of the recruitment rules/provision and the clear recommendation of the Administrative Ministry. Since then, the claims of the writ-petitioners still remained unanswered and their grievances are yet to be met. Finding no other alternative efficacious remedy, the

writ petitioners moved before the High Court Division and obtained Rule.

Writ-respondent No.4, the Inspector General of Registration, Department of Registration contested the Rule by filing affidavit-in-oppositions contending, inter alia, that the Ministry of Establishment at present the Ministry Public Administration has not approved the proposal and there is no Service Rules for the extra Moharars by which they can be appointed or absorbed in the revenue budget. The extra Moharars are enlisted by the District Registrar on the report of Sub-Registrar. In their appointment letter, no assurance was given to absorb/regularize them in their service in the revenue budget.

The High Court Division, by the impugned judgment and order, made the Rules absolute. Against which, the Government filed this civil petition for leave to appeal and obtained leave giving rise to this appeal.

Mr. Sk Md. Morshed, the learned Additional Attorney General, appearing for appellants, submits that the Moharars, writ-petitioners of different Sub-registry Offices, are being appointed by the District Registrar on

the report of Sub-Registrars and in the Registration Manual, there is a clear provision regarding their appointment and job nature and the terms and conditions of the service as rendered by the Extra Moharars are ruled and governed by the provision of said Manual and since the Registration Manual has not provided any provision for absorption of the Extra Moharars in the revenue budget and the High Court Division without considering the aspects made the Rule absolute and as such, the operation of the impugned judgment and order is liable be set aside.

He further submits that the Extra Moharars belonged to extra establishment created temporarily by the Sub-Registrars with the sanction of the District Registrar and since they are being recruited by the Sub-Registrars on the exercise of discretion temporarily not against the substantive and as such, they have not acquired any right to get absorption of their service in the revenue budget and as such, the impugned judgment and order is liable to be set aside.

On the other hand the learned Advocate(s) appearing for respondents made their submissions supporting the impugned judgment and order of the High Court Division.

We have heard the learned Advocates of both sides. We have also perused the impugned judgment and order of the High Court Division and other materials on record.

In the instant case the High Court Division held that after having served a long period and now being barred by excess age to apply for a government job afresh it is the "legitimate expectation" of the writ-petitioners that they would be absorbed/ appointed/ regularized in the permanent posts of the department but the respondents for malafide and oblique reasons are yet to make the writ-petitioners permanent.

But with the decision of this Division in the case of the secretary Ministry of the Fisheries and Livestock vs. Abdur Razzak 71 DLR AD 395 and subsequent decision of Director General, represented by the Bangladesh Rural Development Board, Dhaka vs. Ashma Sharif 72 DLR AD 188, the matter in issue regarding absorption in the revenue budget has already been set at rest once and for all. The agog of waiting has come to an end with the pronouncement

of those decisions. This Division has cleared up every aspect of the common issues leaving no ambiguity which is no longer a res-integra.

However, eventually this Division in the case of Secretary Ministry of Fisheries and Live stock Vs. Abdul Razzak 71 DLR (AD) 395 has dealt with the issue of absorption, regularization and transfer of the employees in the revenue budget.

In the above case this Division held that:

"No court can direct the Government or its instrumentalities to regularize the service of the officers and employees of the development project in the revenue budget in the cases where statutory requirements have not been fulfilled. Regularization cannot be claimed as a matter of right. It is statutory requirement that opportunity shall be given to eligible persons by public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointments to a post or an office under the Government."

It is further observed to the effect:

"The legitimate expectation would not override the statutory provision. The doctrine of legitimate expectation cannot be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision"

In the case of the Director General, represented by Bangladesh Rural Development Board (BRDB), Dhaka Vs. Asma Sharif, Shariatpur and others report in 72 DLR (AD) 188 this Division also held that:-

"The theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the Government has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The Government cannot constitutionally make such a promise. It is also obvious that the theory

cannot be invoked to seek a positive relief of being made permanent in the post."

And

"However, sympathy, empathy or sentiment by itself, cannot be a ground for passing an order where the litigants miserably fail to establish legal right. It is true that the respondents had been working for a long time, the same by itself would not be a ground for directing regularization of the service."

It is also important to note some more observations as made in the above case:

"The Constitution is the supreme law of the State. All the institutions be it legislature, executive or judiciary, being created under the Constitution, cannot ignore it. The dictum- "Be you ever so high, the law is above you" is applicable to all, irrespective of his status, religion, caste, creed, sex or culture. Henry D Bracton-"The King is under no man but under the God and the Law". No one is above the law.

It is to be noted that the Government has no authority to issue any orders granting regularization/absorption or appointment in violation of the Constitutional scheme and recruitment rules in force. All recruitment in matters of Public employment must be made in accordance with prevailing rules. While dealing with the concept of recruitment the Supreme Court of India has categorically laid down that the expression "recruitment" would mean recruitment in accordance with the Rules and not de hors the same and if an appointment is made de hors the Rules, it is not appointment in the eye of law. (ref: RS Garg vs State of UP MANU/SC/8239/2006 : (2006) 6 SCC 430 and University of Rajasthan vs Prem Lata MANU/SC/0106/2013 : AIR 2013 SC 1265). Similarly, the High Court Division in exercising power under Article 102 of the Constitution will not issue any direction for transfer/absorption/regularization or permanent continuance, unless employees claiming so had been appointed in

pursuance of regular recruitment in accordance with relevant rules in open competitive process, against sanction posts.

It is true that in their heydays of life the respondents are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be made destitute, there being no provision for pension, retirement benefits etc. The employment cannot be on exploitative terms.

When the employees of the development projects or casual employees appointed as stopgap arrangement have put in for considerable years of service in the posts and their works have been approved but they could not be regularized, the only provision provides for them is to qualify the requisite examination and in such circumstances, they would get relaxation of upper age limit. If they are not selected, at the end of the day, they would return home from their respective working place with empty hand. It is the duty of the Government/employers to

provide some benefits to them, on the basis of the period of service they rendered, so that they may not fall in extreme hardship otherwise the families of the those employees would face economic ruination."

So it is now well settled that Court cannot pass an order to regularize/absorb the temporary, contractual or casual employees under the revenue budget unless there is any statutory provision and thus the respondents' claim of absorption in the permanent post under the revenue budget on the principle or theory of legitimate expectation has got no legal basis.

Fortified with the ratio decidendi that has been spelt out in the decisions as referred to above we unequivocally endorse the same principle and hold that the writ-petitioners are not entitled to get any relief as sought for. But at the same time we also sympathetically endorse the view of this Division taken in the case of 72 DLR AD (supra) that the incumbent respondents should not be driven out without anything and the government should come forward in this respect in aid of these hapless employees in these days of hardship. It is our belief that the present respondents should not face displacement without recourse.

In view of the above, we find merit in the appeal.

Accordingly, the appeal is allowed without any order as to costs.

The judgment and order dated 05.02.2017 passed by the High Court Division is hereby set aside.

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