

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

**WRIT PETITION NO. 15362 OF 2018.**

**IN THE MATTER OF :**

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

**IN THE MATTER OF :**

Selim.

..... Petitioner.

**-VERSUS -**

Government of the People's republic of Bangladesh represented by the Secretary, Ministry of Local Government, Rural Development and Co-Operative, Local Government Division, Bangladesh Secretariat, Dhaka and others.

.... Respondents

Mr. Mohammad Saiful Islam, Advocate

.....For the petitioner.

Mr. A.K.M. Fazlul Hoque, Advocate

....For the respondent No.13.

Mr. ABM Abdullah Al Mahmud, D.A.G with

Mr. Ashique Rubaiyat, AAG

.....For the respondents.

**Present:**

*Mr. Justice K.M. Kamrul Kader*

*And*

*Mr. Justice Mohammad Ali*

**Heard On: 01.12.2022 & 19.01.2022**

**And**

**Judgment On: 12.03.2023.**

**K.M. Kamrul Kader, J:**

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh the Rule Nisi was issued on 12.12.2018 in the following terms:-

*“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the respondents should not be directed to regularize/absorb the petitioner as M.L.S.S. (Office Sohayak) of Homna Upazilla Parishad, Homna, Comilla under the revenue budget of the People’s Republic of Bangladesh and/or pass such other or further order or orders as to this Court may seem fit and proper.”*

Facts necessary for disposal of the Rule, in short, are that Homna Upazilla Parishod by a resolution dated 27.12.2016 took decision for appointing one M.L.S.S on master roll/daily basis. In pursuance of the said resolution dated 27.12.2016 the respondent No. 12, the Upazilla Nirbahi Officer published an advertisement in a local daily "AMADER COMILLA" on 04.05.2017 for temporary appointment in the post of M.L.S.S (Office Sohayak) in Homna Upazilla Parishod, Comilla on master roll/daily basis payment. The petitioner having required qualification applied for the said post. Subsequently, he was selected and the authority issued appointment letter vides memo No. ০৫.০২.১৯৫৪.১০১.০০১.০০০. ২০১৭-358 dated 25.05.2017. The petitioner joined in the post on 01.06.2017 and since then he has been serving on master roll/daily basis with utmost sincerity and dignity and without any objection from any corner. It is also stated in the petition that while the petitioner has been discharging his duties and responsibilities with utmost sincerity to the satisfaction of all, he came to know that the respondent No.12 has published an advertisement for appointment in the post of M.L.S.S (Office Sohayak) against one permanent vacant post in Homna Upazilla Parishod.

The petitioner collected the copy of the said advertisement which was published on 07.09.2018 in the daily "MANABJAMIN". Subsequently, on 29.07.2013 the respondent No.8, Senior Assistant Secretary, Administrative Development Department of Cabinet Secretary issued an office order vide memo No. 08,00,0000.211.06.023.13.315 dated 29.07.2013 stating that considering the insufficiency of outsourcing service providers in the local area as well as the sensitivity of the activities of the Upazilla Parishod the authority has decided to appoint M.L.S.S (Office Sohayak) in accordance with rules and regulations instead of outsourcing process. Thereafter, the Ministry of Public Administration accorded its consent by issuing an office order vide memo No. 05.154.015.০২.০০.০০৫.২০০০ (খলু-১)-৩০১ dated 31.10.2013 to appoint 962 M.L.S.S (Office sohayak) in 481 Upazilla Parishod under revenue budget in accordance with rules and regulations instead of outsourcing process. Thereafter, Finance Division, Ministry of Finance also accorded its consent in this regard by issuing offices order vides memo No.07.156.028.10.04.01.2003.03 dated 07.01.2014 and fixed the salary scale for the post of M.L.S.S (Office Sohayak) by issuing another officer order vide memo No.০৭.০০.০০০০.১৬২,৪৬.০২৮.১১-৬৭ dated 29.04.2014. Subsequently, the respondent No.5, Deputy Secretary of Ministry of Local Government and Rural Development issued no objection letter vide memo No.8.08.05.00.00.008.2018 dated 14.08.2014 for temporary appointment of 962 M.L.S.S (Office Sohayak) in 481 Upazilla Parishod. The said no objection letter was valid for a period of 06(six)

months from the date of issue. In pursuance of the said no objection letter when different Upazilla Parishod in the country attempted to gave appointment to other person, other than the persons who were serving as M.L.S.S (Office Sohayak) on master roll basis in different Upazilla Parishod of the Country, few M.L.S.S from different Upazilla Parishod filed several writ petitions for regularization/absorption their post and the rule was issued in those writ petitions were disposed of by this Court on 09.03.2015 with direction upon the respondents to absorb/regularize/confirm the petitioners in their respective/equivalent posts in the revenue budget with continuity of service in accordance with law and the said Judgment dated 09.03.2015 passed by this Court were upheld by the Hon'ble Appellate Division in the Civil Petition for Leave to Appeal No.3205-3208 of 2015 as well as in Civil Review Petition No.129 of 2017. It is further stated that one Abu Hanif, son of Haji Md. Khalil Mia who was temporary M.L.S.S (Office Sohayak) working on master roll basis in Homna Upazilla Parishod was one of the writ petitioner in Writ Petition No.8221 of 2014 and subsequently he has been absorbed/confirm as M.L.S.S (office Sohayak) as permanent employee government under the revenue budget. Under such a circumstances the petitioner contacted with respondent No.11 and 12 and requested them to explain the justification of such advertisement since at the time of his initial appointment on master roll basis, he was given the impression that he will be regularized/absorbed in the said post as permanent employee in due course of time, but the authority did not pay any heed to it.

