

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 5640 of 2018.

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-And-

IN THE MATTER OF :

Md. Rafiqul Islam and others

.....Petitioners.

-Versus-

Bangladesh, represented by the Secretary, Ministry
of Public Administration and others.

.....Respondents.

Mr. S.M. Quamrul Hasan with
Ms. Rabeya Khanom, Advocates

...For the petitioners.

Mr. Tirtha Salil Pal, Advocate

...For the respondent No.4

Mr. Sk. Shaifuzzaman, DAG with
Ms. Rehana Sultana, AAG and
Mr. Md. Salim Azad, AAG and
Mr. Md. Samiul Alam Sarkar, AAG and
Ms. Zulfia Akhter, AAGs

.....For the respondents.

Present:

Mr. Justice K.M. Kamrul Kader

&

Mr. Justice Mohammad Showkat Ali Chowdhury

Heard On : 22.09.2021 & 13.07.2023

And

Judgment On : 01.11.2023.

K.M. Kamrul Kader, J:

On an application preferred by the petitioner under Article 102 of the
Constitution of the People's Republic of Bangladesh, this Rule *Nisi* was
issued 12.04.2018, in the following terms:

*“Let a Rule Nisi be issued calling upon the respondents to
show cause as to why the impugned letter dated 30.05.2013*

under Memo No.05.159.015.45.00.008. 2000-185 (Annexure-E) and letter dated 27.11.2016 under Memo No.05.00.0000. 159.00.008.2000 (Angsha-1)-408 (Annexure-G) issued by the Ministry of Public Administration, respondent No.1 under signature of its Deputy Secretary, Zaheda Parvin denying to absorb the service of the petitioners under the revenue budget discriminating with the other posts of the same project namely থানা স্বাস্থ্য কমপ্লেক্সের সার্বিক কর্মকান্ডের উন্নয়ন (১ম পর্ব-৫০ টি) should not be declared to have passed without lawful authority and is of no legal effect and why they should not be directed to absorb the petitioners under the revenue budget with continuity of service and other benefits and/or pass such other or further order of orders as to this Court may seem fit and proper.”

The averments figured in the writ petition, in support of the Rule, in short is that the petitioners were appointed in a project namely "থানা স্বাস্থ্য কমপ্লেক্সের সার্বিক কর্মকান্ডের উন্নয়ন (১ম পর্ব ৫০টি)" as Driver and they were joined in the said post on 01.06.1994 and 26.06.1995 respectively and after completion of said project the petitioners were transferred to a project namely Essential Service Package, ESP and lastly, they were transferred to Community Clinic Project, under the respondent No.6 and since the date of transfer the petitioners discharging their duties with full satisfaction to the authority concerned without any objection from any corner. It is stated that, after completion of the project the respondent No.5 requested the respondent No.3 to absorb the petitioners and 7 other posts under the revenue budget and the respondent No.3 requested the Secretary, Ministry of Establishment respondent No.1, to absorb the 10 (ten) posts of the concluded project along

with the petitioners vide letter dated 30.04.2000 under memo No. ডি.ও প্রবা-৩/থানা-৭/৯৯/০৬. It is further stated that the Ministry of Establishment, approved 05(five) posts of Secretary and M.L.S.S. vide letter dated 21.06.2000 under memo No. সম/টিম ৫(২)-৮/২০০-১১২ under signature of its Senior Assignment Officer excluding the post of the petitioners without giving any reasons and the same was communicated to the respondent No.5 vide letter 02.07.2000 under memo No. স্বাপকম/প্রবা-৩/থানা-৭/৯৯/৪৭২ and the respondent No.5 was keep silent to further correspondence about the petitioners. The Ministry of Health-respondent No.3, again requested the Ministry of Public Administration, respondent No.1 to absorb the petitioners under the revenue budget vide letter dated 17.04.2013 under memo No. 45.174.014.02.00.002.2013-123. The respondent No.1 vide letter dated 30.05.2013 under memo No.05.159.015.45.00.008.2000-185 under the signature of the Deputy Secretary, Ministry of Public Administration denied the said request stating that there is no opportunity to consider the proposal of absorption of the petitioner, after completion of 14 years of this project. The respondent No. 3 vide several Memo requested the respondent No. 1 to absorb the petitioners service in revenue budget but the respondent No.1 denied to accept their proposal. It is also stated that the petitioner No.1 made an application on 09.04.2018, before the respondent No.3 to take necessary steps to absorb their service under the revenue budget, but the respondents did not pay any heed to it.

