

IN THE SUPREME COURT OF BANGLADESH  
(APPELLATE DIVISION)

**PRESENT:**

Mr. Justice Md. Abdul Wahhab Miah  
Ms. Justice Nazmun Ara Sultana  
Mr. Justice Muhammad Imman Ali  
Mr. Justice Md. Nizamul Hoq

**CIVIL APPEAL NO.08 OF 2012**

(From the judgment and order dated the 21<sup>st</sup> day of October, 2009 passed by the Administrative Appellate Tribunal in Appeal No.154 of 2007)

Md. Mahmudul Haque : . . . Appellant

-Versus-

Government of Bangladesh and : . . . Respondents  
others.

For the Appellant : Mr. A. M. Aminuddin, Senior  
Advocate instructed by Mrs. Madhu  
Malati Chowdhury Barua, Advocate-  
on-Record

For the Respondents : Mr. Ekramul Hoq, Deputy Attorney  
General instructed by Mr. Haridas  
Paul, Advocate-on-Record

**Date of Hearing** : **30.03.2016**

**Date of Judgment** : **The 30<sup>th</sup> day of March, 2016**

**(JUDGMENT)**

**Md. Abdul Wahhab Miah, J:** This appeal, by leave, is from the decision of the Administrative Appellate Tribunal, Dhaka in Administrative Appellate Tribunal Appeal No.154 of 2007 allowing the same.

The appellant as the petitioner (hereinafter referred to as the appellant) filed an application before the Administrative Tribunal No.1, Dhaka under section 4(2) of the Administrative Tribunals Act, 1980 (the Act) for declaring the order vide Memo No.বাস-ককস/ইউনিট-৫/পদোন্নতি-৩৯/২০০৫/২৫৭ dated 25.08.2005 and Memo No.শকম/শা-১০/জের্ণ্যতা-২/০৩/৩৪৯ dated 26.10.2005 as illegal, arbitrary, incompetent, without lawful authority and was of no legal effect and also for declaration that he was

entitled to his seniority on the basis of his past service with all the attendant benefits towards promotion from the date on which his juniors were promoted along with increments, time-scale, fixation of pay etc. with arrears.

In the application, it was stated, *inter-alia*, that the appellant was first appointed on 09.01.1988 as Economic Investigator in the scale of taka 900-60-1550-EB-75-2075 under Bangladesh Manpower Planning Center of the Ministry of Labour and Manpower vide No.BMPC/RNE-9/83-86(Part)/37/1(15). The appellant served in that capacity after joining there on 12.01.1988 with full satisfaction of the authority concerned upto 10.05.1989 when due to the administrative reorganization, the Department of Bangladesh Manpower Training Center was abolished and its officers and staffs were declared surplus. The case of the surplus employees was taken over by the Ministry of Establishment for absorption in different Government offices under section 2(E) of the Surplus Public Servants Absorption Ordinance, 1985( the Ordinance,1985). In the process, the Ministry of Establishment by its Memo No.ME (SP) 12/89-800/1(4) dated 11.12.1990 recommended for absorption of the appellant in the post of Labour Inspector (General) of Factories and Establishment in the scale of TK.900-2075 with direction to absorb him under sections 5, 6, 7, 8 and 9 of the Ordinance, 1985. Accordingly, the Ministry of Labour and Manpower directed the Chief Inspector of Factories and Establishment to absorb the appellant as Labour Inspector (General) vide Memo No.Sha-6/A-1/90 dated 19.12.1990. On receipt of the order of the Ministry, the Chief Inspector of Factories and Establishment by notification vide No.Sha:Ni-1/90/319 dated 26.12.1990 absorbed the appellant in the post of Labour Inspector (General) in the scale of taka 900-2075. In this notification, the

Chief Inspector of Factories and Establishment added a note that the appellant's seniority would be counted from the date of his joining in that office, because his previous service was non-gazetted. The unemployed appellant was then compelled to accept the job. However, after joining the post as Labour Inspector (General), the appellant applied for his seniority in the service from the date of his joining in the feeder post, that is, the post of Economic Investigator on 12.01.1988. The duly constituted seniority gradation committee considered the case of the appellant and after consulting with the relevant service rules and other materials took the decision to compute the seniority of the appellant and one Md. Shamsul Alam from the date of their joining in the parent posts and consequently, the Ministry of Labour and Manpower issued a seniority list to that effect vide Memo No. ১১/৬/এ-৩/৯১/১৬০/১(৫) dated 18.07.1991. Thereafter, the Ministry of Labour and Manpower sent the necessary papers of the class-II officers of the Directorate of Labour and the Department of the Inspection for Factories and Establishments to the Public Service Commission (PSC) and the Ministry of Establishment to verify and select the seniority of the officers; the PSC upon perusal of the necessary papers, examining the relevant laws and after consulting the Ministry of Establishment published a seniority list of the class-II officers of both the departments, i.e. Directorate of Labour and the Department of Inspection for Factories and Establishments giving effect from the date of joining the posts of the parent departments/offices in the case of the absorbed employees vide Memo No. বাপঃ ককম/এম.আর.৪/১ এস-৪৭/৯৭/৪৬৯৬ dated 18.09.1997 issued under the signature of the secretary of the PSC.

