

**16 SCOB [2022] AD 46****APPELLATE DIVISION****PRESENT:****Mr. Justice Md. Nuruzzaman****Mr. Justice Borhanuddin****Ms. Justice Krishna Debnath****CIVIL APPEAL NO.234 OF 2014**

(From the judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal in A.A.T. Appeal No.83 of 2009)

**Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Planning, Planning Division, Sher-E-Bangla Nagar, Dhaka and another**

**..... Appellants****=VERSUS=****Sayed Mahabubul Karim****..... Respondent**

For the appellants

:Mr. Md. Jahangir Alam, Deputy Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record

For the Respondent

:Mr. S. N. Goswami, Senior Advocate, instructed by Ms. Madhu Malati Chowdhury Barua, Advocate-on-Record

Date of hearing

:20-04-2022 and 17-05-2022

Judgment on

:The 18<sup>th</sup> May, 2022**Editors' Note**

Question arose in this case as to whether the petitioner-respondent who left for Japan for higher training with the leave of the Government for 6 months and availed a further leave of another 3 (three) months as leave outside Bangladesh and joined in his post after 7 years 7 months 24 days being absent from service during this time without any leave from the competent authority, have ceased to be a government servant in accordance with Rule 34, 1<sup>st</sup> Part of the Bangladesh Service Rules, in spite of the fact that he was initially permitted to rejoin in the post and worked there for about 1 year and 7 months. The Administrative Appellate Tribunal decided that by accepting the joining of the respondent-petitioner the Director General of Industry and Labour Wing retrospectively approved his unauthorized leave and the Government waived its right to reject the rejoining of the petitioner in service. The Appellate Division held that the Director General was not empowered to act under rule 34 and therefore, his act of allowing the respondent rejoining in service was not only without lawful authority but also void *ab intio*. The Court also held that the doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions and as such, though the respondent has served for about 1 year and 7 months after rejoining in the service, that cannot be deemed to be a waiver by the government against the clear statutory provision embodied in rule 34.

**Key Words**

**Rule 34, 1<sup>st</sup> Part of the Bangladesh Service Rules; Doctrine of estoppels, waiver and acquiescence; void *ab initio***

**Rule 34, 1st Part of the Bangladesh Service Rules:**

**It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation. ... (Para 14)**

**What is void *ab initio*, that cannot be validated later in any way:**

**However, the Administrative Appellate Tribunal miserably failed to notice that in the instant case there found no application of the said “special circumstances of the case” by the Government. Rather the then Director General applied the said “special circumstances of the case’ concerning the unauthorized leave of absence of the respondent for 07 years and 07 months and 24 days from his work. As the Director General was not empowered to act under rule 34, his alleged application of the said “special circumstances of the case’ was not only without lawful authority but also void *ab initio*. What is void *ab initio*, that cannot be validated later in any way. ... (Para 17)**

**No estoppel against law:**

**Doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions. ... (Para 18)**

**JUDGMENT****Md. Nuruzzaman, J:**

1. This Civil Appeal, by leave, has arisen out of the judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal in A.A.T. Appeal No.83 of 2009 allowing the appeal.

2. The respondent herein, as petitioner, filed A.T. case No.203 of 2007 under section 4(2) of the Administrative Tribunal Act, 1980 before the Administrative Tribunal No.1, Dhaka challenging the order dated 25.09.2007 declaring that petitioner has ceased to be in the employment of the Government with effect from 23.03.1998.

3. Facts leading to filing of this civil appeal, in short, are that he joined service on 30.01.1989 as a Statistical Investigator under the Director General of Bangladesh Bureau of Statistics and since then he discharged his duty sincerely and honestly to the satisfaction of all concerned. That the petitioner was granted Ex-Bangladesh leave for higher training in Japan from 23.09.1997 to 20.06.1998. But due to some unavoidable circumstances he could not return home in time. Eventually, he returned home on 15.02.2006 and joined duty on 16.02.2006 and since then he served in his original capacity and as usual, drew salary and other attending service benefits and in this way, the petitioner served the Government for 1 year and 7 months. Suddenly, on 16.03.2006, the opposite party No.2 served a show cause notice upon the petitioner alleging unauthorized absence from service for more than 5 years

