

1 SCOB [2015] HCD 18**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 11959 of 2013

Md. Mahbubur Rahman Basunia
..... Petitioner

-Versus-

**The Government of Bangladesh represented by
the Secretary, Ministry of Agriculture,
Bangladesh Secretariat, Ramna, Dhaka and
others**

.....Respondents

Mr. A. M. Amin Uddin with
Mr. Yousuf Khan Rajib, Advocates
.....For the petitionerMr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Mr. Md. Shafiqueel Islam Siddique, AAG
....For the respondent nos. 1 & 3Mr. Abul Kalam Chowdhury, Advocate
....For the respondent no. 2Mr. Abdul Wadud Bhuiyan with
Mr. S. R. M. Lutfor Rahman Akhand, Advocates
....For the respondent no. 4.Heard on 19.10.2014, 25.11.2014, 30.11.2014,
01.12.2014, 04.12.2014 and 08.12.2014.
Judgment on 10.12.2014.**Present:****Mr. Justice Moyeenul Islam Chowdhury****-And-****Mr. Justice Md. Ashraful Kamal****Article 102 of the Constitution
Writ of Certiorari:**

The High Court Division exercising power while dealing with the Writ of Certiorari does not work as a Court of Appeal and as such it is not required to make determination of facts on its own. It can interfere with the findings of a Court of facts under its extra-ordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted *malafide* or in violation of the principle of natural justice.(Para 30)

উন্নয়ন প্রকল্প হইতে রাজ্য বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫
Sub-Rule (3) of Rule 4:

Undeniably the post of the petitioner is beyond the jurisdiction of the Public Service Commission and that being so, for regularizing the service of the petitioner, the recommendation of the DPC or the Selection Committee, as the case may be, is a must. But admittedly no recommendation of the DPC or the Selection Committee, as the case may be, was obtained prior to regularization of the service of the petitioner in BARI. So we find that the petitioner was regularized in the service of BARI as Assistant Director (Finance and Accounts) on 24.05.2006 in flagrant violation of Sub-Rule (3) of Rule 4 of the Rules of 2005.(Para 34)

বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মকর্তা ও কর্মচারী) চাকুরী প্রবিধানমালা, ২০১১
Regulation 46(1):

It is true that Chapter Seven of the Service Regulations of 2011 is captioned “সাধারণ আচরণ ও শৃংখলা”. But none the less, it appears from the language employed in Regulation 46(1) that the appellate authority can hear any appeal preferred against any order by an aggrieved employee and the appeal need not be confined to matters arising out of disciplinary proceedings only.... the appellate authority can entertain any appeal against any order of the authority, whether it relates to disciplinary proceedings or not, under Regulation 46 of the Service Regulations of 2011.(Para 43)

The Government Servants (Discipline and Appeal) Rules, 1985**Sub-Rule (2) of Rule 22**

From a combined reading of the provisions of Sub-Regulation (3) of Regulation 46 of the Service Regulations of 2011 and Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985, the position that emerges is that the appellate authority will pass such orders as it deems just and equitable, regard being had to the facts and circumstances of the case. Given this scenario, it cannot be said that the appellate authority committed any illegality by way of forming a three-member inquiry committee and acting upon the report dated 29.05.2013 of that committee.(Para 45)

Judgment**MOYEENUL ISLAM CHOWDHURY, J:**

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Memo No. 12.062.027.01.00.001.2010-326 dated 08.10.2013 issued under the signature of the respondent no. 3 (Annexure-‘H’ to the writ petition) cancelling the order of promotion of the petitioner made under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012 and directing the respondent no. 2 to take necessary steps to promote the respondent no. 4 with the observation that the regularization of the petitioner was violative of the existing rules should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. Subsequently the petitioner filed an application for issuance of a further Rule whereupon a further Rule Nisi was issued calling upon the respondents to show cause as to why the order dated 02.12.2013 issued by the respondent no. 2 under Memo No. ১ব্য/গ-৭৭৬/২০১২/প্রশাসন/একক নথি/৫৯৬৩ (Annexure-‘N’ to the application for issuance of a further Rule) cancelling the order of promotion of the petitioner dated 09.09.2012 to the post of Senior Assistant Director (Finance and Accounts) pursuant to the order dated 08.10.2013 issued under the signature of the respondent no. 3 should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

3. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner joined as an Assistant Director (Accounts) on 15.03.1997 in a project, namely, “উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)” under Bangladesh Agricultural Research Institute (BARI), Joydebpur, Gazipur. The respondent no. 3, by an order dated 04.11.2003, transferred all the employees who joined the aforesaid Development Project to the Revenue Budget since 01.01.2000 and accordingly the petitioner along with others was transferred to the Revenue Budget. Thereafter the respondent no. 3, by another order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts), Gardening Research Centre, BARI, Joydebpur, Gazipur on temporary basis. Subsequently the petitioner was regularized as Assistant Director (Finance and Accounts) by the order under Memo No. ২প-৫/২০০৪/প্রশাসন/১১৯৫২ dated 24.05.2006. While the petitioner was working as Assistant Director (Finance and Accounts), the respondent no. 2, by the order under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012, promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) and he joined the promoted post on the self-same date (09.09.2012). While the petitioner has been working as Senior Assistant Director (Finance and Accounts), BARI, the respondent no. 3 illegally issued the order under Memo No. 12.062.027.01.00.001.2010-326 dated 08.10.2013 cancelling the order of regularization of the petitioner under Memo No. ২প-৫/২০০৪/প্রশাসন/১১৯৫২ dated 24.05.2006 and the order of promotion of the petitioner under Memo No. ১প-১/২০০৯/প্রশাসন/২৩৭৭ dated 09.09.2012 and directing the respondent no. 2 to promote the respondent no. 4 to the post of Senior Assistant Director (Finance and Accounts) in place of the petitioner. Be that as it may, since the petitioner joined the Development Project on 15.03.1997, he is senior to the respondent no. 4 who joined the post of Assistant Director (Finance and Accounts) on 09.08.2006. Although the respondent no. 4 joined as Assistant Director (Finance and Accounts), BARI on 09.08.2006; yet the fact remains that the petitioner was temporarily posted as Assistant Director (Finance and Accounts), BARI by an office-order dated 03.05.2006 and he was regularized as Assistant Director (Finance and Accounts) by another office-order dated 24.05.2006. As the petitioner is senior to the respondent no. 4 in the service of BARI, the cancellation of the order of promotion of the petitioner and the order of his regularization in the service of BARI (Annexure-‘H’ to the writ petition) is without lawful authority and of no legal effect.