Some Labour Inspectors raising objection against the said seniority list submitted a representation to the Ministry of Labour and Manpower so

far as the same related to the absorbed employees and consequently, the matter was placed in the coordination meeting held on 09.10.1997 headed by the Secretary, Ministry of Labour and Manpower; the meeting refused the prayer of the so-called aggrieved employees on the clear assertion that there was no scope of sending the matter to the Ministry of Establishment as the PSC in the earlier occasion had taken decision upon the opinion of the Ministry of Establishment. The officers, namely, Abul Hossain who had been absorbed in the post of Labour Inspector (General) in the Department of Inspection for Factories and Establishments, Md. Rezaul Huq Chowdhury, Md. Ishaq Mia and Md. Shamsul Alam absorbed in the Directorate of Labour who were the Economic Investigators of the Department of Bangladesh Manpower Planning Center and were declared surplus were given seniority from the date of their first appointments. Their names appeared in the seniority list prepared by the PSC and on the basis of that seniority list they have already been promoted to the higher posts, i.e. Assistant Chief Inspector and Assistant Directors of Labour. Two vacancies occurred in the post of the Assistant Chief Inspector (General) to be filled up by way of promotion from amongst the Labour Inspectors (General) according to the seniority. The appellant and two others submitted their prayers for promotion in the vacant position. The Chief Inspector of Factories and Establishments forwarded the applications of Abu Tayeb Khan and Md. Faridul Islam to the Secretary, Ministry of Labour and Employment and the Secretary forwarded the matter to the PSC, without forwarding the application of the appellant whose name stood at serial No.1 of the seniority list. The names of Abu Tayeb Khan and Md. Faridul Islam were at serial Nos.2 and 3. This was done with a *malafide* intention to deprive the appellant of promotion; the note/recommendation

was not sent to the PSC through the Ministry of Establishment. The PSC, by exercising high executive fiat and without consulting the Ministry of Establishment, opened the finalized seniority issue of the appellant and others and with a *malafide* intention took an illegal and arbitrary decision to place Abu Tayeb Khan and Md. Faridul Islam before the position of the appellant vide Memo No.বাস-ককম/এম.আর-৪/১ এ-৪৭/৯৭ /৪৬৯৬ তারিখ ১৮/০৯/০৭ only to enable them to be promoted to the vacant posts. The Secretary of the PSC forwarded the decision of the Commission to the Secretary, Ministry of Labour and Employment, vide Memo No.বাস/ককস/ইউনিট-৫/জ্যেষ্ঠতা-১৭/২০০৪/১২৭ তারিখঃ ০৪.০৫.২০০৫. The PSC not only revised the seniority list but also recommended Abu Tayeb Khan and Md. Faridul Islam, whose names were at serial Nos.2 and 3 in the finally published seniority list for promotion to the post of Assistant Chief Inspector (General) vide Memo No.বাসওককস/ইউনিট-৫/পদোন্নতি-৩৯/২০০৫/২৫৭ তারিখ:২৫/০৮/২০০৫. In the circumstances, finding no other alternative, the appellant filed Writ Petition No.6814 of 2005 before the High Court Division challenging the impugned order of the PSC dated 25.08.2005, but the said petition was rejected on 18.10.2005 on the ground of jurisdiction. After the order of the High Court Division, the Chief Inspector of Factories and Establishments requested the Secretary, Ministry of Labour and Employment to promote Abu Tayeb Khan and Md. Faridul Islam to the post of Assistant Chief Inspector by his office Memo No.সঃবিঃ-১২/৯৭/৩৫১/প্রঃপঃ তারিখ ২৫.১০.২০০৫ and on the next day the Ministry vide its Memo No.শ্রকম/শা-১০/ জ্যেষ্ঠতা-২/০৩/৩৪৯ তারিখ ২৬/১০/২০০৫ promoted Abu Tayeb Khan and Md. Faridul Islam to the position of Assistant Chief Inspector (General). Abu Tayeb Khan was posted in the Head Office, Department of Inspection for Factories and Establishments, Dhaka and Md.

