

18 SCOB [2023] AD 54

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Mr. Justice Md. Abu Zafor Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NOS.3013 AND 3045 OF 2019

(From the judgment and order dated 29.04.2019 passed by the High Court Division in Writ Petition Nos.17372 and 16602 of 2017).

Government of Bangladesh and others

**... Petitioners
(In both the cases)**

= Versus =

Sk. Md. Abdullah Faruque and others

**... Respondent
(In C.P. No.3013 of 2019)**

Mohammad Mohiuddin and others

**... Respondent
(In C.P. No.3045 of 2019)**

For the Petitioners
(In both the cases)

Ms. Abanti Nurul, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record

For Respondent No.4
(In C.P. No.3013 of 2019)

Mr. Md. Imam Hasan, Advocate, instructed by Mr. M. Ashraf-uz-zaman Khan, Advocate-on Record
Not represented

Respondent Nos.1-3, 5
(In C.P. No.3013 of 2019)

For Respondent No.1
(In C.P. No.3045 of 2019)

Mr. Md. Imam Hasan, Advocate, instructed by Mr. M. Ashraf-uz-zaman Advocate-on-Record

Respondent Nos.2-7
(In C.P. No.3045 of 2019)

Not represented

Date of hearing & judgment

The 2nd day of January, 2023

Editors' Note:

In the instant case High Court Division directed the writ respondents to absorb the writ petitioners as Lecturers in their concerned Government Colleges relying on জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০১৮ and gave relief to the writ petitioners although the Rule *Nisi* had not been issued in that term and the writ petitioners did not make any such prayer in the writ petition. The Appellate Division held that the High Court Division travelled beyond the scope of Rule *Nisi* in giving relief to the writ petitioners. Consequently, the judgment and order of the High Court Division was set aside.

Key Words:

Article 102 of the Constitution; Chapter XIA of the Supreme Court (High Court Division)

Rules, 1973; জাতীয়করনকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরন বিধিমালা-২০১৮;

Article 102 of the Constitution:

The relief under article 102 of the Constitution being an equitable relief the High Court Division has to cautious while passing the judgment and order so that the relief which it is giving to the parties by the judgment and order is not beyond the terms of the Rule *Nisi*. (Para 19)

Article 102 of the Constitution and Chapter XIA of the Supreme Court (High Court Division) Rules, 1973:

The High Court Division erred in law in travelling beyond the scope/terms of the Rules *Nisi*:

The person who wants to invoke article 102 must be an aggrieved person and must specify the relief in his prayers. Chapter XIA of the Supreme Court (High Court Division) Rules, deals with preparing and filing of writ petition under article 102 of the Constitution. It provides that the aggrieved person must specifically set out the relief sought for. So, the writ petitioner must have specific claim in the form of prayer against such persons who are respondents, following which the Court can grant relief, if favourable, in accordance with law. In the present cases, the High Court Division has delivered the impugned judgment and order basing on the “জাতীয়করনকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরন বিধিমালা-২০১৮” by which the earlier Rules of 2000 has been repealed and thereby directed the writ respondent-leave petitioner herein to absorb the writ petitioners-respondents herein as Lecturers in their concerned Government Colleges despite of the fact that the writ petitioners did not make any such claim in the form of prayer in the writ petition asking absorption under the aforesaid absorption Rules of 2018 nor the Rules *Nisi* were issued at that effect. As such, the High Court Division erred in law in travelling beyond the scope/terms of the Rules *Nisi* in both the writ petitions in giving relief to the writ petitioners while passing the impugned judgment and order. (Para 25 & 26)

JUDGMENT

Md. Abu Zafor Siddique, J:

1. Delay of 168 and 172 days in filing Civil Petitions for Leave to Appeal Nos.3013 and 3045 of 2019 respectively are hereby condoned.
2. These civil petitions for leave to appeal are directed against the judgment and order dated 29.04.2019 passed by the High Court Division in Writ Petition Nos.17372 and 16602 of 2017 thereby making both the Rules *Nisi* absolute.
3. The subject matter and the point of law involved in both the civil petition are same and similar and as such, they are heard together and disposed of by this single judgment.
4. Facts relevant for disposal of Civil Petition for Leave to Appeal No.3013 of 2019 in short are as follows:
5. That present respondent Nos.1 to 4 as writ petitioners filed Writ Petition No.17372 of 2017 stating *inter alia* that they were appointed with required qualifications as Lecturers in Bir Shreshtha Nur Mohammad Degree College at different times when the said College was

non-government College; writ-petitioner No.1, having qualification of B.A. (Hon's) and MSS (Social Science), joined as Lecturer on 25.11.1997 and since then has been serving as Lecturer of Economics in the said College; writ-petitioner No.2, having educational qualifications of B.A. and MSS (Social Science), joined as Lecturer on 09.12.2002 and since then has been serving as Lecturer of Social Work; writ-petitioner No.3, having educational qualifications of B.Com and M.Com, joined as Lecturer on 27.10.2002 and since then has been serving as Lecturer of Management; Writ-petitioner No.4, having educational qualifications of B.S.S and M.S.S, joined as Lecturer on 10.06.2001 and since then has been serving as Lecturer of Political Science. It is stated by the writ-petitioners that two of the writ-petitioners have been enlisted as MPO teachers of the said College. Thereafter, because of good performance of the said College, the Government, vide Memo dated 21.05.2013, nationalized the said College and, accordingly, published gazette on 23.05.2013. Accordingly, the said College was renamed as Government Bir Sreshtha Nur Mohammad Degree College. Thereafter, the Ministry of Public Administration created 40 posts of teachers and some post of non-teaching staffs ignoring the recommendation of the Education Ministry to create 65 posts in total. Upon such nationalization, the Ministry of Education subsequently, on 29.05.2014, published the names of the teachers who were appointed on ad-hoc basis as per Rules 3 and 5 of the “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০০০”. However in the said list, the names of the writ-petitioners were not included. It is further stated that since, at the relevant time under the said আত্মীকরণ বিধিমালা-২০০০, the educational requirement for such absorption as Government teachers was the equivalent requirements applicable to the Government cadre posts, the writ-petitioners subsequently obtained such qualifications with prior approval from the College authority. Accordingly, a representation was made to the College authority for absorbing their service as Government teachers. Representation was made to the Director General, Secondary and Higher Secondary Education as well for absorbing their services as Government teachers, but got no positive response. Under such circumstances writ petitioner respondent Nos.1 to 4 have filed the writ petition and obtained the Rule *Nisi*.

6. Fact of Civil Petition for Leave to Appeal No.3045 of 2019 in short are as follows:

7. That respondent Nos.1 to 6 as writ petitioners have filed Writ Petition No.16602 of 2017 stating *inter alia* that they were appointed as Lecturers of Charfasson College with required qualifications applicable at the time of appointment. Writ-petitioner No.1, having B.A and M.A in Islamic Studies, was appointed as a Lecturer in Secretarial Education on 20.11.2002 and he joined on 21.11.2002. Thereafter, he was appointed as Lecturer of Islamic Studies, and since then he has been serving in the said College as Lecturer of Islamic Studies. Writ-petitioner No.2, having educational qualifications of B.Com (Honors) and M.Com (Accounting), was appointed as Lecturer in Accounting on 09.06.2012 and, accordingly, he joined in the said post on 12.06.2012. Since then he has been serving in the said College as such. Writ-petitioner No.3 was appointed as Lecturer of Philosophy on 22.02.2000 and he joined in the said post on 01.03.2000. Since then he has been serving as Lecturer of the said College. Writ-petitioner No.4, having B.A and M.A. (Social Science), was appointed as Lecturer of Social Welfare on 08.05.2004 and she joined in the said post on 09.05.2004. Since then she has been serving as Lecturer of the said College. Writ-petitioner No.5, having B.Com and M.Com (Management), was appointed as Lecturer of Management on 09.06.2012 and joined in the said post on 12.06.2012. Since then she has been serving as such in the said College. Writ-petitioner No.6, having B.Com and Masters of Business Studies (Management), was appointed as Lecturer of Management on 09.06.2012 and he joined in the said post on 12.06.2012. Since then he has been serving as Lecturer in the said