Being aggrieved by and dissatisfied with the Memo No.05.159.015.45.00.008. 2000-185 dated 30.05.2013 and Memo

No.05.00.0000. 159.00.008.2000 (Angsha-1)-408 dated 27.11.2016 issued by the respondents, denied to absorb the service of the petitioners under the revenue budget, finding no other alternative and equally efficacious remedy the petitioners filed this instant writ petition and obtained the present Rule.

Mr. S.M. Quamrul Hasan the learned Advocate appearing on behalf of the petitioners submits that since the petitioners are ordinary employees, performing their as driver and continuing their service in different projects from their date of joining on 01.06.1994 and 26.06.1995 respectively and the proposal for absorption was made immediate after conclusion of their initial project along with other posts and the then Ministry of Establishment absorbed only 05(five) posts excluding the petitioners, which tantamount to discrimination and thereby, the respondents had violated the fundamental rights of the petitioners as guaranteed in our constitution. Equality before law and equal opportunity in public employment and there shall not be any differentiation amongst the persons similarly situated in giving jobs and our constitution protects the rights and interest of the people by controlling the abuse of power in as much as Rule of law postulates and connotes an assertion of majesty of constitution and bedrock of administrative legality and as such, he prays for a direction upon the respondents to absorb the petitioners under the revenue budget with continuity of service and other benefits. He also submits that Non-discrimination in the matter of public employment is the core principle of Article 29 for which the Government is bound to absorb the petitioners of the projects under the revenue budget. Article 29 has imposed a constitutional duty on the Government to treat all the employees of the project equally and they should be absorbed under the

revenue budget with continuity of service and other benefits like other five employees. Thus, impugned orders are illegal, malafide, discriminatory, unwarranted, void abinitio and without lawful authority because the Ministry of Public Administration does not have any lawful authority to take a new decision contrary to the decision of the Head of the executive Government and as such, he prays for making the Rule absolute.

Mr. Tirtha Salil Pal, learned Advocate appearing on behalf of the respondent No.4 by filing an affidavit-in-opposition opposes the Rule and submits that the petitioners were appointed initially "থানা স্বাস্থ্য কমপ্লেক্সের সার্বিক কর্মকাণ্ডের উন্নয়ন (১ম পর্ব ৫০টি)" as Driver. Thereafter, the Government took Health, Population Sector Program (HPSP) followed by the 3rd Sector Program (HPNSDP). The petitioners were transferred consecutively to the abovementioned last 02(two) projects by the DGHS as skilled employees and lastly, they were working in the said 3rd Sector Program (HPNSDP) in Emergency Service Delivery (ESD) activities. Considering the continuity of satisfactory services of the petitioners, the concerned official of the respondent No.4 duly recommended absorbing their services in the revenue budget. This recommendation was duly forwarded to the office of the respondent No.1, Ministry of Public Administration, by the office of respondent No.3, Ministry of Health & Family Welfare. He further submits that the issues of grievance of the petitioners are mainly directed to the respondent No.1 and the respondent No.4 has hardly any significant role to play to that regard. The office of the respondent No.4 has already forwarded necessary recommendation and subsequent clarification to the concerned authority regarding the agitating issues of the petitioners. The respondent

