

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

WRIT PETITION NO. 13604 of 2018

In the matter of:

An application under Article 102 read with Article 44 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of :

Md. Moshiar Rahman

..... Petitioner

-Versus-

Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Ramna, Dhaka and others

..... Respondents

Mr. Md. Rokon Uddin Mahmud, Senior Advocate with

Mr. Md. Oziullah and

Mr. Md. Moazzem Hossain, Advocates

..... For the petitioner

Mr. Muhammad Mohsen Rashid with

Mr. Muhammad Zeeshan Mohsen, Advocates

..... For respondent Nos.1 and 4

**Heard on 23.01.2019, 30.01.2019,
05.02.2019 and Judgment on 24.10.2019**

Present:

Mr. Justice Md. Ashfaul Islam

And

Mr. Justice Mohammad Ali

Md. Ashfaul Islam, J.:

This Rule under adjudication, issued on 04.11.2018, at the instance of the petitioner, was in the following terms: -

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the Rule 9 of Bangladesh Service Rule (BSR) part-I, as of Annexure-M should not be declared to be void and ultra vires to the Constitution and why the Memo No.05.00.0000.130.32.808.15-530 dated 4.9.2018 issued by the respondent No.3, as of Annexure-I should not be declared to have been made without lawful authority and is of no legal effect and why a direction should not be given upon the respondents to conduct a proper and thorough inquiry to ascertain the age of the petitioner on the basis of the Secondary School Certificate and/or such other or further order or orders passed as to this court may seem fit and proper.”

At the time of issuance of the Rule a direction was given upon the parties to maintain status-quo in respect of possession and position.

The averments made in the petition, leading to the Rule are as under:-

The petitioner Md. Moshir Rahman was born on 02.01.1962. Petitioner after going through early schooling, passed the Secondary School Certificate (S.S.C) Examination in 1976 with Second Division

from the Bagachara United High School under the Board of Intermediate and Secondary Education, Jashore. The Board in its S.S.C Certificate dated 04.07.1976, issued in favour of the petitioner, mistakenly mentioned the petitioner's date of birth as 02.01.1960 in place of 02.01.1962. Due to inadvertence and lack of guidance under the then prevailing socio-economic circumstances no measures were taken to correct the apparent error on the S.S.C Certificate of the petitioner.

It has been stated that while filling up the application/form for the Bangladesh Civil Service (BCS) Examination in 1985, the petitioner mentioned the wrong date of birth as appeared in the S.S.C Certificate dated 04.07.1976, as he did not have any other legal document in support of his original date of birth i.e. 02.01.1962. Thereafter, to rectify the apparent error on the S.S.C Certificate as to his date of birth, the petitioner in 1986 before joining the Cadre Service applied for correction of the date of birth as appeared in the S.S.C Certificate dated 04.07.1976. The petitioner's application for correction of date of birth went through the lengthy process at the Jashore Board at a very slow pace and subsequently, the Jashore Board in its meeting held on 21.04.1987, 11.06.1987 and 12.06.1987 following scrutiny of necessary documents accepted 02.01.1962 in place of 02.01.1960 as the correct date of birth of the petitioner. However, the decision regarding correction of the date of

birth of the petitioner was not communicated to the petitioner until November, 2006 (Annexure-‘A’, ‘A-1’ and ‘A-2’).

It has been further stated that although Jashore Board corrected the mistake as to the petitioner’s date of birth on 21.04.1987 prior to petitioner’s joining at the Cadre Service, the petitioner as he was not aware of the said decision of the Jashore Board having found no other legal document out of necessity unwillingly stated wrong date of birth as per his S.S.C Certificate dated 04.07.1976 in ‘Personal Data Sheet’ and other official documents while joining at the Cadre Service on 15.02.1988. Be it mentioned that the Jashore Board as in November, 2006 communicated their decision regarding correction of date of birth to the petitioner on 01.11.2006 (Annexure-‘B’).

It appears from the petition that on 28.11.2006 Jashore Board replaced petitioner’s S.S.C Certificate dated 04.07.1976 with a new Certificate with actual date of birth of the petitioner (Annexure-‘C’). On 14.6.2007 soon after obtaining corrected S.S.C Certificate, with actual date of birth the petitioner applied to the respondents to take necessary steps to record the date of birth in ‘Personal Data Sheet (PDS)’ as per the corrected SSC Certificate being the legal document confirming the date of birth of the petitioner (Annexure-‘D’).

It has also been stated that long after submission of the petitioner’s application, the respondents by a memo dated 07.04.2016

sought queries and also directed the petitioner to submit necessary documents in support of his application (Annexure-‘E’).