4. In the Supplementary Affidavit dated 05.06.2014 filed on behalf of the petitioner, it has been stated that the Senior Assistant Secretary, Ministry of Finance, by an order dated 04.09.2003, informed the respondent no. 2 of the transfer of 44(forty-four) posts of the Development Project to the Revenue Budget. Accordingly the

respondent no. 3, by an order dated 04.11.2003, transferred all the employees of the Development Project, namely, “উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)” to the Revenue Budget since 01.01.2000 and as such the petitioner along with others was transferred to the Revenue set-up since that date (01.01.2000). Anyway, the Departmental Promotion Committee (DPC), by its resolution dated 09.09.2012, recommended the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) and the said recommendation was placed in 50th General Meeting of the Board of Management of BARI chaired by the Director-General on the same date (09.09.2012) and the Board of Management unanimously decided to promote the petitioner to the post of Senior Assistant Director (Finance and Accounts) and thereafter the petitioner was promoted thereto on 09.09.2012 and he joined the promoted post of Senior Assistant Director (Finance and Accounts) on that very date (09.09.2012). The BARI authority did not commit any illegality in promoting the petitioner to the post of Senior Assistant Director (Finance and Accounts). As the respondent no. 4 is junior to the petitioner, he is not entitled to be promoted to the post of Senior Assistant Director (Finance and Accounts) of BARI.

5. The case of the respondent no. 4, as set out in the Affidavit-in-Opposition, in short, is as follows:

The respondent no. 4 is senior to the petitioner inasmuch as the respondent no. 4 joined BARI on 15.08.2006 in the post of Assistant Director (Finance and Accounts) directly which is a permanent post in the Revenue Budget of BARI and the authority, by its order dated 08.03.2007, regularized the service of the respondent no. 4 with effect from 15.08.2006. On the other hand, the petitioner joined a Development Project under the name and style “Horticulture Development Project” in 1997 and subsequently the petitioner’s post was temporarily transferred to the Revenue Budget and he was temporarily appointed in the post of Revenue set-up; albeit his post was not included in বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মচারী) চাকুরী প্রবিধানমালা, ১৯৯০ (briefly the Service Regulations of 1990) and in the BARI organogram. However, the post of the petitioner was created and included in বাংলাদেশ কৃষি গবেষণা ইনস্টিটিউট (কর্মকর্তা ও কর্মচারী) চাকুরী প্রবিধানমালা, ২০১১ (hereinafter referred to as the Service Regulations of 2011) and his post was made permanent by the order of the Ministry of Agriculture under Memo No. গবেষণা-১/চাকুরী/রাজস্বখাত-২৮/২০০০ dated 23.01.2012 with effect from 01.06.2012. The petitioner was appointed as Assistant Director (Finance and Accounts) in the Development Project, namely, “উদ্যান উন্নয়ন প্রকল্প (বারী অংশ)” and the duration of the project expired on 31.12.1999. Thereafter the Ministry of Agriculture, by its Memo No. কৃ-৩/চাকুরী (রাজস্বখাতে স্থানান্তর)-২৮/২০০৩/৭২০ dated 04.11.2003, temporarily transferred 44(forty-four) posts including the post of the petitioner to the Revenue Budget and gave sanction on year-to-year retention basis with retrospective effect since 01.01.2000 under certain terms and conditions. Subsequently the BARI authority, without following the terms and conditions mentioned in the Memo dated 04.11.2003 issued by the Ministry of Agriculture and violating the relevant provisions, directly appointed the petitioner to the post of Assistant Director (Finance and Accounts) on temporary retention basis by its Memo No. ২প-৫/২০০৪/প্রশাসন/৯৮১২ dated 16.04.2005. At that point of time, there were 2(two) posts of Assistant Director (Finance and Accounts) in the BARI organogram and as such the BARI authority in his appointment letter imposed a condition to the effect that “রাজস্বখাতে স্থানান্তরিত সহকারী পরিচালক (অর্থ ও হিসাব) পদটি স্থায়ী হওয়ার পর সন্তোষজনকভাবে কার্য সম্পাদন সাপেক্ষে তাহাকে চাকুরীতে স্থায়ী করা হইবে।” Since the petitioner’s post was created and included in the Service Regulations of 2011, there was no scope to regularize his service prior thereto. Besides, before regularization of the service of the petitioner, the BARI authority did not take any approval from the Selection Committee or the DPC, as the case may be, which was mandatory for regularization of his service as per “উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫” (in short, the Rules of 2005). So the order of regularization dated 24.05.2006 of the service of the petitioner is illegal. Anyway, the respondent no. 4 raised an objection to the alleged seniority of the petitioner and made an application to the Director-General of BARI for fixation of inter se seniority. On the basis of that application submitted by the respondent no. 4, the Director-General of BARI formed a high-powered three-member committee by his order under Memo No. বি-৬৪৬/২০১২/প্রশাসন/১২৯৪ dated 06.08.2012. That committee asked the petitioner and the respondent no. 4 to submit their respective papers and documents and accordingly they submitted the same. The committee perused the papers and documents and found that some irregularities had been committed at the time of regularization of service and fixation of seniority of the petitioner and accordingly the committee made a report dated 05.09.2012 and submitted the same to the Director-General of BARI under Memo No. ৪৫২ dated 06.09.2012 recommending fixation of the two contestants’ inter se seniority by the Ministry of Public Administration. But none the less, the BARI authority promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) by the order dated 09.09.2012.