College. It is stated that because of the good, performances of the writ-petitioners, they were enlisted as MPO teachers of the said College. Thereafter, because of good performance of the said College, the Government, vide Memo dated 22.10.2013, nationalized the said College and, accordingly, published gazette on 31.10.2013. Accordingly, the said College was renamed as Charfasson Government College. Thereafter, Upon such nationalization, the Ministry of Education subsequently, on 16.04.2015, published name of the teachers who were appointed on ad-hoc basis as per Rules 3 and 5 of the “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০০০” and gazette notification was published on 14.05.2015 by dropping the names of the writ-petitioners in the said list. It is further stated that since, at the relevant time under the said আত্মীকরণ বিধিমালা-২০০০, the educational requirement for such absorption as Government teachers was the equivalent requirements applicable to the Government cadre posts, the writ-petitioners subsequently obtained such qualifications with prior approval from the Colleges authority., Accordingly, a representation was made to the College authority for absorbing their services as Government teachers. Representation was made to the Director General, Secondary and Higher Secondary Education as well for absorbing their services as Government teachers, but got no positive response. Under such circumstances writ petitioner respondent Nos.1 to 6 have filed the writ petition and obtained the Rule *Nisi*.

8. The High Court Division took both the Rules *Nisi* together for hearing and ultimately, after hearing the parties and considering the materials on record, both the Rules *Nisi* were made absolute by the impugned judgment and order dated 29.04.2019. Hence, the writ-respondents are now before us having filed these two civil petitions for leave to appeal for redress.

9. Ms. Abanti Nurul, learned Assistant Attorney General appeared on behalf of the leave-petitioners in both the civil petitions for leave to appeal submits that the High Court Division erred in law in travelling beyond the scope of Rule *Nisi* in giving relief to the writ petitioner respondents under the absorption Rules, 2018 although no Rule *Nisi* was issued to that effect and as such, the impugned judgment and order is liable to be set aside. Moreover, she next submits that since the writ-petitioner respondents were appointed as Lecturer in Bir Sreshtha Nur Mohammad Degree College, Sarsha, Jessore and Charfasson Government College, Bhola, when they were the non-government Colleges in 1997, 2000, 2001, 2002, 2004 and 2012 respectively. But the said Colleges were nationalized by the Government vide gazette notification dated 14.05.2013 and 22.10.2013 and subsequently, the Ministry of Education by circular dated 15.07.2013, 22.10.2013, 29.05.2014 and 16.04.2015 published the names of the Lecturers who were appointed on ad-hoc basis on different subject for the Bir Sreshtha Nur Mohammad Degree College, Sarsha, Jessore and Charfasson College as per Rules 3 and 5 of the “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০০০” and accordingly, Gazette Notification was published on 05.06.2014 and 14.05.2015 excluding the names of the writ petitioner respondents since at that point of time they had no requisite qualifications for becoming absorbed in the nationalized Colleges and as such, the impugned judgment is liable to be set aside. She further submitted that as per Rules 1 in Clause (2) of the “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০১৮” that “এই বিধিমালা জারির তারিখ বা তৎপরবর্তীতে সরকারিকৃত কলেজের ক্ষেত্রে এই বিধিমালা প্রযোজ্য হইবে।” the writ-petitioner respondents cannot claim any benefits for absorption in the nationalized Colleges under that provision of Rules and as such the High Court Division, without applying judicial mind, passed the judgment and order dated 29.04.2019 in clear violation of the provision of law. She lastly submitted that at the time of nationalization and post creation, the writ-petitioner respondents had no requisite qualifications and as such, they have no right to get any remedy in the writ petition and thus

impugned judgment and order is liable to be set aside on disposing of the civil petitions. However, she submits that since some of the writ petitioners are already enjoying the Government portion of monthly salary (MPO) and other benefits they will be continuing to get the same in accordance with law.