No. 4 is prepared and will follow the decision of this Court as would be directed by adjudication of the instant rule. He further submits that the Rule of the instant writ petition is liable to be discharged in the light of the judgment and Order dated 02.07.2019 passed by the Hon'ble Appellate Division of the Supreme Court of Bangladesh in **Civil Appeal No.460 of 2017 with Civil Review Petition No.181 of 2018, Secretary, Ministry of Fisheries and Livestock and others –Vs.- Abdul Razzak and others, reported in 71 DLR (AD)(2019)395** and the judgment and order dated 09.02.2020 in **Civil Petition for Leave to Appeal Nos.994 of 2018 with 990 and 993 of 2018, The Director General, represented by Bangladesh Rural Development Board (BRDB), Dhaka –Vs.- Asma Sharif, Shariatpur and others, reported in 72 DLR(AD)(2020)188.**

We have heard the submissions of the learned Advocates for both the parties and perused the writ petition, supplementary affidavit and affidavit-in-opposition and the annexures annexed thereto.

It appears from record that the writ petitioners were appointed in a project namely "থানা স্বাস্থ্য কমপ্লেক্সের সার্বিক কর্মকান্ডের উন্নয়ন (১ম পর্ব ৫০টি)" as Driver and they were joined in the said post on 01.06.1994 and 26.06.1995 respectively and after completion of said project the petitioners were transferred to a project namely Essential Service Package, ESP and lastly they were transferred to Community Clinic Project, respondent No.6 and since the date of transferred the petitioners discharging their duties with full satisfaction to the authority concerned without any objection from any corner.

The writ petitions concerning absorption in the revenue budget with the continuity of service were disposed of by this Division in several cases mainly based on the decision of Government of Bangladesh, represented by the *Secretary, Ministry of Labour and Manpower vs. Mohammad Anisur Rahman 18 MLR (AD) 372* and the *Chief Engineer, the Local Government and Engineering Department and others vs. Kazi Mizanur Rahman and others 17 BLC (AD) 91*.

Subsequently, an appeal against a decision on similar matter arising out of Writ Petition No. 7166 of 2015, the Hon'ble Appellate Division finally set at rest the earlier decisions passed by this Division mainly based on 18 MLR (AD) 372 and 17 BLC (AD) 91. We have found that the Hon'ble Appellate Division has cleared up every aspect of the common issues leaving no ambiguity. The decision is the *Secretary, Ministry of the Fisheries and Livestock and others vs. Abdur Razzak and others 71 DLR AD 395* in order to absorb the employees and officers of development project, the government has promulgated Rules namely “উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিত/করন ও জেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫” and Rule ২(গ) of the said Rules says as under:

২(গ) উন্নয়ন প্রকল্পের কর্মকর্তা ও কর্মচারী অর্থ ১৯৭২ সনের এপ্রিল মাসের ৯ তারিখ হইতে ৩০শে জুন ১৯৯৭ ইং তারিখের মধ্যে শুরু হওয়া উন্নয়ন প্রকল্পের কোন পদে ফেল ভিত্তিতে নিযুক্ত কর্মচারী এবং ১৯৮৩ সনের মে মাসের ১৩ তারিখ বা তৎপরবর্তীকালে রাজস্ব বাজেটের কোন পদ সাময়িকভাবে পদস্থ কর্মকর্তা বা কর্মচারী; admittedly for better understanding and to dispel all sorts of anomalies, it is better to quote only the most relevant portion from Judgment of the Honorable Appellate Division, wherein their Lordships crystallized the whole thing in the following manner:

"Since the provisions of "Bidhimalas" are statutory provisions the authority concerned must comply with the provisions of the "Bidhimalas" as quoted earlier before regularization of absorbed officers and employees in the revenue set up. However, this Court is bound to insist the Government making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. No court can direct the Government or its instrumentalities to regularize the service of the officers and employees of the development project in the revenue budget in the cases where statutory requirements have not been fulfilled. Regularization cannot be claimed as a matter of right. It is statutory requirement that opportunity shall be given to eligible persons by public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the Government. When the High Court Division is approached for relief by filing writ petition, necessarily the High Court Division has to ask itself whether the person before it had any legal right to be enforced or not. It cannot be directed to devise a third mode of selection. Accordingly, it is observed that:

1. The legitimate expectation would not override the statutory provision. The doctrine of legitimate expectation cannot be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision.