Being aggrieved by the action of the respondents, the petitioner finding no other alternative, efficacious remedy filed the instant writ petition before this Court and obtained the present Rule.

Mr. Mohammad Saiful Islam learned Advocate appearing on behalf of the petitioner and submits that the petitioner has been serving in the said post since his appointment and has acquired skills and expertise and there is no allegation of misconduct against him, rather; the petitioner has been serving satisfactorily without any blemish from any quarter. He further submits that when the petitioner got appointment on master roll basis in pursuant to the resolution dated 27.12.2016, he has clear impression that he will be absorbed/regularized in the revenue budget as permanent employee in due course of time which is also evident from the language of the said resolution. He again argued that if the petitioner's service is not absorbed/regularized in the said post then he will be discriminatory to him because one of his colleague was working as temporary M.S.S.S. (Office Sohayak) on master roll basis in Homna Upazilla Parishad and he was one of the writ petitioner in Writ Petition No.8221 of 2014 and as per direction of this Court as well as the Hon'ble Appellate Division his service has been absorbed/confirmed as M.L.S.S. (Office Sohayok) as permanent employee of the Government under the revenue budget on 14.03.2018. The learned Advocate for the petitioner lastly submits that the service of the petitioner can be regularized/absorbed as per the guidelines formulated in the decision reported in 17 BLC (AD)91 and prays for absolute the Rule.

Mr. A.K.M. Fazlul Hoque, the learned Advocate appearing on behalf of the respondent No.13 without filing any affidavit-in-opposition and submits that in recent cases, namely 72 DLR (AD)188, 13 SCOB (2020)(AD) 26, the Appellate Division of the Supreme Court of Bangladesh has taken a view that a mandamus cannot be issued in favour of the employees directing the government and its instrumentalities to make any one regularized in the permanent posts as of right. Therefore, in the light of the precedence taken by our Apex Court which is binding on our High Court Division and as such the rule is liable to be discharged.

We have heard the submissions of the learned Advocate for the petitioners and the learned Deputy Attorney General and perused the writ petition, supplementary affidavit and the annexures annexed thereto.

It appears from the record that the writ petitioner was appointed in the post of M.L.S.S (Office Sohayak) in Homna Upazilla Parishod, Comilla on master roll/daily basis payment and he was appointed in order to facilitate the smooth functioning of the administration and he was paid regularly from the budget allocated by the concerned authority.

Learned Advocate for the petitioner argued that the petitioner was duly appointed and has requisite qualifications. He has been continuing his service in his respective post with utmost sincerity to the satisfaction of all. Therefore, he has *legitimate expectation* that he would be absorbed against the permanent posts. In this connection, he referred to the case of **Bangladesh Biman Corporation –vs.- Rabeya Bashri Irene and others**

reported in 55 DLR (AD) 132. In the case referred to above, the Appellate Division has held as under:-

*“In the background of the existing practice of absorbing the employee of the petitioner’s category on satisfactory completion of the initial period of employment under a contract, it can be said that there was a reasonable ground for the writ petitioners to expect for being absorbed permanently in the service of the corporation.”*

The learned Advocate for the petitioner also argued that the petitioner joined in the post of M.L.S.S (Office Sohaya) in Homna Upazilla Parishod, Comilla on master roll/daily basis payment. Thus, the writ petition is also covered under the guidelines given in the decision reported in **18 MLR (AD) 372** and **17 BLC (AD) 91**.

The writ petition 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**.

But, on an subsequent appeal against a decision of this kind 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*

*Fisheries and Livestock and others vs. Abdur Razzak and others reported in 71 DLR (AD) 399.* For better understanding and to dispel all sorts of anomalies it is better to quote only the most relevant portion from Judgment of the Appellate Division. 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 bypassing Public Service Commission should be 41 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 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/regularise their service giving continuity of the same cannot be approved. So, the same is set aside."*

Under such circumstances and the discussions made above, we are of the view that justice would be best served if we direct the respondents to continue the appointment process and consider the petitioner's application, if any, in accordance with law. We hope that the authority shall give preference to the writ petitioner in the appointment process, if he is not otherwise disqualified subject to relaxation of the age limit.

In the result, the Rule is disposed of. The respondents are directed to continue the appointment process and shall give preference to the writ petitioner in the appointment, if he is not otherwise disqualified subject to relaxation of the age limit. However, there is no order as to costs.

Communicate the judgment and order at once.

**Mohammad Ali, J:**

I agree.