

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaquul Islam

Mr. Justice Md. Abu Zafor Siddique

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.49 OF 2020

(From the judgment and order dated 20.07.2016 passed by this Division in Civil Appeal No.107 of 2011).

Government of Bangladesh, represented by : ...Appellants.
the Secretary, Ministry of Law, Justice
and Parliamentary Affairs, Bangladesh
Secretariat, Dhaka and others.

-Versus-

Abdur Rahman Bhuiyan and others. : ...Respondents.

For the Appellants. : Mr. Mehedi Hasan Chowdhury,
Additional Attorney General with Mr.
Md. Mujibor Rahman, Assistant
Attorney General instructed by Mr.
Haridas Paul, Advocate-on-Record.

For the Respondents. : Mr. M. Qumrul Hoque Siddique, Senior
Advocate instructed by Mr. Md.
Zahirul Islam, Advocate-on-Record.

Date of Hearing. : The 28th November, 2023 and 07th February, 2024.

Date of Judgment. : The 07th February, 2024.

J U D G M E N T

Borhanuddin, J: This appeal by leave is directed against the judgment and order dated 20.07.2016 passed by this Division in Civil Appeal No.107 of 2011 arising out of a judgment and order dated 17.08.2009 passed by the High Court Division in Writ Petition No.1773 of 2008 making the Rule absolute with direction.

Facts, in brief, are that the writ-petitioners joined service as Extra Mohorars in different Sub-Registrar offices and thereafter they were promoted to the post of TC Mohorars; Despite such promotion their pay has been reduced at the lowest level in the scale; They have already completed 15 to 20 years of service in the registration department and entitled to get higher pay after promotion; If higher pay is not allowed, then their previously fixed pay must be protected and allowed to be drawn; Regarding the reduction of their scale they have given a list in the writ petition showing how drastically their pay scale has been reduced; Pay of an incumbent can be reduced if he is found guilty of any offence after a full fledged inquiry as a measure of punishment but the pay already drawn by them has been reduced at a lower level though they have not committed any offence; They have been treated unjustly by arbitrary executive action; In similar situation, other persons previously have been allowed higher pay after promotion; There is thus discrimination in the treatment of the writ-petitioners who are standing on the same footing.

Their further case is that in the registration department, the post of TC Mohorar and the Mohorar are in the same scale with same status; On the other hand, the TC Assistant and the Assistant are on the same footing with same status; The writ-respondents have counted previous service of the Mohorars and Assistants with all future service benefits including pensionary benefits but they deny same benefits to the TC Mohorars and TC Assistants which is arbitrary and malafide; Under the Constitutional provisions the action of writ-respondents is inequitable and discriminatory; The writ-petitioners have been promoted from the feeder post for which they are entitled to get benefits of their previous service in the feeder post; The inaction and denial of the writ-respondents to recognize the pay scale and status of the writ-petitioners are illegal, malafide, without backing of law, inasmuch as, it is against all norms of fairness and justice; The Government has promulgated many laws for counting previous service of the personnel of development projects, ad-hoc appointees, Mujibnagar employees etc. and pursuant to the said provisions of laws, those

classes of employees are getting their benefit of previous service record; The writ-petitioners who have been working for a long time as TC Mohorars and TC Assistants against substantive posts are entitled to get similar benefits; Because of the inaction of the writ-respondents the writ-petitioners should not suffer; Under the provisions of the Service (Reorganization and Condition) Act, 1975, the writ-petitioners are entitled to united grades and pay of scale, equal pay and other benefits of service.

Being aggrieved by and dissatisfied with the inaction and failure of the writ-respondents to protect the pay of the writ-petitioners in the present posts and counting their previous service in the post of TC Mohorars and TC Assistants, the writ-petitioners filed the writ petition before the High Court Division and obtained a Rule Nisi.

The writ-respondent no.4 contested the Rule by filing an affidavit-in-opposition, contending interalia, that the writ-petitioners are not Government employees and are not getting any salary from revenue budget and therefore, they are not entitled to get any scale of pay; Their

claim is absolutely contradictory and getting salaries as per their posts; The treatment of the writ-petitioners cannot be taken as 'hostile discrimination and double standard' inasmuch as they are not Government servant and no pick and choose policy has been adopted; Since the writ-petitioners are not the Government servants, they are not entitled to get any benefit/privilege under the circular dated 23.09.1996; In the case of Nurul Islam and another vs. the Secretary, reported in 46 DLR (AD) 188, this Court opined that the TC Mohorars are paid with fixed pay from a special fund of the Inspector General of Registration (IGR) and as per the said decision the writ-petitioners are not Government servant and thus Rule 42 of the Bangladesh Service Rules, Part-1 is not applicable to them; Since the post of TC Mohorars are not Government post, they are not entitled to claim benefits like the Government servants.