10. Mr. Md. Imam Hasan, learned Advocate appeared on behalf of respondent in both the civil petitions for leave to appeal made submissions in support of the impugned judgment and order passed by the High Court Division. He submitted that although the writ-petitioners did not have the required qualification for being absorbed as Lecturers under the Nationalized Colleges as per the provision of the “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০০০” but they subsequently obtained their educational qualifications and as such, the writ-petitioners are entitled to have their service absorbed under the Nationalized Colleges in view of “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০১৮” by which the earlier Rules of 2000 has been repealed as evident from the saving clause of rule 15 sub-rule 2 Kha which provides that if any teacher or staffs of the concerned College was not absorbable under the bidhimala 2000 and if their services are absorbable under the Bidhimala, 2018 then they may be absorbed under the bidhimala 2018 considering which the High Court Division has rightly passed the impugned judgment and order in accordance with law and hence he submitted that these two civil petitions for leave to appeal are liable to be dismissed by affirming the impugned judgment and order passed by the High Court Division.

11. We have considered the submissions of the learned Assistant Attorney General for the leave-petitioners in both the civil petitions and the learned Advocate for the writ petitioner-respondents, perused the impugned judgment and order along with other connected papers on record.

12. It is not disputed that the writ-petitioners had lack of qualification for being absorbed as Lecturers under the aforesaid Nationalized Colleges as per the provision of “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০০০”. The writ-petitioner respondents have stated in the additional paper book that subsequently they have upgraded their educational qualifications and as such, they claimed that they are eligible to be absorbed as teachers in the Nationalized Colleges as per the provision of “জাতীয়করণকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরণ বিধিমালা-২০১৮”. In support of their claim, the learned Advocate for the writ-petitioner respondents referred to rule 15(2)(Kha) of aforesaid Absorption Bidhimala, 2018 basing on which the High Court Division has delivered the impugned judgment and order in favour of the writ petitioner-respondents and as such, according to the learned Advocate for the writ petitioner respondents the High Court Division did not commit any illegality in passing the impugned judgment and order.

13. In this respect, the learned Advocate for the leave-petitioners emphatically raised a question that the High Court Division has travelled beyond the scope/terms of the Rule *Nisi* in giving relief to the writ petitioner respondents by the impugned judgment and order which is liable to be set aside in accordance with law.

14. To answer on this point, let us go through the prayers formulated in the writ petitions which read as follows:

“A Rule Nisi calling upon the respondents to show cause as to why the refusal of the respondents in absorbing the service of the petitioners Lecturer of Government Bir Shreshtha Nur Mohammad Degree College and Charfasson Government College,

Bhola upon considering the required academic qualifications of the petitioners to be absorbed as Lecturer of Government College while Nationalization of the same should not be declared to have been done without lawful authority and is of no legal effect and also to show cause as to why the respondents should not be directed to absorb the service of the petitioners as the Lecturer of Government Bir Shreshtha Nur Mohammad Degree College, Sharsha, Jessore and Charfasson Government College, Bhola upon considering the required academic qualification of the petitioners to be absorbed in the Government College while Nationalization of the same.”

15. Now let us see the terms of the Rule *Nisi* issuing orders in both the writ petitions as appears from the impugned judgment and order which read as under:

“Rules in the aforesaid writ petitions were issuing in similar terms, namely calling upon the respondents to show cause as to why their refusal in absorbing the serviced of the petitioners as Lecturers of Government Colleges, namely Government Bir Shreshtha Nur Mohammad Degree College (Writ Petition No.17372 of 2017) and Charfasson Government College (Writ Petition No.16602 of 2017) after nationalization of the same upon considering the required academic qualifications of the petitioners, should not be declared to be without lawful authority and is of no legal effect and as to why they should not be directed to absorb the petitioners services as Lecturers of the said Colleges upon considering their such academic qualifications.”