The petitioner after explaining the reasons for delay to give reply of the above Memo dated 07.04.2016 promptly, by a letter dated 14.01.2018 replied to the queries which had been sought by the said Memo, petitioner also mentioned that in a similar circumstances Office of the Comptroller and Auditor General of Bangladesh allowed to correct the date of birth recorded in service book and records upon receiving corrected S.S.C Certificate from the Jashore Board (Annexure-‘F-series’).

Then again on 03.05.2018 the petitioner again applied to correct his date of birth in PDS based on the corrected S.S.C Certificate (Annexure-‘G’).

The respondent No.2 by a Memo dated 24.06.2018 directed the petitioner to submit the documents filed with Jashore Board for correction of date of birth. The respondent No.2 by another Memo dated 19.07.2018 requested the Jashore Board to provide the records relating to the petitioner’s application for correction of date of birth. The Controller, Examination of Jashore Board by a memo dated 13.8.2018 narrated the fact relating to the correction of date of birth of the petitioner, however, the Board could not supply the records as requested for, due to the long time lapse and for not maintaining the records due to

repeated shifting of the offices of the concerned department of the Jashore Board (Annexure-‘H’ and ‘H-1’).

The respondent No. 4, Deputy Secretary, Ministry of Public Administration by a memo dated 04.09.2018 suddenly without showing any reason mechanically with reference to the Rule 9 of BSR Part-1 kept the petitioner’s application, for correction of his date of birth in PDS on the basis of duly corrected SSC Certificate, in record/file without making any final decision on the same (Annexure-‘I’).

It is at this stage the petitioner moved this Division and obtained the present Rule and order of Status-quo.

Mr. Md. Rokon Uddin Mahmud, the learned Senior Advocate appearing with Mr. Md. Oziullah and Mr. Md. Moazzem Hossain the learned Advocate(s) for the petitioner after placing the petition and other materials on record mainly submits that the impugned order is ex-facie illegal and without lawful authority, being violative of the fundamental rights under Article 27, 29 and 31 of the Constitution and the same is afflicted by malice in law and in fact, and also passed in violation of principles of natural justice.

In elaborating his submissions the learned Counsel contends that the S.S.C Certificate issued by the Board of Intermediate and Secondary Education, Jashore on 28.11.2006 is a valid legal document to confirm age of the petitioner which ought to have been considered by the respondents in dealing with the petitioner’s application for correction of date of birth in PDS. As per Rule 9 of BSR Part-1 read with the Rule 24

of General Financial Rules, date of birth in official service records can be corrected in certain circumstances. If, as he submits, the service book/register would be rectified based on the corrected SSC Certificate of the petitioner issued by the competent authority, Jashore Board, Jashore that would not be manifestly unjust and unreasonable because after completion of all legal formalities it has been done. Therefore, memo dated 4.9.2018 that is the impugned order issued by the respondent No.4, the Deputy Secretary, Ministry of Public Administration should be declared illegal, unlawful having no legal effect. In this regard the learned Counsel placed reliance in the decision of Pragati Industries Ltd. vs. AKM Mafizur Rahman and others reported in 16 BLC (HC) 374 in which the principle of reasonableness was applied and decision was given in respect of change in date of birth.

Drawing our notice to Annexure-‘F-series’ of the writ petition Mr. Mahmud submits that in a similar circumstances Office of the Comptroller and Auditor General of Bangladesh allowed to correct the date of birth of one Mr. G.M. Anisur Rhaman recorded in service book and records upon receiving corrected S.S.C Certificate from the Jashore Board.

He further submits as per if Rule 9 of BSR Part-1 read with the Rule 116 of General Financial Rules, date of birth in official service records can be corrected in certain circumstances. The petitioner will be highly prejudiced if, on the basis of, mechanical interpretation of Rule 9 of BSR Part-1 be accepted as contained in the order impugned against. Certainly, the impugned order has been issued in colourable exercise of

power and in gross violation of fundamental rights of the petitioner guaranteed under the Constitution.

Therefore, he submits that this Rule should be made absolute in all fairness.

By filing affidavit-in-opposition Mr. Muhammad Mohsen Rashid, appearing with Mr. Muhammad Zeeshan Mohsen the learned Advocate(s) for the answering respondents on the other hand vehemently opposes the Rule. He has categorically stated in the affidavit-in-opposition that the petitioner's date of birth as provided by him is recorded as 02.01.1960 and he has passed his S.S.C in the year 1976, that is, at the age of 16 years which is the national average age of passing S.S.C exams. If the date is changed then his age of passing S.S.C would be 14 years. Further as per the writ petition he had applied for correction of the date of birth and the same was purportedly corrected by the Board of Intermediate and Secondary Education, Jashore on 21.04.1987 that is, before his joining the cadre service, that being so, then what prompted him to write his date of birth as 02.01.1960 on 15.02.1988 when he filled up the form in his own hand at the time of joining in Government Service, is a question which remains a mystery.