Upon hearing the parties the High Court Division made the Rule absolute with direction vide judgment and order dated 17.08.2009.

Having aggrieved, the writ-respondents as petitioners preferred Civil Petition for Leave to Appeal No.88 of 2010. This Division by the order dated 03.01.2011 granted leave in the said civil petition resulting in Civil Appeal No.107 of 2011.

This Division upon hearing the appeal by the judgment and order dated 20.07.2016 dismissed the appeal.

Feeling aggrieved, the writ-respondents as petitioners preferred Civil Review Petition No.436 of 2019 before this Division and obtained leave granting order on 23.01.2020 considering the following grounds:

"I. Because the High Court Division erred in law in not finding that the writ petition in the nature of mandamus itself was not maintainable as there was no Government order impugned in the writ petition claiming to have reduced the pay and grade of the writ-petitioners nor there appears any representation to the Government ventilating their alleged grievance of inaction before filing of the writ petition and in absence of those vital legal ingredients the judgment passed by the High Court Division cannot be enforced and this Court without considering the above aspect of the case

dismissed the appeal as such the impugned judgment and order may kindly be reviewed.

II. Because the High Court Division erred in law in passing the impugned judgment by filing to consider that the Registration Manual, 2014 comes under the definition of law as defined in Article 152 of the Constitution of Bangladesh and is recognized as a law by this Division in 46 DLR (AD) 188 (Para 161) and since pursuant to paragraph 307 of Chapter XXVI of the Registration Establishment of the Registration Manual 2014, the service of the writ-petitioner-respondents as TC Mohorars are only to collect Local Government Taxes and their pay allowances are borne by the IGR (Inspection General of Registration) fund, a fund created from Local Government Tax to meet the service charge of such tax collecting staff and as such TC Mohorars do not belong to the permanent clerical establishment of the office as stipulated in Paragraph 305 of the Registration Establishment of the Registration Manual, 2014 and hence there is no scope to consider the service of the writ-petitioner-respondents are not under the revenue budget, rather their service is absolutely Non-Government service, and in that view of the matter, the respondents TC Mohorars are not entitled to benefits as the Government servants and this Division without considering the above aspect of the law dismissed the appeal and as such the

impugned judgment and order may kindly be reviewed.

III. Because the High Court Division erred in law in passing the impugned judgment and order in failing to consider that since the respondents TC Mohorars are not Government servants and therefore, TC Mohorars are not Government servants and therefore, the Rule 42 of the Bangladesh Service Rules, Part-1 is not applicable to them and therefore, they are not entitled to get benefits of Government servants and hence there is no scope to direct the appellant-petitioner to protect the pay of the writ-petitioner-respondents and to count their previous service in counting their pension benefits from the date of their initial appointment as TC Mohorars and this Division without considering the above aspect of the law dismissed the appeal and as such the impugned judgment and order may kindly be reviewed.

IV. Because the High Court Division erred in law in not taking into its consideration the circular dated 04.12.2000 which was issued by the writ-petitioner no.4 in compliance with the judgment passed by the this Division in Civil Petition for Leave to Appeal No.532 of 1992, reported in 46 DLR (AD) 188 (Para 1 & 11), outlining the procedure of promotion of TC Mohorars to TC Assistants where it has been pointed out that the post of TC Mohorars and TC Assistant cannot be termed as permanent and

this Division without considering the above aspect of the case dismissed the appeal and as such the impugned judgment and order may kindly be reviewed."

Consequently, instant civil appeal arose.

Mr. Mehedi Hasan Chowdhury, learned Additional Attorney General appearing for the appellants summaries his argument in line with the leave granting order.

On the other hand Mr. M. Qumrul Hoque Siddique, learned Advocate appearing for the respondents in support of the impugned judgment and order dated 20.07.2016 submits that the grounds of review are addressed elaborately by this Division in the impugned judgment and order and as such the appeal is liable to be dismissed.

Article 105 of the Constitution confers jurisdiction on the Appellate Division to exercise power of review. It reads as follows:

"105: The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any Rules made by that Division to review any judgment pronounced or order made by it."