6. According to the general rules of seniority, the petitioner is junior to the respondent no. 4 by 6(six) years. After completion of 4(four) years of satisfactory service, the respondent no. 4 got selection grade scale by Memo No. বি-১৯০/২০০৯/প্রশাসন/৫৩৯২ dated 13.12.2010 and his present scale of pay is Tk. 15,000-26,200/-. But the petitioner did not get selection grade scale in the post of Assistant Director (Finance and Accounts) in that he did not complete 4(four) years of service in the substantive post of Assistant Director (Finance and Accounts). At the time of promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts), his

scale of pay was Tk. 11,000-20,370/-. The granting of selection grade scale to the respondent no. 4 by the BARI authority is clearly indicative of his seniority vis-à-vis the petitioner. As the petitioner was unlawfully promoted to the post of Senior Assistant Director (Finance and Accounts), the respondent no. 4 filed a petition of appeal before the Secretary, Ministry of Agriculture as appellate authority. In the matter of promotion to the post of Senior Assistant Director (Finance and Accounts), the respondent no. 4 was illegally and unjustly superseded. However during the pendency of the appeal, the appellate authority formed a three-member inquiry committee to enquire into the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) and the said inquiry committee perused the documents and papers submitted by the 2(two) contestants, namely, the petitioner and the respondent no. 4, heard them in person and made a report dated 29.05.2013 to the Secretary, Ministry of Agriculture. On the basis of the report dated 29.05.2013 (Annexure-‘29’ to the affidavit-in-opposition), the appellate authority, that is to say, the Secretary, Ministry of Agriculture rescinded the order of promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts) holding that the regularization of the petitioner in the service of BARI was unlawful and directed the Director-General of BARI to promote the respondent no. 4 thereto within 30(thirty) working days.

7. The petitioner cannot claim his seniority for promotion to the next higher post from the date of his joining the Development Project. According to the SRO No. ১৮২-আইন/২০০৫/সম/বিধি-১/এস-৯/২০০০ dated 20.06.2005 (Rules of 2005), he is entitled to claim his seniority from the date of regularization of his service in the Revenue Budget since 01.06.2012. Over and above, the petitioner did not complete a minimum of 5(five) years service for promotion to the post of Senior Assistant Director (Finance and Accounts) as per the Service Regulations of 2011. That being so, the petitioner was not eligible for promotion thereto and the appellate authority rightly cancelled the orders of promotion and regularization of the petitioner in the service of BARI and directed the Director-General of BARI to promote the petitioner by the impugned order. As the impugned order of the appellate authority, that is to say, the Secretary, Ministry of Agriculture is in perfect accord with the relevant provisions of law, no exception can be taken thereto.

8. The respondent no. 2 has also filed an Affidavit-in-Opposition opposing the Rule. As the case of the respondent no. 2 is similar to that of the respondent no. 4, his case is not reiterated here.

9. In the Supplementary Affidavit-in-Opposition dated 19.11.2014 filed by the respondent no. 4, it has been averred that as the petitioner’s post was not in the BARI organogram, it was kept on year-to-year retention basis up to 31st May, 2012.

10. In the Supplementary Affidavit-in-Opposition dated 03.12.2014 filed by the respondent no. 4, it has been mentioned that BARI is a body corporate constituted by the Bangladesh Agricultural Research Institute Ordinance, 1976 and the Service Regulations of 2011 were framed pursuant to Section 18 of the said Ordinance. The Director-General is the head of BARI and he is subordinate to the Secretary of the Ministry of Agriculture. As the controlling authority of the Director-General of BARI, the Secretary, Ministry of Agriculture is the appellate authority and accordingly the respondent no. 4 preferred the appeal to the Secretary, Ministry of Agriculture under Regulation 46 of the Service Regulations of 2011.

11. In the Affidavit-in-Reply filed on behalf of the petitioner, it has been stated that as per the seniority list of the Finance and Accounts Section of BARI, the petitioner is senior to the respondent no. 4 and that is why, the petitioner was legally promoted to the post of Senior Assistant Director (Finance and Accounts).

12. At the outset, Mr. A. M. Amin Uddin, learned Advocate appearing on behalf of the petitioner, submits that prior to cancellation of the promotion of the petitioner by the Secretary, Ministry of Agriculture, the petitioner was not afforded any opportunity of being heard and in that view of the matter, the impugned order (Annexure-‘H’ to the writ petition) was passed by not following the principle of “Audi Alteram Partem” and in this perspective, the impugned Annexure-‘H’ is not sustainable in law and, therefore, it is liable to be struck down.

13. Mr. A. M. Amin Uddin further submits that it is on record that the petitioner joined as Assistant Director (Accounts) in a project under the name and style “Horticulture Development Project” in 1997 and the project came to an end on 31.12.1999 and afterwards 44 (forty-four) posts of the project including the post of the petitioner were transferred to the Revenue Budget from the Development Budget and the post of the petitioner was kept on year- to-year retention basis and the respondent no. 3, by an office-order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts) in BARI on temporary basis and subsequently the respondent no. 2, by an order dated 24.05.2006, regularized the service of the petitioner as Assistant Director (Finance and Accounts) of BARI and as per Rule 5(1) of the Rules of 2005, the seniority of the petitioner shall have to be counted from the date of his regularization in the Service of BARI with effect from 24.05.2006 and it is the admitted position that the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 and this being the position, it is evident that the petitioner is

senior to the respondent no. 4 and as such the petitioner was rightly promoted to the post of Senior Assistant Director (Finance and Accounts) on 09.09.2012.