2. While transferring any development project and its manpower to revenue budget the provisions provided in

the notifications, government orders and circulars quoted earlier must be followed. However, it is to be remembered that executive power can be exercised only to fill in the gaps and the same cannot and should not supplant the law, but only supplement the law.

3. Before regularization of service of the officers and employees of the development project in the revenue budget the provisions of applicable "Bidhimala" must be complied with. Without exhausting the applicable provisions of the "Bidhimala" as quoted above no one is entitled to be regularised in the service of revenue budget since those are statutory provisions.

4. The appointing authority, while regularising the officers and employees in the posts of revenue budget, must comply with the requirements of statutory rules in order to remove future complication. The officers and employees of the development project shall get age relaxation for participation in selection process in any post of revenue budget as per applicable Rules.

5. A mandamus cannot be issued in favour of the employees directing the government and its instrumentalities to make anyone regularized in the permanent posts as of right. Any appointment in the posts described in the schedule of Bangladesh Civil Service Recruitment Rules, 1981, Gazetted Officers (Department of Live Stock Service) Recruitment Rules, 1984 and Non-gazetted Employees (Department of Live Stock Service) Recruitment Rules, 1985 by passing Public Service Commission should be treated as back door appointment and such appointment should be stopped.

6. To become a member of the service in a substantive capacity, appointment by the President of the Republic shall be preceded by selection by a direct recruitment by the PSC. The Government has to make appointment according to recruitment Rules by open competitive examination through the PSC.

7. Opportunity shall be given to eligible persons by inviting applications through public notification and appointment should be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law.

8. It is not the role of the Courts to encourage or approve appointments made outside the constitutional scheme and statutory provisions. It is not proper for the Courts to direct absorption in permanent employment of those who have been recruited without following due process of selection as envisaged by the constitutional scheme.

In view of the discussion made above and since it is not apparent from the judgment of the High Court Division and other materials available in the record that the procedure provided in the Government notification, circulars or orders and the process of appointment indicated in the "Bidhimalas" 1995 or 2005 have been followed duly for appointing the writ petitioners and that they are no longer in service in view of terms of appointment letters and contracts, the direction of the High Court Division to absorb/regularize their service giving continuity of the same cannot be approved. So, the same is set aside."

Under such circumstances, the petitioners have no right to be regularized or permanent in the concerned department. If the respondents

published any advertisement for appointment, the petitioners as per directive of our Apex Court are entitled to file application. Further, if the petitioners' service is continues for 20(twenty) years or more as employee of the project without break then the authority take appropriate step to give pecuniary benefit to the petitioners. We find support of this contention, in the case of ***Government of Bangladesh and Ors. Vs. Md. Saiful Islam and Ors 16, SCOB [2022] AD***, wherein their Lordships held that:

“We are of the same view that after receiving continuous service for 20 years from a work-charged employee without break, if he is left in uncertainty over his future, that is wholly denying socio-economic justice and completely contrary to Fundamental Principles of State Policy as enumerated in part II of our Constitution. The Government should formulate a policy instrument for giving pensionary and other benefits to the work-charged employees who have served without break for a considerable period of time i.e. for 20 years or more. All the authorities should take immediate appropriate action in that behalf.”

Considering these aspects of the matter, we are of the view that justice would be better served if we direct the respondents to give opportunity to the petitioners to file the applications and the authority may consider their applications in this regard.

Accordingly, the Rule is disposed of with direction. The respondents are directed to give opportunity to the petitioners to file applications, if the respondents published any advertisement for recruitment in the similar posts. The respondents may consider their application if any, by relaxation of their age limit. The respondents are also directed to take appropriate step for

providing pecuniary or service benefits to the petitioners if the petitioners' service is continues for 20(twenty) years or more as employees of the project/projects without break, if they attained their retirement age or released from their service.

However, there is no order as to costs.

Communicate at once.

Mohammad Showkat Ali Chowdhury, J:

I agree.