16. On perusal of the prayers made in the writ petitions as well as the terms of the Rule issued as per prayers as quoted above, we do not find that the writ petitioners have challenged the absorption Rules, 2000 or asked for any relief under the absorption Rules, 2018 by which the earlier absorption Rules of 2000 were repealed nor the Rule *Nisi* has been issued in that terms. So, the terms of the Rules *Nisi* in both the writ petitions are crystal clear that the writ petitioners did not challenge the absorption Rules, 2000 or ask for any relief under the absorption Rules, 2018 by which the earlier absorption Rules of 2000 were repealed.

17. Having gone through the impugned judgment and order it appears that the High Court Division has relied on the absorption Rules of 2000 and 2018 in giving relief to the writ petitioner respondents. The High Court Division found that under the previous absorption Rules of 2000, the writ petitioners were not qualified to be absorbed as Government teachers as the minimum qualification for such absorption was the qualification applicable to a cadre post as provided in Rule 2(Chha) of the Absorption Rules of 2000. But, the new Absorption Rules of 2018 have obliterated the said requirement by Rule 5 which provides that the required qualification for absorption shall be the required qualifications for appointments in a non-government College. Therefore, the High Court Division came to a definite finding that there should not be any dispute as regards basic qualifications of the petitioners for absorption in the Government Colleges after promulgation of the new absorption Rules of 2018, which has recognized such entitlement of the petitioners for such absorption with the required qualifications for appointment in the non-government Colleges as well. So, it is clear that the High Court Division relying on the aforesaid absorption Rules of 2018 has passed the impugned judgment and order and gave relief to the writ petitioner respondents although the Rule *Nisi* has not been issued in that terms.

18. So, the High Court Division has travelled beyond the terms of the Rule *Nisi* issuing orders in both the writ petitions in giving relief to the writ petitioners by the judgment and order impugned in both the civil petitions for leave to appeal before this Division.

19. The relief under article 102 of the Constitution being an equitable relief the High Court Division has to be cautious while passing the judgment and order so that the relief which it is giving to the parties by the judgment and order is not beyond the terms of the Rule *Nisi*.

20. Reliance may be placed in the case of **the Managing Director, Dhaka Electric Supply Company Limited and others Vs. Md. Tamjid Uddin and others, reported in 5 L.M.(AD)130**, wherein the points for determination by this Division were as under:

- I. *For that the High Court Division passed the impugned judgment and order declaring the promotion of the petitioners to the post of Assistant Managers to be unlawful and without jurisdiction should be set aside inasmuch that the terms of the Rule Nisi issued in Writ Petition No.651 of 2012 did not entail/cover the lawfulness of the petitioner's promotions.*
- II. *For that the High Court Division passed the impugned judgment and order in breach of the principles of natural justice inasmuch that the petitioners were never made party to the Writ Petition No.651 of 2012, no Rule Nisi was ever issued or served upon them and nor were they asked or given an opportunity to present their case before passing of the impugned judgment.*
- III. *Because the cancellation of departmental promotion after two and half years and direction to take necessary steps for promotion in making the Rule disposed of, the High Court Division went beyond the scope of Article 102 of the Constitution and thereby usurped the function of the executive and as such, the judgment and order passed by the High Court Division is liable to be set aside."*

21. To answer the aforesaid points, this Division in the said case has gone through the Rule *Nisi* issuing order, prayer formulated in the writ petition basing on which the Rule *Nisi* was issued along with the judgment and order impugned in that including the provision of article 102 of the Constitution, and thereby held in paragraph No.16 as follows:

"On perusal of the materials on record it appears that the High Court Division, while passing the impugned judgment, found the first part of the Rule, relating to "publishing the advertisement" has become infructuous due to completion of appointment by direct recruitment in 67% of the vacant posts and as such, in the name of consequential relief it declared the entire process of promotion to the post of Assistant Manager, illegal and without lawful authority, although Rule Nisi was not issued on the entire promotion process concerning promotion, dated 27.12.2011, of the appellants of C.A. No.135 of 2015, or any such prayer being specifically made in the writ petition."