It has been further stated that no where in the writ petition the petitioner has stated the date or produced a copy of the application to the Board to ascertain as to when and how did he discover that his date of birth has been wrongly recorded because thereafter he has passed H.S.C

in 1978; B.Sc. in 1980; M.A. in 1983 and LL.B (preliminary) in 1984 which is a normal sequence. It is surprising that from 1976 until 1984 the writ petitioner did not realize that his date of birth has been wrongly written in the S.S.C Certificate.

It has been further submitted that as per the writ petition the Jashore Board communicated the decision of correction of date of birth in November 2006 and that it took him another 7 months to communicate the matter of change of date of birth to his employer, this answering respondent.

He further submits that the petitioner being a cunning person, from the very beginning of his service started planning and indulging in a malafide act for extending his service by two years and came to this Division with unclean hands at a point in time when he has reached the age to superannuate that is retirement.

In respect of Rule 9 of B.S.R part-1 it has been submitted that in all likelihood the same cannot be declared ultra-virus of the Constitution, because if that is done, it will open a pandora's box and many would be attracted to change their date of birth to extend their services which would create confusion and anarchy in the service of the Republic, therefore, the challenge mounted to the Rule is a malafide exercise by the writ petitioner to get his service extended by two years. The writ petitioner was suppose to go on PRL from 01.01.2019 on being

superannuated and he himself being in government service for the next two years through a pre-planned malafide scheme which he devised at the time of joining service, but kept it a secret. The Rule 9 of BSR Part-1 if declared ultra-virus would put the entire service of the Republic in serious jeopardy and create uncontrollable anarchy in all the services of the Republic.

In support of his contention he has placed reliance upon some decisions. Those are *Habibur Rahman Khan vs. Bangladesh and others* 53 DLR AD 105, *Aleem Jute Mills Limited vs. Mia Eklas Uddin Ahmed and others* XIII ADC (2016) 107 and *G.M., Bharat Coking Coal Ltd., West Bengal vs. Shib Kumar Dushad and others* (2000) 8 SCC 696.

We have heard the learned Advocate appearing for both the parties at length. We have considered the petition, affidavit-in-opposition and other materials on record carefully with precision.

The moot question that calls for consideration in this petition is whether under the facts and circumstances of the instant case conjunct with the relevant laws and in particular some serious attending circumstances, this Rule would sustain.

Admittedly, the original Matriculation Certificate of the petitioner contains year of issue 1960 as it was found in the S.S.C Certificate dated 04.07.1976. But it has been claimed that the same was done mistakenly, which should have been 02.01.1962. It is also admitted that the

petitioner appeared in the public service Commission Examination in the year of 1985 and thereafter in the year of 1987 in a successive meeting of the Jashore Board dated 21.04.1987, 11.06.1987 and 12.06.1987, on scrutiny it was accepted that the correct date of birth of the petitioner in the certificate would be 02.01.1962 in place of 02.01.1960. Therefore, the petitioner knew his date of birth was 02.01.1962 when he joined in the service in the year of 1988, then how come the petitioner in his joining form duly filled up in his own hand stated his date of birth as 02.01.1960? Admittedly, when he knew that his date of birth by the Jashore Board was changed in the previous year 1987 as 02.01.1962. It is also admitted that this change of date of birth in the S.S.C Certificate was communicated to the petitioner by the Jashore Board in the year 2006. Of course, right thereafter, he has applied to the authority on 14.06.2007 to do the needful in this respect.

Be it mentioned that at the time of joining in the service in the year 1988, retirement age of government servant was 57 years which he was well aware. Thereafter by the amendment of Public Servants (Retirement) (Amendment) Act, 2012 which came into gazette on 20.02.2012, section 4 was amended and the government servant retirement age of 57 years was extended up to 59 years.

Since, the petitioner from the very beginning was well aware of all these facts he took some steps to correct his age first of all when he came

to know that the retirement age of Government Servant was 57 years as per Public Servant (Retirement) Act, 1974. He also knew it very well that with this two years extension of service he can continue for another two years after his actual date of superannuation, that is on January 19.01.2019, that is, this year. For further appreciation let us now quote provision 9 of Bangladesh Service Rules Part 1 which enjoins:

“বিধি-৯। সরকারী চাকুরীতে যোগদানের সময় একজন প্রার্থী তাঁহার যে বয়স ঘোষণা করেন তাহাই তাঁহার চাকুরী জীবনের জন্য প্রযোজ্য হইবে এবং পরবর্তীকালে যে কোন উদ্দেশ্যেই হউক না কেন উহার কোন পরিবর্তন করার তাঁহার কোন অধিকার থাকিবে না বা অনুমতি দেওয়া হইবে না।”

In the decisions referred to above reported in 53 DLR AD 105 the Hon’ble Appellate Division held “The High Court Division therefore rightly held that the declaration made under Rule 9 could be modified by the employer on the basis of evidence to the contrary. The declaration does not put an embargo on the employer to look into the personal record of the declarant to see if the declaration made in the verification roll is correct or not. The petitioner having failed to prove that his date of birth as recorded in the Matriculation Certificate was wrong the High Court Division rightly held that the petitioner would retire as per section 4 of Act XII of 1974 on completion of age 57 years on the basis of his age found in Matriculation Certificate.”