Faridul Islam was posted in the Divisional Office of the Inspection of Factories and Establishments, Chittagong. As per schedule No.1 to the Rules of Business, 1996, the decision of the Ministry of Establishment on absorption of the surplus employees is final and before taking any decision the PSC has to take opinion of the Ministry of Establishment. The seniority of the absorbed officers from non-gazetted posts of the same pay and scale has been clarified in the Establishments Ministry's Memo No.সম(বিধি-২)জ্যেষ্ঠতা-৫৩ /৯৪-৯১ তারিখ ১৬.০৬.১৯৯৬ superseding all the previous orders and decisions. The application was registered as Administrative Tribunal Case No.240 of 2005.

The case was contested by respondent Nos.1 and 2 herein as opposite party Nos.1 and 2 (hereinafter referred to as the respondents) in the form of filing written replies contending, *inter-alia*, that the appellant accepted the condition mentioned in the appointment letter that his seniority would be counted from the date of joining the new gazetted post. The minutes of the meeting dated 09.10.1997 signed by the Secretary, Ministry of Labour and Employment on 15.01.1998 as submitted by the appellant is an internal decision only. "No order of Memorandum confirming the same" was issued by the Ministry in that respect, because the seniority of the appellant along with others which was given earlier was not right. The Ordinance, 1985 is the milestone and the guidelines for absorbing the surplus personnel and giving them the required seniority. In paragraph-2 of the application, the appellant has mentioned section 2(e) of the Ordinance, 1985 in favour of his absorption, but he tactfully with a *malafide* and fabricated intention avoided section 6 of the Ordinance, 1985. Section 6 of the Ordinance, 1985 clearly stated that the seniority of a surplus public servant will be given on the basis of government circular issued from time

to time. On 20.03.1979, the Establishment Division vide their Circular No.ED(R-11) S-59/77-25(500) dated Dhaka the 20<sup>th</sup> March, 1979 stated in para (1) that a surplus person should be allowed to count his past service in the parent department for fixation of his seniority if he is appointed in the absorbing department to an equivalent post or cadre. The post of ‘Economic Investigator’ of the appellant in the parent department was a non-gazetted post and as such, the previous post was not an equivalent post or equivalent cadre. The post of Labour Inspector (General) in the present department is a class-II gazetted post and as such, is a higher class of post which is not equivalent to the previous post. So, the appellant cannot get seniority by adding two un-equivalent and unequal posts and it was clearly mentioned in his appointment letter in the department.

The appointment letter was cent percent correct and any benefit given violating the conditions of the appointment letter was faulty. Besides, the Establishment Ministry vide its Memo No.(বিধি৩২) জেষ্ঠ্যতা-৯৭/৯৩৩০৫ dated 04.01.1994 made a clarification to the effect that though the scales of the previous and present post were same, due to inferior status the seniority could not be given adding the previous post. The promotion of Abul Hossain and others as mentioned in the application was made suppressing the actual facts and figures to the PSC. That was a faulty decision. These incumbents suppressed the important guidelines of section 6 of the Ordinance, 1985 with a view to fulfill their ill and ulterior motives and to enjoy the illegal benefits from the legal authority, that is, from the PSC as well as suppressed the actual facts. Unfortunately, they succeeded to have a faulty seniority list vide PSC’s Memo No.বাসকক/এসআর/১ এসঃ ৪৭/৯৭ /৪৬৯৬ dated 18.09.1997 and accordingly, some of them got promotion earlier. This fault was detected by the PSC on 04.05.2005 and they correctly placed

the appellant just below Abu Tayeb Khan and Md. Faridul Islam vide their letter No.বাসকক/ইউনিট-৫/জেষ্ঠ্যতা-১৭/২০০৪/১২৭ dated 04.05.2005 and finally they have been recommended for promotion vide PSC's letter No.বাসকক/ইউনিট-৫ /পদোন্নতি-৩৯ /২০০৫/২৫৭ dated 26.10.2005 and accordingly, their notification of promotion was issued vide Memo No.শমক/শা-১০/জেষ্ঠ্যতা-২/০৩/৩৪৯ dated 26.10.2005 and they have been serving in the promoted post of Assistant Chief Inspector of Factories and Establishment (General) since 27.10.2005. Their promotion order was published in the Gazette on 26.01.2005. The cases of Abul Hossain of this department and Rezaul Haque Chowdhury, Md. Ishaq Mia and Md. Shamsul Haque of other department cannot stand as a legal claim on the part of the appellant because an unjust and faulty earlier decision cannot stand forever. When the fault is detected that cannot be followed further. So, the authority, i.e. PSC reviewed and reconstructed the seniority of Abu Tayeb Khan, Md. Faridul Islam and the appellant. When the two posts of Assistant Chief Inspector (General) were vacant, the Ministry of Labour and Employment reviewing the seniority list sent the same to the PSC for final approval in the form of a statement. In doing so nothing was suppressed and there was no *malafide* behind the same with a view to deprive anybody. The PSC thoroughly examined all the cases fairly on the basis of the Ordinance and found no material and substance to give seniority to the appellant and as such, he was genuinely placed below Abu Tayeb Khan and Md. Faridul Islam who have been working in the gazetted feeder post of Labour Inspectors (General) as per Recruitment Rules of the Department since longer time than the appellant. So, the complaint of exercising high executive fiat on the part of PSC with *malafide* intention is not true and totally baseless. In the application, the appellant has not impugned or