Rules have been made known as the Supreme Court of Bangladesh (Appellate Division) Rules, 1988. Order XXVI of the said Rules, deals with review and it reads as follows:

PART IV

ORDER XXVI

REVIEW

1. Subject to the law and the practice of the Court, the Court may, either of its own motion or on the application of a party to a proceeding, review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure and in a Criminal proceeding on the ground of an error apparent on the face of the record.

Rule 2-9 of this order contains procedure regarding filing of an application for review.

Thus, a perusal of the same would show that the jurisdiction of this Court, to entertain a review petition in a civil matter, is patterned on the power of the Court under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC, for short). Order XLVII Rule 1 of the CPC, reads as follows:

REVIEW

1. (1) Any person considering himself aggrieved-

- (a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
- (b) *by a decree or order from which no appeal is allowed,*
or
- (c) *by a decision on a reference from a Court of Small Causes,*

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

It is settled law that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate

Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudication. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

Main contention of the appellants is that the TC Mohorars are not Government servant and as such they cannot claim any benefit like Government servant. Let us see the findings of the impugned judgment and order dated 20.07.2016 passed by this Division in Civil Appeal No.107 of 2011 where this Division after elaborately discussing Bengal Statue 1781, Bengal Regulation No.1793, Act of 1964, Act of 1865, Act of 1871, Act of 1877 and Act 16 of 1908, Act of 1964 and different provision of Registration Manual, 2014 arrived at a finding:

"It is surprising to note here that from the above, it is found Clauses (अ) to (इ) that the provisions relating to the appointment, disciplinary actions against the 3rd and 4th class employees are also proposed by the inspecting officers. Last Clause (ई) is relevant which relates to the appointment, transfer, promotion, inquiry and their claim of future fund and withdrawals to be made by

TC employees. This clause finds a reference about the TC employees. However from the above remark we notice that the appointment, transfer, promotion and inquiry relating to their service conditions are being regulated by certain unwritten guidelines. As observed above, though there is no Rule or Regulation covering the field, this provision suggests that this Department is being run following conventions at least since 1908, in which year, the Registration Act came into force. Paragraph 291 Ka empowers the Inspectors to report to the IGR regarding the irregularities or mal administration by the District Registrars relating to the appointment, transfer or other related matters of third and fourth class employees. Paragraph 295 provides the guidelines given to the Inspectors and District Registrars at the time of inspection of the registration offices.

One of the guidelines is to examine the attendance of permanent Mohrars and additional scribes/provisional copyists. Possibly this is for the purpose of checking as to whether the copyists and permanent Mohrars are being paid in excess of the rates etc. Nothing has been stipulated regarding the TC Mohrars, TC Assistants, Head Assistants or Assistants in this paragraph. Paragraph 305 provides that the permanent clerical posts and Mohrars are Government paid employees and their salaries are compiled in form 2432. The bills for

clerks and Mohrars who are employed with the registration officers are signed by the said officers. So, from this paragraph it is seen that the permanent clerks and Mohrars are treated as Government employees.” (Sic)

This Division upon perusing documents annexed to the writ petition arrived at a finding that TC Mohorars are promoted from Extra Mohorars. The relevant findings runs as under:

“On an evaluation of these provisions it reveals that the appointment, posting, promotion of TC Mohrars cannot be made by the Registrars whimsically. The appointments have to be made in accordance with the guidelines being given by the IGR from time to time. Though TC Mohrars are holding equivalent post of permanent Mohrars they are not included in office clerk establishment. However, TC Mohrars are promoted from amongst the list of Extra Mohrars. Learned Attorney General has admitted this fact in course of hearing. We find no logic behind the explanation given in Paragraph 307 that these TC Mohrars should not be treated as office clerks of Sub-Registrar or Registrar though they hold the similar status of permanent Mohrars and both permanent Mohrars and TC Mohrars are promoted from the post of Extra Mohrar. On perusal of the manual we find no provision providing the procedure for appointment of TC Mohrars directly.” (Sic)

This Division also discussed how the TC Mohorars collecting Government revenue. Relevant portion of the findings is quoted below:

"Though Paragraph 307 says that one Office Assistant and two permanent Mohrars shall compose of the office of the registrar, it is not clear from the manual whether TC Mohrars are utilized to perform the works of office clerks in the registration office. But taking consideration of the voluminous works being transacted in every registration offices, it cannot be denied that these TC Mohrars are also performing the clerical works similar to that of Office Assistants, although their specific business is to collect taxes. The registration department is providing more than ten thousand crore taka in the Government exchequer. Out of the said amount a portion is used for the payment of salaries to tax collectors of the local Government department. These tax collectors are employed in the City Corporations and Pourashavas and therefore they are employees of autonomous bodies, and it is informed that they are enjoying the new National Pay Scale of Serial No.14 and 15. There is clear statement in Paragraph 307 that the job of TC Mohrar is for collecting Government revenue. It is specifically stated that 'স্থানীয় সরকারের কর আদায়কারি কর্মচারীদের ব্যয় মিটাবার নিমিত্তে-----' so, they are also collecting revenue for the local Government employees."

