

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Present

Madam Justice Kashefa Hussain

And

Madam Justice Fatema Najib

Writ Petition No. 1626 of 2019

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. Humayun Kabir

..... Petitioner.

Vs.

Governemnt of Bangladesh and others.

.....Respondents.

Mr. Najmul Huda, Advocate

.....For the petitioner.

Mr. Noor Us Sadik Chowdhury, D.A.G

with Mr. Md. Awlad Hossain, A.A.G

with Mr. Rashedul Islam, A.A.G

.... for the respondent Nos. 1-3

Mr. Md. Abdullah-Al-Mamun, Advocate

.... for the respondent No. 4.

Heard on: 03.04.2022, 04.04.2022
and judgment on: 06.04.2022.

Kashefa Hussain, J:

Rule nisi was issued in the instant writ upon the respondents to show cause as to why the Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ dated

12.06.2018 fixing the age limit of the petitioner and others to 35 years for initial appointment in the post of Lecturer, Assistant Teacher, Assistant Moulvi, Demonstrator, etc. (Annexure-H) and the undated public notice (গণবিজ্ঞপ্তি) of the respondent No. 2 inviting e-application between 19.12.2018 to 02.01.2019 for the appointment of Teachers in the vacant posts of Non-government Education Institutions from the registered candidates of NTRCA whose age was within 35 years (Annexure-J) should not be declared to have been passed without lawful authority and is of no legal effect and as to why a direction should not be given upon the respondents to relax the age restriction of the petitioner and others to make e-application pursuant to public notice (গণবিজ্ঞপ্তি) for the appointment of Assistant Teacher in the vacant post of the Non-Government Educational Institutions and to consider the appointment of the petitioner in the post of Assistant Teacher (ICT) at Barabari Boyez Uddin High School, Rangpur Sadar, Rangpur what they are required by law to do and /or such other or further order or orders passed as to this court may seem fit and proper.

The petitioner case inter alia is that the petitioner is a brilliant Assistant Teacher (Information and Communication Technology, ICT) of Barabari Boyez uddin High School, Rangpur Sadar, Rangpur. That respondent No. 1 is Bangladesh represented by the Secretary, Secondary and Higher Education Division of the Ministry of Education, the respondent No. 2 is the Chairman of the Executive Board of Non-Government Teachers' Registration and Certification Authority (NTRCA), the respondent No. 3 is the Director General (DG),

Directorate of Secondary and Higher Education and the respondent No. 4 is Barabari Boyez Uddin High School represented by its Headmaster.

The petitioner was appointed in the post of Assistant Teacher (Computer) at Barabari Boyez uddin High School, Rangpur Sadar, Rangpur vide a letter under memo No. ১০/০১১/নিঃ (১) তাং- ১৭/০৭/২০১১ ইং under the signature of the said school, that is the respondent No. 4. Subsequently, he joined therein on 20.07.2011 after complying with all legal formalities which was accepted by the school authority. The Board of Secondary and High Education, Dinajpur approved the course “Computer Education” in the Barabari Boyez Uddin High School, Rangpur Sadar, Rangpur on 13.01.2013 in compliance to the direction of the Ministry of Education. The petitioner has passed the 10th Teachers Registration Examination held in 2014 conducted by Non-Government Teachers’ Registration & Certification Authority (NTRCA) as per the provisions of Non-Government Teachers’ Registration Act, 2005 and he obtained 61.50 percentage of marks. The Non-Government Teachers’ Registration and Certification Authority (NTRCA) has published the combined national merit list on 10.07.2018 for the subject Computer Education for School and Madrasha and according to said merit list the position of the petitioner is 587 and therefore he is entitled to get appointment in the said subject of his school where he is serving since long or somewhere else in Bangladesh. The petitioner has been serving the respondents and other authority concerned since his joining with complete satisfaction and his service record is unblemished. The respondents have not enlisted his name in the MPO though he is a

regular Assistant Teacher of ICT at Barabari Noyez Uddin High School, Rangpur Sadar, Rangpur and he is receiving his salary from the contribution of the school concerned, that is the respondent No. 4. The petitioner has served as polling officer in the 11th National Parliament Election satisfactorily and he is also a regular invigilator of S.SC Examination 2019. That the petitioner has applied on a number of occasions for the post of Assistant Teacher (Computer) in different schools through e-application of NTRCA but he is yet to be appointed permanently in the said post as a MPO enlisted teacher. After being appointed by the respondent No. 4 and being qualified by NTRCA the petitioner has long been waiting to be appointed in the permanent post of Assistant Teacher (ICT) in the school where he is serving presently nor did the respondents arrange his posting at a new school/madrasah for him in the said post. By qualifying in the examination of 2014 conducted by NTRCA and in a better position of the merit list the petitioner could reasonably expect his appointment in accordance with law. However the respondents most arbitrarily and with a malafide intention kept his matter hanging over the years. That it is the legitimate expectation of the petitioner that his turn will come for appointment in the post of Assistant Teacher (ICT) when his merit serial comes of. Although he has been waiting long, no positive steps been taken by the government or the respondents in connection with his appointment. That the petitioner has been qualified through a rigorous selection process of NTRCA in accordance with law and the petitioner and others similarly situated have been waiting eagerly for their appointment. That the Secondary and High