challenged the revision of gradation of three persons in question, recommendation for promotion as well as the order of promotion. The writ petition filed by the appellant was not rejected on the ground of jurisdiction, but on the ground of suppression of facts. The Establishment Ministry's Memo No. সম(বিধি-২)/জ্যেষ্ঠতা-৫৩ /৯৪-৯১ dated 16.06.1996 is not a rule but a mere Memorandum. It is simply an explanation issued by the Senior Assistant Secretary of the Ministry without any directive of the competent higher authority. So it can be easily presumed that such a letter cannot stand as final decision because this was not issued on the basis of the Ordinance or Rules of the Government. The seniority Rules have not been violated as the PSC is the appropriate authority to determine the seniority and to recommend for promotion. The Ministry of Labour and Employment is legally bound to issue the promotion order as per the recommendation of the PSC. There being no merit in the application, the case was liable to be rejected.

The Administrative Tribunal hearing the parties by its decision dated 12.04.2007 allowed the application declaring the impugned Memos as illegal, arbitrary, without lawful authority and were of no legal effect. The Tribunal also declared that the appellant was entitled to his seniority on the basis of his past service with all "attendant benefits towards promotion from the date of which his juniors" were promoted along with increments, time scale, fixation of pay etc with arrears. Against the decision of the Administrative Tribunal, respondent Nos.1 and 2 filed Administrative Appellate Tribunal Appeal No.154 of 2007 before the Administrative Appellate Tribunal, Dhaka. The Administrative Appellate Tribunal by the impugned decision allowed the appeal and set aside the decision of the Administrative Tribunal and affirmed the impugned orders.

Against the decision of the Administrative Appellate Tribunal, the appellant preferred Civil Petition for Leave to Appeal No.172 of 2010 before this Division and leave was granted to consider the following grounds:

- I. For that the learned Administrative Appellate Tribunal committed error of law in deciding the seniority of the petitioner in total disregard to the principle contained in the O.M.ED (R-II) S-59/77-25(500) dated 20<sup>th</sup> March 1979 in which it is provided that when a ‘surplus public servant’ is absorbed 100% of his previous service would be counted towards the fixation of seniority, calculation of pay, leave and pension.
- II. For that the condition included in the absorption order dated 09.01.1988 of the petitioner that his previous service would not be counted as he was absorbed in a gazetted post with the scale of TK.900-2075 in grade-XII. His previous appointment was also in grade-XII with the scale of TK.900-2075 as shown in Annexure-A to the application filed before the Administrative Tribunal.
- III. For that every case of absorption is required to be settled on its facts and there is no linkage with others and there is provision for relaxation. In such view of the matter, there was no need to include any other officer who would be affected by absorption of a surplus public servant.
- IV. For that the post held by the petitioner in the Bangladesh Manpower Planning Center and the post in which he was absorbed are both in grade-XII and as such, there would no justification for the claim that he was absorbed in a higher post.”

Mr. A. M. Aminuddin, learned Counsel, appearing for the appellant has, in fact, canvassed the grounds on which leave was granted and in support of his contention, he referred the cases of Bangladesh, represented by the Secretary, Ministry of Establishment-Vs-Shafiuddin Ahmed and 2 others, 50DLR(AD) 27 and the Director General, NSI-Vs-Md. Sultan Ahmed, 16BLD(AD)76.

Mr. Ekramul Hoq, learned Deputy Attorney General, for the respondents, on the other hand, has supported the impugned decision of the Administrative Appellate Tribunal.