and asked him to show cause as to why he shall not be declared to have ceased to be a Government employee. The petitioner submitted his written statement explaining the circumstances necessitating his absence from duty for the relevant period. On consideration of the facts and circumstances, the opposite party No.2, Director General, Bureau of Statistics accepted his explanation and allowed him to join his duty in pursuance of which the petitioner has already served the Government for about 1 year and 7 months. The petitioner has contended that since the Government allowed the petitioner to join service and served for a period of 1 year and 7 months only on receiving salary and other attending benefits, the Government is now legally estopped from challenging the petitioner's position as a Government employee as the plea of the petitioner's unauthorized absence from duty was earlier condoned by the Government. It was contended that the petitioner, in the facts and circumstances of the case, must be regarded to be in service and, as such, the impugned order declaring him to be not in the employment of the Government has been illegal and inoperative.

4. The opposite parties contested the case by filing written statement denying the material allegations of the petition contending, inter-alia that on due consideration of the prevailing facts and circumstances of the case, the petitioner was rightly regarded as out of Government employment on cogent reasons and consequently the petitioner was not entitled to get any relief in this case.

5. On conclusion of the trial, the Administrative Tribunal-1, Dhaka considering the evidences and documents on record dismissed the A.T. Case No.203 of 2007 by its judgment and order dated 11.03.2009.

6. Feeling aggrieved, by the judgment and order of the Administrative Tribunal, Dhaka, the petitioner as appellant preferred A.A.T. Appeal No.83 of 2009 before the Administrative Appellate Tribunal, Dhaka, which upon hearing the parties, by its judgment and order dated 18.01.2011 allowed the appeal and thereby set aside the judgment and order of the Administrative Tribunal-1, Dhaka and the impugned order dated 25.09.2009 declaring that the petitioner has ceased to be in the employment of the Government with effect from 23.03.1998 is struck down being illegal and arbitrary. The petitioner must be regarded to be in service as usual but he shall not be entitled to any salary for the period during which he remained absent from duty. He may, however, be entitled to other service benefits as permissible under the law. The authority is hereby directed to give appellant-petitioner Syed Mahubul Karim a suitable assignment promptly.

7. Feeling aggrieved by the impugned judgment and order dated 18.01.2011 passed by the Administrative Appellate Tribunal, Dhaka, the present petitioner filed the instant civil Petition for leave to appeal before this Division and obtained leave which, gave, rise to the instant appeal.

8. Mr. Md. Jahangir Alam, the learned Deputy Attorney General appearing on behalf of the appellants submits that the respondent being absent in service without any leave from the competent authority for more than 5 years having ceased to be Government servant under Rule 34, 1<sup>st</sup> Part of the Bangladesh Service Rules, the Administrative Appellate Tribunal erred in law in allowing the appeal. He further submits that the respondent having left for Japan for higher training with the leave of the Government for 6 months and having availed a leave of another 3(three) months as leave outside Bangladesh and he having joined in his post on 16.02.2006 after the expiry of 7 years 7 months 24 days, the same period being absolutely

unauthorized, the Administrative Appellate Tribunal erred in law allowing the appeal and, as such, the impugned judgment and order passed by the Administrative Appellate Tribunal, Dhaka is liable to be set aside.

9. Mr. S. N. Goswami, the learned Senior Advocate appearing on behalf of the respondent made submissions in support of the impugned judgment and order of the Administrative Appellate Tribunal, Dhaka. He submits that the learned Administrative Tribunal was manifestly wrong in disallowing the respondent's case without properly considering the material facts of the case and the law bearing on the object and, as such, the Administrative Appellate Tribunal rightly passed the impugned judgment. Hence, the instant appeal may kindly be dismissed.

10. We have considered the submissions of the learned Deputy Attorney General for the appellants and the learned Senior Advocate for the respondent. Perused the impugned judgment of the Administrative Appellate Tribunal and connected other materials on record.