14. Mr. A. M. Amin Uddin also submits that no forum of appeal as contemplated by Regulation 46 of the Service Regulations of 2011 is available to the respondent no. 4 and as the respondent no. 4 is aggrieved by the promotion order of the petitioner dated 09.09.2012, he ought to have filed a Review Petition before the authority under Regulation 47 of the Service Regulations of 2011 and the appeal before the Secretary, Ministry of Agriculture preferred by the respondent no. 4 being not maintainable, he illegally entertained the appeal, passed an order for formation of a three-member inquiry committee into the matter and ultimately on the basis of the report dated 29.05.2013 (Annexure-‘29’ to the affidavit-in-opposition of the respondent no. 4) of the three-member inquiry committee, he rescinded the orders of promotion and regularization of the petitioner in the service of BARI by Annexure-‘H’ to the writ petition and in such a posture of things, the Annexure-‘H’ is non est in law.

15. Mr. A. M. Amin Uddin further submits that Chapter Seven of the Service Regulations of 2011 relates to “সাধারণ আচরণ ও শৃংখলা” and the provision of appeal as contemplated by Regulation 46 of the Service Regulations of 2011 is intended for dealing with matters arising out of disciplinary proceedings only and the impugned order (Annexure-‘H’ to the writ petition) was passed by an authority who was not empowered to hear and decide the appeal of the respondent no. 4 and the entire exercise undertaken by the Secretary, Ministry of Agriculture in this regard was an illegal exercise.

16. Mr. A. M. Amin Uddin next submits that Clause (kha) and Clause (ga) of Sub-Regulation (2) of Regulation 46, in particular, pertain to disciplinary proceedings and in that view of the matter, Regulation 46 of the Service Regulations of 2011 does not provide for any forum of appeal against the promotion order of the petitioner dated 09.09.2012; but curiously enough, the Secretary, Ministry of Agriculture disregarded the same and made the impugned order which is not tenable in law.

17. Mr. A. M. Amin Uddin also submits that the Director-General of BARI did not apply his mind to the cancellation of the promotion of the petitioner and at the behest or dictation of the Secretary, Ministry of Agriculture, the Director-General rescinded the order of promotion of the petitioner by issuing Annexure-‘N’ to the application for issuance of a further Rule and since the Annexure-‘N’ was issued being dictated by the Secretary, Ministry of Agriculture, it cannot be sustainable in law. On this point, Mr. A. M. Amin Uddin has referred to the decisions in the cases of *The Purtabpore Co., Ltd...Vs...Cane Commissioner of Bihar and others, 1 SCC 308; State of U. P. and others...Vs...Maharaja Dharmander Prasad Singh and others, 2 SCC 505* and *Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others...Vs...Md. Faizur Rahman and others, 51 DLR (AD) 59*.

18. Per contra, Mr. Abdul Wadud Bhuiyan, learned Advocate appearing on behalf of the respondent no. 4, submits that the three-member inquiry committee formed by the Ministry of Agriculture perused the papers and documents submitted by both the contestants, namely, the petitioner and the respondent no. 4 and the inquiry committee also heard them in person and as the Secretary, Ministry of Agriculture acted in accordance with the recommendation given by the three-member inquiry committee, it cannot be said by any stretch of imagination that the principle of “Audi Alteram Partem” was not adhered to prior to issuance of the impugned order by the Secretary, Ministry of Agriculture (Annexure-‘H’ to the writ petition) and in this perspective, the Annexure-‘H’ is perfectly a valid and lawful order.

19. Mr. Abdul Wadud Bhuiyan next submits that there were only 2(two) posts in the organogram of BARI at the relevant point of time and as such the post of the petitioner, on its transfer from the Development Budget to the Revenue Budget, was kept on year-to-year retention basis up to 31st May, 2012 and as there was no substantive post of the petitioner in the Service Regulations of 1990 (since repealed), he could not be made permanent until 01.06.2012 and admittedly the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 against a substantive vacant post and such being the state of affairs, the respondent no. 4 is undoubtedly senior to the petitioner; but the BARI authority illegally deprived the respondent no. 4 of his due promotion and promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) by the order dated 09.09.2012.

20. Mr. Abdul Wadud Bhuiyan further submits that as per Sub-Rule (3) of Rule 4 of the Rules of 2005, the recommendation of the DPC or the Selection Committee, as the case may be, is a sine qua non for regularization of the service of the petitioner; but indisputably no recommendation was made either by the DPC or by the Selection Committee for regularization of the service of the petitioner in accordance therewith and this being the landscape, the order of promotion of the petitioner dated 09.09.2012 made by the Director-General of BARI is ex-facie illegal.

21. Mr. Abdul Wadud Bhuiyan also submits that although Chapter Seven of the Service Regulations of 2011 is captioned “সাধারণ আচরণ ও শৃংখলা”, yet the fact remains that any order can be appealed against before the higher authority as per Regulation 46 of the Service Regulations of 2011 and the preferring of any appeal to the higher authority arising out of any promotion matter as in the present instance to the Secretary, Ministry of Agriculture by the respondent no. 4 has not been debarred by Regulation 46, regard being had to the language of Clause (ka) of Sub-Regulation (2) of Regulation 46 of the Service Regulations of 2011.

22. Mr. Abdul Wadud Bhuiyan further submits that Clause (ka) of Sub-Regulation (2) of Regulation 46 provides— “এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না” and this provision engrafted therein clearly indicates that the appellate authority shall consider whether the prescribed procedure has been followed under the Service Regulations of 2011 and in case of failure to follow the prescribed procedure thereunder, whether there has been a failure of justice by that reason and this Clause (ka) leaves no room for doubt that the appeal to the Secretary, Ministry of Agriculture preferred by the respondent no. 4 was very much competent.