22. This Division in that case also held as under:

"In the present case, on perusal of the writ petition, the prayer portion and the terms of the Rule issuing order, it appears that the writ petitioner did not make such prayer challenging the promotion of the present appellants nor any relief has been sought against them making them parties. As such the finding and decision of the High Court Division, so far it relates to 'declaring the promotion of the present appellants to be illegal and without lawful authority', is not a correct finding and decision and rather it is beyond the prayer as sought for. The same could have been correct if the writ petitioners would have challenged the present appellants' 2½ years earlier promotion making them parties and Rule being issued to that effect."

23. Further, reliance may be placed in the case of **West Bengal, Home Department and**

others Vs. Ram Chandra Choudhury reported in AIR 1973 Cal 220, it has been held in paragraph-32 as follows:

“.....Orders for recovery of money can be made by this Court in exercise of its writ jurisdiction, but only in a limited class of cases, namely, where the statutory provision under which money was paid was declared by this Court to be void or where money has been paid under orders which have been struck down. The third and the more formidable obstacle to the amendment of the petition, at this stage, is that an amendment relating to recovery of arrears of salary would be wholly beyond the terms of Rule Nisi which was made absolute by the trial Court. This Court sitting in appeal over the judgment and order by which the Rule Nisi was made absolute, cannot, at this stage, enlarge the scope of the Rule Nisi to which a return has been filed by the appellants, so as to enable the respondent to agitate the question of recovery of his arrears of salary.”

24. Thus, in the light of the aforesaid decision it is clear that granting of such relief beyond the terms of the Rule *Nisi* is not approved by this Division. The High Court Division should not have granted any relief different from the terms of the Rule *Nisi* issued as per prayer made in the writ petition.

25. Whether the High Court Division went beyond the scope of Article 102 of the Constitution, in giving relief beyond the terms of the Rule *Nisi* as in the present case, we need to see article 102 of the Constitution as well as the High Court Division Rules which deal with writ petitions. Article 102 (2)(1) provides that ‘the High Court Division on the application of any person aggrieved, may give such directions or orders to any person including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental right conferred by part III of this Constitution’. So the person who wants to invoke article 102 must be an aggrieved person and must specify the relief in his prayers. Chapter XIA of the Supreme Court (High Court Division) Rules, deals with preparing and filing of writ petition under article 102 of the Constitution. It provides that the aggrieved person must specifically set out the relief sought for. So, the writ petitioner must have specific claim in the form of prayer against such persons who are respondents, following which the Court can grant relief, if favourable, in accordance with law.

26. In the present cases, the High Court Division has delivered the impugned judgment and order basing on the “জাতীয়করনকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরন বিধিমালা-২০১৮” by which the earlier Rules of 2000 has been repealed and thereby directed the writ respondent-leave petitioner herein to absorb the writ petitioners-respondents herein as Lecturers in their concerned Government Colleges despite of the fact that the writ petitioners did not make any such claim in the form of prayer in the writ petition asking absorption under the aforesaid absorption Rules of 2018 nor the Rules *Nisi* were issued at that effect. As such, the High Court Division erred in law in travelling beyond the scope/terms of the Rules *Nisi* in both the writ petitions in giving relief to the writ petitioners while passing the impugned judgment and order. Thus, the finding of the High Court Division is not the correct reflection of the terms of the Rules *Nisi* and as such the same does not leg to stand in accordance with law.

27. In view of the aforesaid facts and circumstances we are of the view that the finding and decision arrived at by the High Court Division in both the civil petitions for leave to appeal being not based on proper appreciation of both the facts and law the same calls for interference by this Division. As such, we are inclined to set aside the impugned judgment and order upon disposing of both the civil petitions for leave to appeal without granting any leave on the same.

28. In the result, these two civil petitions for leave to appeal are disposed of. The impugned judgment and orders of the High Court Division are set aside.