From the decision of the Administrative Tribunal, it appears that it gave clear finding that the case was not bad for defect of party as the persons who were connected with the passing of the order impugned dated 26.10.2005 were made parties; the Public Service Commission prepared a seniority list on 18.09.1997 counting the seniority of the appellant from the date of his joining the post as Economic Investigator in the scale of TK.900-2075 at Bangladesh Manpower Planning Center of the Ministry of Labour and Manpower observing the existing rules and issued the list vide Memo No.ককস/এস.আর.-৪/১ এস-৪৭/৯৭/৪৯৬ dated 18.09.1997 but, afterwards, evading that seniority list took an arbitrary decision recommending to place Abu Tayeb and Md. Faridul Islam before the position of the appellant without making “any notice” to the concerned person, that is, the appellant; the other officers, namely, Abul Hossin, Md. Rezaul Hoque Chowdhury, Md. Ishaq Mia and Md. Shamsul Alam who were absorbed in the post of Labour Inspector (General) in the department of Inspection of Factories and Establishments and in the Directorate of Labour respectively were also Economic Investigators of the same department of Bangladesh Manpower Planning Centre and were declared as surplus employees and they were given their seniority from the date of their first appointment and their names appeared in the seniority list prepared by the PSC and on the basis of that seniority list they have already been promoted to the next higher post. So, the appellant was discriminated violating his fundamental right of equality before law as enshrined in article 27 of the Constitution of the People’s Republic of Bangladesh; the appellant joined his parent post as

Economic Investigator at the National Pay Scale of TK.900-2075 and thereafter, being absorbed as surplus employee joined the post of Labour Inspector (General) of the Factories and Establishments in the same scale pay of TK.900-2075 and that the controversy of gazetted and non-gazetted post as raised by the respondents was resolved by the preparation of the seniority list of the class-II gazetted officers issued by the PSC vide Memo No.বাসককস/এম.আর-৪/এস-৪৭/৯৭/৪৬৯৬ dated 18.09.1997 under the signature of the Secretary of the Commission and on the basis of the said seniority list some persons have already been promoted to the post of the Assistant Chief Inspector, therefore, the appellant was entitled to get his seniority by counting his service in the post of Economic Investigator.

From the decision of the Administrative Appellate Tribunal, it appears that it allowed the appeal on the finding, *inter-alia*, that the application was bad for defect of parties as the persons, namely, Abu Tayeb Khan and Md. Faridul Islam recommended for promotion by the Secretary, PSC who were supposed to be affected by the order to be passed by the Administrative Tribunal were not made parties. In the letter of absorption of the appellant, there being clear condition that his seniority in the service would be counted from the date of his joining the new assignment and not from the date of his joining his parent post since abolished and by accepting the said condition the appellant joined his service and served for a quite longer period making no grievance against the terms of the appointment and then filed the case before the Administrative Tribunal on 02.12.2005 which was obviously a belated manoeuvre possibly “being envious of the promotion of his juniors standing on a different footing” so his case was clearly hit “by the principle of waiver, estoppels and acquiescence.” The Administrative Appellate Tribunal concluded by saying

that the authority committed no illegality in passing the impugned orders and accordingly affirmed those orders.

This appeal, in fact, can be decided on the Office Memorandum No. ED(R-II)S-59/77-25(500) dated 20.03.1979 issued by the Cabinet Secretariat, Establishment Division, read with section 6 of the Ordinance, 1985 and the clarification made by the Ministry of Establishment by its Memo dated 16.06.1996. The relevant clause of the office Memorandum issued by the Establishment Division, Cabinet Secretariat on 20<sup>th</sup> March, 1979 reads as follows:

“(1) From one Govt. department to another- A surplus person should be allowed to count his past service in the parent department towards fixation of his seniority, calculation of pay, leave and pension and there should be relaxation of educational qualification and age if he is appointed in the absorbing department to an equivalent post or cadre.”

In the case of Bangladesh, represented by the Secretary Ministry of Establishment (supra), this Division held that the Notifications issued under orders of the President, i.e. in terms of article 55(4) of the Constitution and by the authority competent to frame rules, i.e. by the President under the proviso to article 133 of the Constitution have the precision of rules and are general in nature in their application to promotion to the posts of Joint Secretary and above the Deputy Secretary and they have the force of law. They were no greyish in nature. Similar view has been taken in the case of Director General, NSI (supra). So, the above memorandum has definitely the force of law and the same could not be ignored in fixing the seniority of the appellant over the other Labour Inspector (General) counting his service in the post of Economic Investigator. It is also an admitted fact that in the seniority list prepared by the PSC on 18.09.1997, the appellant's seniority was counted from his previous post, i.e. Economic Investigator