23. Mr. Abdul Wadud Bhuiyan next submits that admittedly the respondent no. 4 did not prefer any review application to the Director-General of BARI as contemplated by Regulation 47 of the Service Regulations of 2011 and instead of preferring any review application before him, the respondent no. 4 chose to prefer an appeal against the order of promotion of the petitioner dated 09.09.2012 and the appeal was duly disposed of by the Secretary, Ministry of Agriculture on the basis of the report dated 29.05.2013 submitted by the three-member inquiry committee.

24. Mr. Abdul Wadud Bhuiyan also submits that it is on record that the BARI authority formed a three-member committee to determine the inter se seniority of the petitioner and the respondent no. 4 and that committee, after hearing the parties and perusing the relevant documents and papers submitted by them, made a report dated 05.09.2012 (Annexure-‘23’) to the Director-General of BARI recommending fixation of inter se seniority of the parties by the Ministry of Public Administration; but for some mysterious and cryptic reasons, the Director-General himself snubbed the report of the committee (Annexure-‘23’) and promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) on 09.09.2012 by superseding the respondent no. 4 and this action is indicative of the malafide intention or bad faith on the part of the Director-General.

25. Mr. Abdul Wadud Bhuiyan next submits that the decisions in the cases of *The Purtabpore Co., Ltd...Vs...Cane Commissioner of Bihar and others, 1 SCC 308; State of U. P. and others...Vs...Maharaja Dharmander Prasad Singh and others, 2 SCC 505 and Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others...Vs...Md. Faizur Rahman and others, 51 DLR (AD) 59* relied upon by Mr. A. M. Amin Uddin being clearly distinguishable are not applicable to the facts and circumstances of the present case and the reference to those decisions by Mr. A. M. Amin Uddin is a shot in the dark.

26. Mr. Abdul Wadud Bhuiyan further submits that being senior to the petitioner, the respondent no. 4 got selection grade scale of Tk. 15,000-26,200/- on 13.12.2010 with effect from 15.08.2010; but the petitioner did not get the same as is apparent from Annexure-‘19’ to the affidavit-in-opposition of the respondent no. 4 and on 08.10.2013, the appellate authority, having considered the pros and cons of the matter and regard being had to the seniority of the respondent no. 4, rescinded the order of promotion of the petitioner dated 09.09.2012 and directed the respondent no. 2 to take necessary steps for promotion of the respondent no. 4 within 30(thirty) working days.

27. Mr. Abdul Wadud Bhuiyan lastly submits that this is a Writ of Certiorari and in a Writ of Certiorari, the scope of interference of the High Court Division under Article 102 of the Constitution is very limited and in support of this submission, he draws our attention to the decision in the case of the Government of Bangladesh and another...Vs...Md. Afsar Ali and others reported in 58 DLR (AD) 107 wherein it has been held by our Appellate Division that the High Court Division can interfere with the findings of fact arrived at by the inferior Tribunal only when it can be shown that the findings are based on no evidence or non-consideration of material evidence and as the impugned order (Annexure-‘H’ to the writ petition) does not come within the purview of the “ratio” enunciated in the aforesaid decision, the petitioner has no legs to stand upon.

28. Mr. Abul Kalam Chowdhury, learned Advocate appearing on behalf of the respondent no. 2, submits that Regulation 46 of the Service Regulations of 2011 provides for the forum of appeal and accordingly the respondent no. 4 preferred his appeal before the appellate forum against the order of promotion of the petitioner dated 09.09.2012 and the appellate authority disposed of the appeal in accordance with law and as the impugned order of the appellate authority dated 08.10.2013 (Annexure- ‘H’ to the writ petition) was passed as per law, the petitioner can not get any relief in this Writ Petition.

29. We have heard the submissions of the learned Advocate Mr. A. M. Amin Uddin and the counter-submissions of the learned Advocates Mr. Abdul Wadud Bhuiyan and Mr. Abul Kalam Chowdhury and perused the Writ Petition, Supplementary Affidavit, Affidavits-in-Opposition, Supplementary Affidavits-in-Opposition, Affidavit-in-Reply and relevant Annexures annexed thereto.

30. It goes without saying that this is a Writ of Certiorari under Article 102 of the Constitution. In this regard, we feel tempted to say that the High Court Division exercising power while dealing with the Writ of Certiorari does not work as a Court of Appeal and as such it is not required to make determination of facts on its own. It can interfere with the findings of a Court of facts under its extra-ordinary jurisdiction under Article 102 only if it can be shown that the Court has acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the petitioner or it has acted malafide or in violation of the principle of natural justice. This view is underpinned by the decision in the case of the Government of Bangladesh ... Vs...Md. Jalil and others reported in 15 BLD (AD) 175.

31. In the decision in the case of the Government of Bangladesh and another...Vs...Md. Afsar Ali and others reported in 58 DLR (AD) 107 adverted to by Mr. Abdul Wadud Bhuiyan, it has been held by the Appellate Division that the High Court Division can interfere with the findings of fact arrived at by the inferior Tribunal only when it can be shown that the findings are based on no evidence or non-consideration of material evidence.

32. From the aforementioned two decisions of the Appellate Division, it is manifestly clear that in a Writ of Certiorari, the scope of interference of the High Court Division under Article 102 of the Constitution is very limited. So keeping this in view, we will adjudicate upon the Rules.

33. It is admitted that the petitioner first joined as Assistant Director (Accounts) in Horticulture Development Project under BARI, Gazipur on 15.03.1997 and the duration of the project eventually ended on 31.12.1999. It is further admitted that 44(forty-four) posts of the project including the post of the petitioner were transferred from the Development Budget to the Revenue Budget with effect from 01.01.2000. It is also undisputed that after the transfer of the post of the petitioner to the Revenue set-up, it was kept on year-to-year retention basis till 31st May, 2012.