In the case reported in 13 ADC 107 the Appellate Division again reiterated “Be that as it may we are of the view that S.S.C Certificate being a legally recognized document giving the date of birth for the writ petitioner carries more weight than any of the other dates of birth claimed by the parties in this case. We therefore hold that the date of birth appearing in the S.S.C certificate of the writ petitioner is the legal date of birth of the writ petitioner-respondent No. 1.”

In the case of GM., Bharat Coking Coal Ltd., West Bengal vs. Shib Kumar Dushad and others 2000(8) SCC 696 it has been held: “ In a case where the controversy over the date of birth of an employee has been raised long after joining the service and the matter has engaged the attention of the authority concerned and has been determined by following the procedure prescribed under the service rules or general instructions issued by the employer and it is not the case of the employee that there has been any arithmetical mistake or typographical error patent on the face of the record, the High Court in exercise of its extraordinary jurisdiction under Article 226 of the constitution should not interfere with the decision of the employer”.

In the said case Indian Supreme Court strongly held that the onus lies heavily on the claimant that is the petitioner in a given situation to discharge the burden what actuated him to change the age.

Admittedly, the petitioner after passing the S.S.C examination successively passed other three public examinations held in the year that is H.S.C in the year 1978, B.Sc in 1980, M.A 1983 and LL.B preliminary in 1984 but from 1976 till 1984 the petitioner never realized that his date of birth has been wrongly written in the S.S.C certificate. Even after receiving the corrected S.S.C Certificate in the year 2006 he took up the matter for further steps in the year of 2007 but he did not pursue that and finally with the change of the age of the government servant in the year of 2012 he took up this matter again on 07.04.2016. Therefore, the service Rule 9 as it stands has been reasonably breached when he expressed his intention other than what he declared at the time of joining in the service.

The entire discipline in the government service and other sector would also be shattered in this respect if this provision has been given a go by that is to say to declare ultra vires the constitution. The doctrine of reasonableness does not also permit to give a decision contrary to that, otherwise everyone after joining in the service can easily go for the correction of Certificate and there will be an absolutely anarchy in the Government Service, needless to mention.

(All the linings are mine)

We cannot also subscribe ourselves to the submissions of Mr. Mahmud that in a similar circumstances Office of the Comptroller and Auditor General of Bangladesh allowed to correct the date of birth of one Mr. G.M. Anisur Rhaman as it appears from Annexure-‘F-series’, for the reason that the same was not challenged by the Office of the Comptroller and Auditor General or any other persons. Therefore, it would be absolutely unjustified to accept the said act as an example or precedent. If it be allowed that would lead to a dangerous consequence in the discipline of Government Service. The decision cited by the learned Counsel in 16 BLC as referred to above which was against the Judgment and Order passed by the Labour Appellate Tribunal, is quite distinguishable from the instant case.

Pertinently, regulations for age correction as it could be seen from Compilation of the General Financial Rules by Ministry of Finance it has been stated in para 116 that every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his by the Christian era with as as far as possible confirmatory documentary evidence, such as a Matriculation Certificate municipal birth certificate and so on. If the exact date is not known, an approximate date may be given. The actual date or the assumed date determined under Para 117 should be recorded in the history of service, service book, or any other record may be kept in respect of the

Government servant's service under Government and once recorded, it cannot be altered, except in the case of a clerical error, without previous orders of the Local Administration.

So, all these admitted facts, dates and the chain of circumstances which started early from 1987 till date manifestly surface a pertinent question what prevented the petitioner to go for a correction of date of birth in the Certificate before 1987? No acceptable, logical and plausible answer has been given in the fore corner of the writ petition. The reasons that has been afforded to justify this is that due to inadvertence and lack of guidance under the then prevailing socio economic circumstances no measure were taken to correct the apparent error in the S.S.C Certificate of the petitioner. This cannot be accepted being bereft of any rationale.

Fortified with all the decisions and the discussions, we are of the view that this rule should be discharged being devoid of any substance.

In the result, the rule is discharged, however, without any order as to costs. The order of status quo granted earlier by this court is hereby recalled and vacated.

Communicate at once.

Mohammad Ali, J:

I agree.