(Sic)

When convention becomes law and how it happens in the present case also discussed in the impugned judgment and order. Relevant paragraphs are quoted below:

"The collection of revenue from the citizens at the time of registration of deeds is a tax and there cannot be any doubt in this regard. Article 83 of the Constitution provides that no tax shall be levied or collected except by or under the authority of an Act of Parliament. So the tax proposed to be levied must be within the legislative competence of the legislature imposing the tax. This article provides not only 'levy' but also collection of 'tax' which must be under the authority of law.

If the executive authority is authorized to collect a tax without sanction of law of invalid law, the court is entitled to interfere with such collection in view of Article 83 but the TC Mohrars have been collecting taxes for over fifty years and if the statements in the Manual are taken to be true, it is a convention being followed for such a long time, this convention may be taken as law.-----

We are conscious that no tax or levy can be collected without any authority of law even then we are compelled to hold that without backing of any law, such tax is being

realised for a long time and none has taken any exception in the process of collecting such tax. Now, if we declare such realisation as one which ultravires Article 83 of the Constitution, serious deadlock will be created in the payment of salaries to the tax collectors of the Local Government and TC Mohrars. Therefore, we declare such realisation as valid one on the doctrine of necessity with a view to avoid chaos and confusion. In this connection we may profitably rely on the definition of 'law' defined in Article 152. 'Law' means any Act, Ordinance, Order, Rule, Regulation, bye-law, notification for other legal instrument and any custom or usage, having the force of law in Bangladesh.

So, a custom or usage which is being followed by a section of people for years together has a force of law and may be enforceable in a court of law. Similarly when a 'convention' exists, and the Government as well as tax payer is following it as binding, then such convention would be enforceable as law."

(Sic)

Discussing all the aspects, this Division categorically arrived at a finding that the TC Mohorars are Government employees. Relevant finding is as under:

"Therefore, the collection of this fees/tax from the taxpayers by the TC Mohrars though not on the strength of an Act of Parliament,

it being a convention being followed over fifty years by administrative orders or circulars has the force of law. If an employee collects tax or revenue by an Act of Parliament and if he is paid out of such collection, under no stretch of imagination such employee can be termed as Non-Government employee, otherwise the amount of tax collected by such employee will be illegal as per Constitution. There is thus, I find no substance in the argument of the learned Attorney General that these TC Mohrars are not Government employees."

(Sic)

Discussing the facts and circumstances of the case in hand and the case reported in 46 DLR (AD) 188, this Division conclusively arrived at a finding that the judgment reported in 46 DLR (AD) 188, has no relevancy in determining the point of law involved in this matter, relevant portion are reproduced hereinunder:

"Learned Attorney General has referred to the case of Nurul Islam v. the Secretary, Ministry of Law, 46 DLR (AD) 188. In that case, the writ-petitioners challenged the action of the Government which sanctioned the circular of the IGR to fill up 475 posts of permanent Mohrars in the different offices of Sub-Registrar from among the posts of Extra Mohrars. The writ petition was filed on behalf of the TC Mohrars

organization namely TC Karmachari Samity. The High Court Division discharged the Rule against which the Samity moved this Court. This Court noticed that the scale of Mohrars of and TC Mohrars being same 'the petitioners are not affected by the impugned order of the Government.' This judgment has not relevance in determining the point of law involved in this matter."

(Sic)

From the leave granting order based on which present appeals arose, it is clear that the appellants in other way round challenged the point of law which has been negatived by this Division in the impugned judgment and order.

It is to be mentioned here that the respondents-writ-petitioners invoked writ jurisdiction under Article 102 of the Constitution to protect their rights as Government employees and against hostile and discriminatory action of the appellant-writ respondents as such writ petition is very much maintainable.

In the case of *Sow Chandra Kante and another vs. Sheikh Habib*, reported in (1975) 1 SCC 674, the Indian Supreme Court held:

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

It is well settled that a party is not entitled to seek a review of a judgment delivered by this Division merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by this Division is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. (*Sajjan Singh vs. State of Rajasthan*, reported in AIR 1965 SC 845.)

Accordingly, the civil appeal is dismissed.

However, no order as to costs.

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