34. Be that as it may, the respondent no. 3, by an office-order dated 03.05.2006, posted the petitioner as Assistant Director (Finance and Accounts) of BARI on temporary basis. Thereafter the respondent no. 2, by an order dated 24.05.2006, regularized the petitioner in the service of BARI as Assistant Director (Finance and Accounts). One of the core questions raised in this writ petition is this: was the petitioner regularized in the service of BARI on 24.05.2006 in violation of the provisions of Sub-Rule (3) of Rule 4 of the Rules of 2005? Sub-Rule (3) of Rule 4 of the Rules of 2005 contemplates that “কর্মকমিশনের আওতাভুক্ত কোন পদে কমিশনের সুপারিশক্রমে এবং কমিশনের আওতা বহির্ভূত কোন পদে বিভাগীয় পদোন্নতি বা বাছাই কমিটির সুপারিশক্রমে নিয়মিত করিতে হইবে।” Undeniably the post of the petitioner is beyond the jurisdiction of the Public Service Commission and that being so, for regularizing the service of the petitioner, the recommendation of the DPC or the Selection Committee, as the case may be, is a must. But admittedly no recommendation of the DPC or the Selection Committee, as the case may be, was obtained prior to regularization of the service of the petitioner in BARI. So we find that the petitioner was regularized in the service of BARI as Assistant Director (Finance and Accounts) on 24.05.2006 in flagrant violation of Sub-Rule (3) of Rule 4 of the Rules of 2005.

35. Of course, as per Sub-Rule (1) of Rule 5 of the Rules of 2005, the seniority of any regularized officer or employee shall be calculated from the date of his regularization in the service. As the petitioner was regularized in the service of BARI on 24.05.2006 illegally, the provisions of Sub-Rule (1) of Rule 5 of the Rules of 2005 cannot be called in aid in this respect.

36. It transpires that the DPC in its meeting dated 09.09.2012 unanimously recommended the petitioner for promotion to the post of Senior Assistant Director (Finance and Accounts) of BARI and the said recommendation was also ratified by the Management Board of BARI in its 50th General Meeting on that very date (09.09.2012). On the self-same date (09.09.2012), the Director-General of BARI promoted the petitioner to the post of Senior Assistant Director (Finance and Accounts) and on that very date, the petitioner also joined his promoted post. From the trend of these events, it seems that the BARI was in an unusual hurry to promote the petitioner to the next higher post without caring for the legality or otherwise of the regularization of the service of the petitioner.

37. On a careful perusal of the organogram of BARI, it becomes crystal clear that there were 2(two) sanctioned posts of Assistant Director (Finance and Accounts) in BARI at the relevant point of time. Indisputably the respondent no. 4 and one Md. Younus Ali were holding those two substantive posts of Assistant Director (Finance and Accounts) at that time. There was no substantive or permanent third post of

Assistant Director (Finance and Accounts) till its creation and inclusion in the Service Regulations of 2011. As mentioned earlier, the post of the petitioner as Assistant Director (Finance and Accounts) of BARI was kept on year-to-year retention basis till 31st May, 2012. Against this backdrop, the question of regularization of the service of the petitioner as Assistant Director (Finance and Accounts) of BARI on 24.05.2006 was out of the question. Accordingly after the framing of the Service Regulations of 2011, the post of the petitioner was made substantive/permanent on 01.06.2012.

38. In this connection, the relevant provisions of Regulation 6 of the Service Regulations of 2011 may be quoted below verbatim:

“৬। পদোন্নতির মাধ্যমে নিয়োগ।— (১) এই প্রবিধানমালার বিধান এবং তফসিলের বিধানাবলী সাপেক্ষে, কোন কর্মচারীকে পরবর্তী উচ্চতর পদে পদোন্নতির মাধ্যমে নিয়োগ করা যাইবে।

(৪) কোন কর্মচারী তাহার পদে স্থায়ী না হইলে তাহাকে পদোন্নতি দেওয়া যাইবে না।

(Emphasis laid is ours.)

39. So it is palpably evident that unless any employee is made permanent in his post, he can not be promoted to the next higher post. There is no gainsaying the fact that the respondent no. 4 directly joined BARI as Assistant Director (Finance and Accounts) on 15.08.2006 against a substantive vacant post and he was made permanent therein with effect from that date (15.08.2006). On the contrary, it may be recalled that the post of the petitioner, on its transfer to the Revenue Budget from the Development Budget, was kept on year-to-year retention basis till 31st May, 2012. As per Annexure-‘41’ to the affidavit-in-opposition filed by the respondent no. 4, the Ministry of Public Administration by its Memo No. ০৫.১৫৭.০১৫.০১.০৫.০০৪.২০০১(অংশ-১)-১১৭ dated 17.05.2010 informed the Ministry of Agriculture that “নিয়োগবিধি চূড়ান্ত না হওয়া পর্যন্ত পদগুলি স্থায়ী করণের কোন অবকাশ নেই”. Again according to the Service Regulations of 2011, an Assistant Director (Finance and Accounts) can not be promoted to the post of Senior Assistant Director (Finance and Accounts) unless he has completed a minimum of 5(five) years service as Assistant Director (Finance and Accounts). As the petitioner was made permanent in the post of Assistant Director (Finance and Accounts) on 01.06.2012, the question of completion of a minimum of 5(five) years service in that capacity by him did not arise at all on 09.09.2012, that is to say, on the date of his promotion to the post of Senior Assistant Director (Finance and Accounts) of BARI. It appears that the BARI authority completely disregarded this aspect of the matter while promoting the petitioner to the next higher post on 09.09.2012.