and on the basis of the said seniority list, the other persons, namely, Abul Hossain absorbed in the post of Labour Inspector (General) in the Department of Inspector for Factories and Establishments, Md. Rezaul Hoque Chowdhury, Md. Ishaque Mia and Md. Shamsul Alam absorbed in the Directorate of Labour who were the Economic Investigator of the Department of Manpower Planning Center and were declared surplus were also given seniority from the date of their first service. And the name of all those persons appeared in the said seniority list dated 18.09.1997 and on the basis of the said seniority list, they all have been promoted to the higher posts, i.e. Assistant Chief Inspector and Assistant Directors of Labour, but subsequently, the PSC changed the seniority list by placing Abu Tayeb Khan and Md. Faridul Islam before the position of the appellant and recommended their names for promotion to the next higher post of Assistant Chief Inspector (General) which was to be filled up by way of promotion from amongst the Labour Inspector (General) according to the seniority. The PSC took the said decision on the basis of the forwarding of the application for promotion filed by them to the said post by the Chief Inspector of Factories and Establishment through the Secretary, Ministry of Labour and Employment straightway without sending the same through the Ministry of Establishment, though as per schedule-‘1’ to the Rules of Business, 1996 the decision of the Ministry of Establishment in respect of the absorption of the surplus employees is final and that before taking any decision the PSC has to take opinion of the Ministry of Establishment. The PSC also recommended the name of Abu Tayeb Khan and Md. Faridul Islam for their promotion to the said post on the basis of the said changed seniority list. Considering all these facts, the Tribunal observed that *“It is astonishing to note that the Bangladesh Public Service Commission while*

*prepared a seniority list observing the existing rules issued the list vide memo No. ককস/এসআর-৪/১ এস-৪৭/৯৭/৪৯৬ dated 18.09.1997 and afterwards evading that seniority list took on arbitrary decision recommending to place Mr. Abu Tayeb Khan and Mr. Faridul Islam before the position of the petitioner. Once the commission prepared a list observing all formalities and the said list subsequently was challenged without making any noticed to the concerned person.”* The Administrative Appellate Tribunal did neither consider these facts nor reversed the above quoted finding of the Tribunal.

From the facts as discussed hereinbefore, it is clear that Abul Hossin and others having the same background were absorbed in the post of Labour Inspector like the appellant and got their seniority and promotion in the post of Assistant Chief Inspector with the approval of the PSC and also the authority concerned on the basis of the seniority list dated 18.09.1997. But the appellant was denied to count the service of his earlier post which was of the same scale and pay for promotion to the next post arbitrarily which was clearly discriminatory and thus violative of article 27 of the Constitution and the notification of the Establishment Division of the Cabinet Secretariat, dated 20<sup>th</sup> March, 1979 and the clarification made by the Ministry of Establishment by its Memo dated 16.06.1996.

The Appellate Tribunal was totally wrong in holding that the application was bad for defect of party as Abu Tayeb Khan and Md. Faridul Islam recommended for promotion by the Secretary of the PSC were not made parties in the application, inasmuch as they were not necessary parties in the application as the propriety of the orders impugned in the application could very well be decided without their presence. In holding the application bad for defect of party the Appellate Tribunal failed

to consider that every case of absorption is required to be settled on its facts and there cannot be linkage with others and there is provision for relaxation as well. Therefore, there was no need to include those two persons in the application filed before the Tribunal. The Appellate Tribunal also failed to consider that there was no dispute as regards the facts, namely, that the appellant was declared as a surplus employee when the Department of Bangladesh Manpower Training Center was abolished and its officers and staffs were declared surplus and were absorbed under the provisions of the Ordinance, 1985. The questions involved in the application were whether the appellant was entitled to count his past service in the post of Economic Investigator in fixing his seniority in the absorbed post of Labour Inspector (General); whether the PSC acted illegally in changing the finalized seniority list of class II officers published by it on 18.09.1997 behind the back of the appellant and that too by passing the Ministry of Establishment and whether the appellant could be said to have been estopped from claiming his seniority counting his service in his previous post of Economic Investigator on the plea that a condition was mentioned in his letter of absorption that his past seniority would not be counted as the post of Economic Investigator was not a Gazette post. And to decide all these questions, section 6 of the Ordinance, 1985, the office Memorandum vide No.ED(R-11) 9-59/77-25(500) dated 20<sup>th</sup> March, 1979 issued by the Cabinet Secretariat, Establishment Division and the clarification given by the Establishment Ministry dated 16.06.1996 were enough. In the context, it is necessary to state that the Chairman and the Secretary of the PSC were impleaded as respondent Nos.4 and 5 in the application filed before the Administrative Tribunal, but they did not file any written statement and thereby failed to justify, their action in changing the finalized seniority list