11. Leave was granted to examine whether-

I. the petitioner-respondent being absent in service without any leave from the competent authority for more than 5 years having ceased to be government servant under Rule 34, 1st Part of the Bangladesh Service Rules, the Administrative Appellate Tribunal erred in law in allowing the appeal and

II. the petitioner-respondent having left for Japan for higher training with the leave of the Government for 6 months and having availed a leave of another 3 (three) months as leave outside Bangladesh and he having joined in his post on 16.02.2006 after the expiry of 7 years 7 months 24 days the same period being absolutely unauthorized, the Administrative Appellate Tribunal erred in law in allowing the appeal.

12. Admittedly, the respondent-petitioner left for Japan for higher training with the leave of the Government for 06 (six) months and availed a leave of another 03 (three) months as leave outside Bangladesh. But due to some self explained unavoidable circumstances he could not return home in time. Eventually he returned home on 15.02.2008 and joined duty on 16.02.2006 and his joining was retrospectively accepted by the Director General of Industry and Labour Wing of Bangladesh Statistic Bureau by retrospectively approving his abovementioned unauthorized leave 07 years 07 months 24 days as leave without pay directly on 22.03.2006. Since then he served in his original capacity and as usual, drew salary and other attending service benefits and in this way the petitioner served the government for 1 year and 7 months.

13. The pivotal law in this regard is Rule 34 of the Bangladesh Service Rules (in short, BSR), Part-I, which provides as follows:

"Unless Government in view of the special circumstances of the case shall otherwise determine, after five years continuous absence from duty, elsewhere than on foreign service in Bangladesh whether with or without leave, a Government servant ceases to be in Government employ."

14. It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state

of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation.

15. True that in such situation, theoretically, the Government might make a different conclusion upon taking into consideration any special circumstances.

16. The Administrative Appellate Tribunal decided this issue on a single point that by accepting the joining of the respondent-petitioner on 22.03.2006 by the Director General of Industry and Labour Wing retrospectively approving his abovementioned unauthorized leave, the Government waived its right to reject the rejoining of the petitioner in service on 16.02.2006 as such impliedly misconceived that the said Director General on behalf of the Government exercised its mandate “special circumstances of the case” under rule 34 of BSR.

17. However, the Administrative Appellate Tribunal miserably failed to notice that in the instant case there found no application of the said “special circumstances of the case” by the Government. Rather the then Director General applied the said “special circumstances of the case’ concerning the unauthorized leave of absence of the respondent for 07 years and 07 months and 24 days from his work. As the Director General was not empowered to act under rule 34, his alleged application of the said “special circumstances of the case’ was not only without lawful authority but also void ab initio. What is void ab initio, that cannot be validated later in any way.

18. Doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions as this Division observed in the case of Siddique Ahmed v. Government of Bangladesh, reported in 65 DLR (AD) 8-

"the plea of waiver or acquiescence is not available in respect of violation of any law. If it is violated, the Court is bound to say so, no matter when it is raised."

19. It was maintained in the case of Md. Mahmudul Haque vs. Government of Bangladesh and Ors. reported in 13ADC(2016)738 as follows-

“The Administrative Appellate Tribunal also failed to consider that there could not be estoppel, waiver and acquiescence against the law.”

20. Similar views was expressed in the case of Jamuna Television Ltd. and Another vs. Government of Bangladesh and Others reported in 34 BLD (AD) 33-

“The position of law is well settled that the Government may be estopped from refusing any representation made by it on the basis of which any person has acted to his detriment. There is no estoppel against statute or there is no application of estoppel to prevent the performance of any constitutional or statutory duty.”

21. The same view was Md. Shahidul Haque Bhuiyan and Ors. vs. The Chairman First Court of Settlement and Ors. reported in LEX/BDAD/0337/2015-

“While considering a statutory provision there can be no estoppel against statute. The doctrine of 'approbate and reprobate' is only a species of estoppel; it applies only to the conduct of the parties. As in the case of estoppel it cannot operate against the provisions of a statute.”

22. Consequently, we opine that the Administrative Appellate Tribunal erred in law in interfering with the judgment and order of the Administrative Tribunal.

23. As such, the appeal is allowed. The judgment of the Administrative Appellate Tribunal is set aside and the judgment of the Administrative Tribunal is restored without any order as to cost. The Government is at liberty in taking initiative for refunding the amount paid to the respondent-petitioner as pay and allowances.