40. Mr. Abdul Wadud Bhuiyan, it seems, has rightly submitted that the respondent no. 4 got selection grade scale of Tk. 15,000-26,200/- on 13.12.2010 with effect from 15.08.2010; but the petitioner did not get the benefit of selection grade scale as he was junior to the respondent no. 4 and prior to the promotion of the petitioner to the post of Senior Assistant Director (Finance and Accounts), his scale of pay was Tk. 11,000-20,370/-. This dimension of the matter was also ignored by the BARI authority before promoting the petitioner to the post of Senior Assistant Director (Finance and Accounts).

41. It is mysteriously astounding that the report dated 05.09.2012 (Annexure-‘23’) of the three-member committee formed by the Director-General of BARI was given a go-by by the Director-General himself wherein the committee unanimously recommended fixation of inter se seniority of the petitioner and the respondent no. 4 by the Ministry of Public Administration. It does not stand to reason and logic as to why the Director-General gave a damn to the report dated 05.09.2012 and promoted the petitioner to the next higher post immediately thereafter, that is to say, on 09.09.2012. This conduct of the BARI authority smacks of some bad motive.

42. However, the next contentious issue between the petitioner and the respondent no. 4 is about the availability or otherwise of the forum of appeal as postulated by Regulation 46 of the Service Regulations of 2011. For proper appreciation of the submission and the counter-submission of the learned Advocates on this crucial point, Regulation 46 is reproduced below:

“৪৬। আদেশের বিরুদ্ধে আপীল।—(১) কোন কর্মচারী উপযুক্ত কর্তৃপক্ষ কর্তৃক সাধারণ বা বিশেষ আদেশ দ্বারা, নির্ধারিত কর্তৃপক্ষের নিকট, অথবা যে ক্ষেত্রে অনুরূপ কোন কর্তৃপক্ষ নির্ধারিত নাই, সেই ক্ষেত্রে যে আদেশদানকারী কর্তৃপক্ষের আদেশের বিরুদ্ধে আপীলের প্রস্তাব করা হইবে, তিনি যে কর্তৃপক্ষের অব্যবহিত অধঃস্তন তাহার নিকট অথবা যে ক্ষেত্রে নিয়োগকারী কর্তৃপক্ষের অধঃস্তন কোন কর্তৃপক্ষ আদেশ দান করিয়াছেন, সেই ক্ষেত্রে নিয়োগকারী কর্তৃপক্ষের নিকট আপীল করিতে পারিবেন।

(২) আপীল কর্তৃপক্ষ নিম্নোক্ত বিষয়সমূহ বিবেচনা করিবে, যথাঃ—

(ক) এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না;

(খ) অভিযোগসমূহের উপর প্রদত্ত সিদ্ধান্ত সঠিক ও ন্যায়সংগত কি না; এবং

(গ) আরোপিত দণ্ড মাত্রাতিরিক্ত, পর্যাপ্ত বা অপর্യാপ্ত কি না।

(৩) আপীল কর্তৃপক্ষ যেরূপ উপযুক্ত বলিয়া বিবেচনা করিবে সেইরূপ আদেশ প্রদান করিবে।

.....”

43. In this context, it may be pointed out that admittedly the respondent no. 4 did not file any review application to the authority as per Regulation 47 of the Service Regulations of 2011. Instead of filing any review application under Regulation 47, he chose to prefer an appeal before the appellate authority (Secretary, Ministry of Agriculture) under Regulation 46 of the Service Regulations of 2011. As per the submission of Mr. A. M. Amin Uddin, Chapter Seven of the Service Regulations of 2011 is captioned “সাধারণ আচরণ ও শৃংখলা” and in that view of the matter, the appeal as contemplated by Regulation 46 is intended to deal with matters arising out of disciplinary proceedings only. In contra-distinction to this submission, Mr. Abdul Wadud Bhuiyan draws our attention to Clause (ka) of Sub-Regulation (2) of Regulation 46 wherein it has been stated— “এই প্রবিধানমালার নির্ধারিত পদ্ধতি পালন করা হইয়াছে কি না, না হইয়া থাকিলে উহার কারণে ন্যায় বিচারের হানি হইয়াছে কি না” and contends that all kinds of appeals are entertainable by the appellate authority under Regulation 46. Again Mr. A. M. Amin Uddin adverts to Clause (kha) and Clause (ga) of Sub-Regulation (2) of Regulation 46 wherein it has been respectively stated— “অভিযোগসমূহের উপর প্রদত্ত সিদ্ধান্ত সঠিক ও ন্যায়সংগত কি না; এবং আরোপিত দণ্ড মাত্রাতিরিক্ত, পর্যাপ্ত বা অপর্യാপ্ত কি না” and argues that the appeals are confined to disciplinary proceedings only. It is true that Chapter Seven of the Service Regulations of 2011 is captioned “সাধারণ আচরণ ও শৃংখলা”. But none the less, it appears from the language employed in Regulation 46(1) that the appellate authority can hear any appeal preferred against any order by an aggrieved employee and the appeal need not be confined to matters arising out of disciplinary proceedings only. In the present case before us, admittedly the Director-General of BARI is subordinate to the Secretary of the Ministry of Agriculture. In other words, the Secretary of the Ministry of Agriculture is the controlling officer of the Director-General of BARI. So it is seen that the Secretary of the Ministry of Agriculture is the appellate authority of the Director-General of BARI. Clause (ka) of Sub-Regulation (2) of Regulation 46 provides that the appellate authority will consider whether the procedure prescribed under the Service Regulations of 2011 was complied with or not and in case of non-compliance, whether there was any miscarriage of justice on that account. Reading the provisions of Regulation 46 as a whole, we reiterate that an aggrieved employee can prefer an appeal to the appellate authority against any order of the authority. Accordingly the respondent no. 4 rightly preferred the appeal to the appellate authority (respondent no. 1). Of course, Clause (kha) and Clause (ga) of Regulation 46(2) are obviously designed for the appellate authority to deal with matters arising out of disciplinary proceedings. Precisely speaking, the appellate authority can entertain any appeal against any order of the authority, whether it relates to disciplinary proceedings or not, under Regulation 46 of the Service Regulations of 2011. That being the legal position, our definite finding is that the appeal preferred by the respondent no. 4 before the Secretary, Ministry of Agriculture was very much maintainable.