dated 18.09.1997. The Government of the Peoples' Republic of Bangladesh, represented by the Secretary of the concerned Ministry, i.e. the Ministry of Labour and Employment and the Chief Inspector, Department of Inspection for Factories and Establishments who were impleaded as respondent Nos.1 and 2 in their written statement also failed to justify the action of the PSC in changing the seniority list dated 18.09.1997 placing Abu Tayeb Khan and Md. Faridul Islam above the appellant and also recommending their names for promotion to the next higher post by passing the case of the appellant who was ahead of them in the seniority list. The only fact they stated to justify the change of the seniority was that the post of Economic Investigator was not a gazetted post and that was not an equivalent post of Labor Inspector (General), but that stand was absolutely incorrect. Because any such thing has not been stated either in section 6 of the Ordinance, 1985 or in the memorandum of the Establishment Division of the Cabinet Secretariat dated 20<sup>th</sup> March, 1979. The only thing that is stated in section 6 of the Ordinance, 1985 is that the seniority of a surplus public servant will be given on the basis of the government circulars issued from time to time and in clause (1) of the Memorandum dated 20.03.1979 it has only been stated that “ ... .. *if he is appointed in the absorbing department to an equivalent post or cadre.*” And there is no denial of the fact that the post of Economic Investigator and the post of Labour Inspector (General) were in the same grade, i.e. grade XII having the same pay scale of taka 900-2075, so it cannot be said that the post of Economic Investigator was not equivalent to the post of Labour Inspector (General) and considering all these facts, the seniority list dated 18.09.1997 was prepared by the PSC in consultation with the Ministry of Establishment. It is also necessary to state that initially it was

the Ministry of Labour and Employment which sent the seniority list to the Ministry of Establishment and the PSC and in that list, the name of the appellant was also shown above Abu Tayeb Khan and Md. Faridul Islam. In the context, it is pertinent to state that the final seniority list was changed by the PSC at the instance of the Chief Inspector of Factories and Establishment, because he forwarded the applications of Abu Tayeb Khan and Md. Faridul Islam for promotion to the next higher post without recommending the name of the appellant. The concerned authorities who changed the finalized seniority list and passed the impugned orders having been made parties and they having contested the application failed to justify their action, there would have been no material difference in defending the impugned orders, had Abu Tayeb Khan and Md. Faridul Islam been made parties in the application, so for their absence, they were not at all prejudiced. It appears to us that in the facts and circumstances of the case, the presence of Abu Tayeb Khan and Md. Faridul Islam were not at all necessary to decide the questions involved in the case.

One of the reasons in dismissing the case of the appellant by the Administrative Appellate Tribunal was that his case was hit by the principles of estoppel, waiver and acquiescence as he joined the absorbed post of Labour Inspector (General) accepting the condition in the letter of absorption that his seniority would be counted from the date of joining his present post of Labour Inspector (General) since his previous post of Economic Investigator at the Bangladesh Manpower Planning Center was not a gazetted post. The Administrative Appellate Tribunal was absolutely wrong in taking the said view inasmuch as, such condition was not mentioned in the body of the absorption letter. This will be clear if we look at the body of the absorption order which reads as under:

প্রজ্ঞাপন

সংস্থাপন মন্ত্রনালয়ের ১৯/১২/৯০ইং  
২৬/৮/৯৭বাং তারিখের এমই(এসপি)-১২/৮৯-৮০০ নং এবং শ্রম ও

জনশক্তি মন্ত্রনালয়ের ২০/১২/৯০ইং, ৫/৯/৯৭ বাং তারিখের শা-৬/এ-১/৯০/৫৪৫ নং অফিস স্মারকের প্রেক্ষিতে অধুমানস্ত বাংলাদেশ জনশক্তি পরিকল্পনা কেন্দ্রের উদ্ধৃত ইকোনমিক ইনভেস্টিগেটর জনাব মোঃ মাহমুদুল হককে শ্রম পরিদর্শক (সাধারণ) পদে টাকা ১০০-৬৫-১৫৫০-ইবি-৭৫-২০৭৫/- সংশোধিত নতুন বেতন স্কেলে আত্মীয়করন করিয়া অত্র পরিদপ্তরাধীন উপ-প্রশাসন পরিদর্শক (সাধারণ), কলকারখানা ও প্রতিষ্ঠান সমূহ রাজউক বিভাগ, বগুড়া এর কার্যালয় পোষ্টিং দেওয়া হইল।

এই আদেশ জনস্বার্থে জারী করা হইল এবং ইহা অবিলম্বে কার্যকরী হইবে।

স্বাঃ/অস্পষ্ট

(ডাঃ এ,কিউ, মাহফুজুল হক)  
প্রধান পরিদর্শক (চলতি দায়িত্ব)  
কলকার খানা ও প্রতিষ্ঠান সমূহ  
গনপ্রজাতন্ত্রী বাংলাদেশ সরকার।

The contents in the body of the absorption letter clearly show that the Chief Inspector (current charge) of Factories and Establishment issued the letter of absorption to the appellant pursuant to the Memorandum issued by the Ministry of Establishment and the Ministry of Labour and Employment and surely there was no such condition in the Memorandum issued by the Ministries and had there been any such thing in the Memorandum that would have been mentioned or reflected in the body of the absorption letter.

The condition that the seniority of the petitioner would be counted from the date of joining the absorbed post of Labour Inspector (General) was mentioned at serial No.10 under the head “অনুলিপি অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য প্রেরণ করা হইল:-”

and that condition reads as follows.

- ১। .....
- ২। .....
- ৩। .....
- ৪। .....
- ৫। .....
- ৬। .....
- ৭। .....
- ৮-৯। .....

১০। জনাব মোঃ মাহমুদুল হক, ৫৮/এ, আজিমপুর সরকারী আবাসন, ঢাকা-১২০৫।

জনশক্তি পরিকল্পনা কেন্দ্রে তাহার চাকুরী নন গেজেটেড পদে ছিল বিধায় শ্রম পরিদর্শক

(সাধারণ) গেজেটেড) পদে যে দিন, তারিখ হইতে তাহার বর্তমান পদে জ্যেষ্ঠতা গন্য করা হইবে। তাহার পূর্বগনের চাকুরীর নথি, জীবন ইত্যাদি সত্ত্বর এই দপ্তরে দাখিল করার জন্য নির্দেশ দেওয়া হইল।”

So, the condition that the seniority of the appellant would be counted from the date of his joining the absorbed post could in no way be accepted or read as a term of the absorption. Reading the absorption letter as a whole, it *prima-facie* appears to us that the condition as mentioned at serial No.10 quoted above was nothing but the fanciful desire of the Inspector of Factories and Establishment having no backing of law. We have looked into the provisions of the Ordinance, 1985, but we could not find anything there to put a condition in the absorption letter as quoted hereinbefore. The learned Deputy Attorney General also failed to locate any provision of law which authorized the Chief Inspector (current charge), Factories and Establishment to incorporate or add such a condition in the absorption letter. We are further obliged to state that the condition that the seniority of the appellant would be counted from the date of his joining the absorbed post was totally against the provision of the Ordinance, 1985 and the Memorandum issued by the Establishment Division, Cabinet Secretariat and the Memorandum issued by the Ministry of Establishment dated 20.03.1979 and 16.06.1996 respectively.

The Administrative Appellate Tribunal also failed to consider that there could not be estoppel, waiver and acquiescence against the law. When the law, namely, the Ordinance, 1985 did not authorize the Inspector Factories and Establishments to add a condition that his seniority would be counted from the date of joining the absorbed post on plea that his previous post was not a gazetted post, he had no authority to add such a condition at the last of the letter of absorption under the head “ অনুলিপি অবগতি ও প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য প্রেরণ করা হইল।” So, joining in the post of Labour Inspector

(General) by the appellant with the endorsement in the absorption letter as quoted hereinbefore, in no way, can be construed as estoppel, waiver, and acquiescence and such plea could not be taken by respondent Nos.1 and 2 to deny the right of the appellant to count his past service.

Therefore, the Administrative Appellate Tribunal was absolutely wrong in taking the above quoted condition mentioned in the absorption letter as estoppel, waiver and acquiescence.

For argument's sake, if it is conceded that the appellant joined his absorbed post accepting the above quoted condition of absorption, the same being contrary to the provisions of the Ordinance, 1985, his right of seniority as per the Ordinance and the notifications as discussed above could not be taken away.

From the decision of the Administrative Appellate Tribunal, it further appears that it accused the appellant of filing the case before the Administrative Tribunal at a belated stage after serving "for quite a long period" ignoring his case that after joining the absorbed post, he applied to the authority for his seniority in the service from the date of his joining the previous post of Economic Investigator and admittedly his seniority was fixed counting his service in the post of Economic Investigator and accordingly, the final seniority list was published by the PSC on 18.09.1997 and that the cause of action to file the application before the Tribunal arose when the said finalized seniority list was changed by the PSC behind his back and the persons who were below him in the seniority list were promoted to the next higher post ignoring his claim of promotion.

For the discussions made hereinbefore, we are constrained to hold that the Administrative Appellate Tribunal acted illegally in allowing the appeal, setting aside those of the Administrative Tribunal and we find merit

in the appeal and accordingly, the same is allowed. The decision of the Administrative Appellate Tribunal is set aside and those of the Administrative Tribunal are restored.

J.

J.

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