44. Now a pertinent question arises: was the appellate authority, or for that matter, the Secretary of the Ministry of Agriculture legally justified in forming a three-member inquiry committee to inquire into the subject-matter of the appeal? In this connection, Sub-Regulation (1) of Regulation 55 contemplates:

“এই প্রবিধানমালায় উল্লেখ নাই, এইরূপ কোন বিষয়ে, সরকারী কর্মচারীদের ক্ষেত্রে প্রযোজ্য বিধি-বিধান, যতদূর সম্ভব, অনুসরণ করা হইবে।”

Again Sub-Regulation (3) of Regulation 46 provides:

“আপীল কর্তৃপক্ষ যেরূপ উপযুক্ত বলিয়া বিবেচনা করিবে সেইরূপ আদেশ প্রদান করিবে।”

45. The Government Servants (Discipline and Appeal) Rules, 1985 may be referred to in this respect. Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985 provides that in the case of an appeal against any other order, the appellate authority shall consider all the facts and circumstances of the case and pass such orders as it deems just and equitable. What we are driving at boils down to this: from a combined reading of the provisions of Sub-Regulation (3) of Regulation 46 of the Service Regulations of 2011 and Sub-Rule (2) of Rule 22 of the Government Servants (Discipline and Appeal) Rules, 1985, the position that emerges is that the appellate authority will pass such orders as it deems just and equitable, regard being had to the facts and circumstances of the case. Given this scenario, it can not be said that the appellate authority committed any illegality by way of forming a three-member inquiry committee and acting upon the report dated 29.05.2013 of that committee (Annexure-‘29’). The procedure prescribed under the Service Regulations of 2011 was not deviated or departed from by the appellate authority (respondent no. 1) in any manner.

46. In this Writ of Certiorari, generally speaking, the finding of the appellate authority cannot be substituted by our finding. In the writ jurisdiction of the High Court Division, we will only see as to whether the finding arrived at by the appellate authority is based on the materials on record or not. In a Writ of Certiorari, it is well-settled, the High Court Division is not an Appellate Court and as the High Court Division is not an Appellate Court, it will not review or re-assess the materials on record unless it is absolutely necessary in order to interfere with a perverse finding of the appellate authority. This being not the case, we are not inclined to interfere with the order under challenge contained in Annexure-‘H’ to the writ petition.

47. As to the contention of Mr. A. M. Amin Uddin that at the behest or dictation of the Secretary, Ministry of Agriculture, the Director-General of BARI issued the order contained in Annexure-‘N’ to the application for issuance of a further Rule and the Director-General of BARI did not apply his mind to the materials on record independently and as the Director-General was mechanically in tune with the Secretary of the Ministry of

Agriculture, the impugned Annexure-‘N’ is liable to be knocked down as being illegal, we would like to observe that the appellate authority, that is to say, the Secretary, Ministry of Agriculture is competent under Regulation 46 to review the entire matter and with that end in view, he formed a three-member inquiry committee of the Ministry of Agriculture and he acted on the basis of the report dated 29.05.2013 of that inquiry committee in rescinding the promotion and regularization orders of the petitioner. In this view of the matter, the original authority must act in accordance with the order passed by the appellate authority. In such a situation, it cannot be agitated that the Director-General of BARI illegally complied with the directive of the Secretary, Ministry of Agriculture by issuing Annexure-‘N’ which is in complete accord with Annexure-‘H’.

48. The facts and circumstances of the cases of *The Purtabpore Co., Ltd....Vs....Cane Commissioner of Bihar and others*, 1 SCC 308; *State of U. P. and others...Vs...Maharaja Dharmander Prasad Singh and others*, 2 SCC 505 and *Board of Intermediate and Secondary Education, Dhaka represented by its Chairman and others...Vs...Md. Faizur Rahman and others*, 51 DLR (AD) 59 banked upon by Mr. A. M. Amin Uddin appear to be signally distinguishable from those of the present case. As such the reference to those cases by Mr. A. M. Amin Uddin is of no avail to him.

49. As regards the submission of Mr. A. M. Amin Uddin that the principle of “Audi Alteram Partem” was not adhered to prior to issuance of Annexure-‘H’ to the writ petition, suffice it to say that undeniably the three-member inquiry committee formed by the Secretary, Ministry of Agriculture heard both the petitioner and the respondent no. 4 in person and perused their papers and documents in support of their respective claims and thereafter the inquiry committee submitted its report dated 29.05.2013 to the appellate authority and ultimately the appellate authority acted on the said report dated 29.05.2013 and made the impugned order contained in Annexure-‘H’ to the writ petition. In this perspective, can we say that the petitioner was condemned unheard by the appellate authority? In our view, the principle of “Audi Alteram Partem” was substantially complied with when they were heard in person by the three-member inquiry committee formed by the appellate authority and as admittedly the appellate authority acted on the report dated 29.05.2013 of the inquiry committee, the question of violation of the principle of natural justice cannot be entertained in any view of the matter. So we are led to hold that the petitioner was not condemned unheard by the appellate authority. Consequently the orders respectively passed by the appellate authority contained in Annexure-‘H’ and the Director-General of BARI contained in Annexure-‘N’ cannot be found fault with on that count.

50. From the foregoing discussions and in view of the facts and circumstances of the case, we have no hesitation in holding that there is no merit in the Rules. The Rules, therefore, fail. Accordingly, the Rules are discharged without any order as to costs.