Education Division of the Ministry of Education, that is the respondent No. 1 most arbitrarily and with a mala fide intention published “বেসরকারি শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এম.পি.ও নীতিমালা -২০১৮ ” on 12.06.2018 wherein Rule 11.6 it has clearly imposed age restriction for appointment in the initial post of teacher and other employees in the following manner “বেসরকারি শিক্ষা প্রতিষ্ঠানের শিক্ষক-কর্মচারীদের চাকরিতে প্রথম প্রবেশের সর্বোচ্চ বয়সসীমা ৩৫ বছর। তবে সমপদে বা উচ্চতর পদে নিয়োগের ক্ষেত্রে ইনডেক্সধারীদের জন্য বয়সসীমা শিথিলযোগ্য।” That by promulgating the aforesaid rules the respondents have violated the equality principle as guaranteed by Article 27 of our constitution and taken away the legitimate expectation of the petitioner and the Rules of 2018 be impugned in the Writ Petition.

The present petitioner is standing on the same footing and hence he should have been considered for appointment in the post of Assistant Teacher (ICT) in the line of the aforesaid judgment. That the respondent No. 2 without complying with the aforesaid direction made in the judgment and order dated 14.12.2017 most arbitrarily and with a mala fide intention published an undated public notice (গণবিজ্ঞপ্তি) inviting e-application between 19.12.2018 to 02.01.2019 for the appointment of Teachers in the vacant posts of Non-Government Education Institutions from the registered candidates of NTRCA whose age was within 35 years on 12.06.2018. That by publishing the said public notice the respondents have made contempt of court inasmuch as they have also taken away the legitimate expectation accrued upon him and the vested

rights of the petitioner. The said public notice is impugned herein. Although the petitioner has been serving in the post of Assistant Teacher (ICT) at Barabari Boyez Uddin High School, Rangpur Sadar, Rangpur the respondents with a mafafide intention have shown the said as post vacant and the petitioner has obtained a computer generated copy of the same which is showing at serial No. 599. That similar nature of Writ Petition being No. 973 of 2019 has been filed by one Md. Ashraful Haque and others who are standing on the same footing of the present petitioner and after hearing the said petition a Division Bench of this division issued Rule Nisi vide order dated 28.01.2019. Another Writ Petition being 15767 of 2018 has been filed by Md. Amzad Hossain and others and after hearing the said petition the said bench have been pleased to issue Rule Nisi vide order dated 02.01.2019. The petitioner is now unable to apply in the vacant post of Assistant Teacher (ICT) in any Non-government Educational Institutions due to the Rule 11.6 of the “বেসরকারি শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এম.পি.ও নীতিমালা-২০১৮” inasmuch as for the age restriction imposed by the public notice dated 18.12.2018. Both the Nitimala and Public Notice have been made arbitrarily and with a mafafide intention which is discriminatory in nature.

Respondent No. 4 filed affidavit in opposition denying the materials allegation in the writ petition inter alia stating that the petitioner got appointment on 17.07.2011 and join on 20.07.2011 in Barabari Boyez Uddin High School, Rangpur Sadar on the basis of submitted certificate of NTRCA. But the NTRCA sent a letter to the

District Education Officer that the said certificate does not exist in the index of NTRCA.

Learned Advocate Mr. M Najmul Huda appeared on behalf of the petitioner while learned D.A.G Mr. Noor Us Sadik Chowdhury with Mr. Md. Awlad Hossain, A.A.G along with Mr. Rashedul Islam, A.A.G appeared for the respondent Nos. 1-3 and learned Advocate Mr. Md. Abdullah-Al Mamun represented the respondent No. 4, school.

Learned Advocate for the petitioner submits that the respondents in violation of the constitution rights of the petitioner guaranteed under Article 31 including other provisions of the constitution most arbitrarily and unlawfully inserted Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ dated 12.06.2018 fixing the age limit of the petitioner and others to 35 years for initial appointment in the post of Lecturer, Assistant Teacher, Assistant Moulvi, Demonstrator, etc. (Annexure-H) including the arbitrary undated public notice (গণবিজ্ঞপ্তি) of the respondent No. 2 inviting e-application between 19.12.2018 to 02.01.2019 for the appointment of Teachers etc. He contends that by arbitrarily fixing the age limit of the petitioner up to 35 years of age, the respondents have deprived the petitioner and others from their legitimate expectation and constitutional right to apply in the said position. He next draws our attention to the undated public notice which was issued by the respondent No. 2 inviting e-application between 19.12.2018 to 02.01.2019 for the appointment of Teachers in the vacant posts in Non-government Education Institutions from the registered candidates of NTRCA whose age was within 35 years (Annexure-J). He submits that

Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ and undated public notice both have been passed without lawful authority and as such ultra vires to the constitution which guarantees protection of all citizens and ensures fundamental rights against any form of discrimination. He submits that the petitioner was initially appointed as a teacher in the school with an index number from the NTRCA in the year 2011. He argues that although he is lawfully entitled but he has not been yet enlisted as an MPO teacher and therefore he has not received any index number as MPO teacher. He contends that under the principle of legitimate expectation the petitioner also is entitled to make application in any of the vacant posts and is entitled to being MPO listed after serving in the school as a teacher for several years. He contends that the petitioner may legitimately expect to be allowed to apply for the post for being listed as MPO teacher and the authority cannot deprive him of his fundamental rights upon issuing the impugned clause in the নীতিমালা-২০১৮ being clause Rule 11.6 and also cannot issue the undated public noticed which is Annexure-H of the Writ Petition. He contends that therefore clause rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ and the undated public notice ought to be declared unlawful and the petitioner ought to be afforded a chance to apply for any vacant post for which he is qualified. He continues that the petitioner is qualified for the vacant post and which qualification has been certified by the NTRCA which is the relevant authority to prepare list of vacant posts of qualified candidates

only. He reiterates that however the respondents without affording the opportunity to apply most arbitrarily inserted Rule 11.6 most arbitrarily in the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ and also most arbitrarily issued the undated public notice. In this context he contends that no new rule can be inserted or enacted by giving retrospective notice. He continues that Rules may be enacted and inserted prospectively only upon giving retrospective effect to any Rule or any other enactment of statutory Rules including any other Rules giving retrospective effect whatsoever is unconstitutional and tantamounts to depriving the concerned person of his fundamental right enshrined in the constitution. He further contends that when the petitioner was initially appointed in the year 2011, the impugned rule 11.6 was not in existence and therefore the subsequent insertion of the clause 11.6 limiting the age upon giving retrospective effect to the Rule of the applicant is arbitrary.

Upon a query from this bench regarding the respondent's contention that the petitioner is not even a teacher since it was discovered upon investigation by the NTRCA that the petitioner's certificate dates back to the year 2010 is a forged certificate, on this issue he contends that the respondents have no lawful authority to dismiss the petitioner from his service without affording him due process without issuing show cause notice and without affording him an opportunity of being heard. He contends that the respondents including the respondent No. 4 without affording him a chance to explain his position and without giving opportunity only relying upon the report of

the NTRCA and upon the resolution of the committee deprived him of his constitutional right and thereby violated the provisions of our constitution and inter alia violated the provisions of the Terms and Conditions of the Service Regulations, 1979.

He draws attention to the service regulations of 1979 and submits that it is clearly prescribed by the said regulation that any teacher accused of any offence before being convicted whatsoever of any offence must be afforded a chance to be heard and to be afforded due process of law.

He draws attention to Annexure-4 which is the affidavit in opposition filed by the respondents and submits that from Annexure-4 it is clear that it is only a resolution of the managing committee of the school and not an order of dismissal. He submits that therefore without affording a chance to the petitioner to be heard and explain his position inter alia followed by other procedures by way of departmental proceedings the petitioner cannot be dismissed from his employment only on the basis of a resolution taken by the managing committee relying only on the NTRCA report.

He next argues that Rule 12 of the service Regulation of 1979 contemplates that no penalty shall be imposed upon any accused teacher unless it is examined by the appeal and arbitration committee of the board. He assails that the respondents without following the procedures prescribed by the said regulation cannot dismiss the petitioner from his post as a teacher and therefore the respondents acted in violation of the regulations and thereby violated the principles of natural justice. He

contends that the claim of the respondents that the petitioner is not a teacher at all since his appointment of 2011 is not correct since the petitioner must be afforded a chance till any final decision may be taken by the authority.

Upon another query from this bench regarding the dispute over the index number given by the NTRCA and the NTRCA being not the competent authority to appoint teacher nor being competent to recommend a teacher for MPO post, he contends that NTRCA only certifies that a person is eligible to be appointed to the post of a teacher. He submits that to be appointed as a teacher and subsequently to be recommended for MPO list it is the duty of the school as the proper appointing authority and not the NTRCA. He concludes his submissions upon assertion that the petitioner is eligible to apply for the post of a teacher from which he has been arbitrarily deprived following insertion of clause 11.6 in the rules of 2018 and also being aggrieved by the undated public notice and therefore those ought to be declared ultra vires the constitution and the Rule be made absolute for ends of justice.

Learned D.A.G for the respondent Nos. 1-3 vehemently oppose the Rule. He submits that the petitioner has no locus standi to challenge the vires of the Rules of the clause 11.6 nor does he have the locus standi to challenge the public notice since it is on record that NTRCA pursuant to investigation discovered that the petitioner practiced fraud and obtained a forged certificate initially in the year 2010. Learned D.A.G upon filing the affidavit in opposition submits that the NTRCA (respondent No. 2) has mentioned that a candidate can sit in exam for

NTRCA certificates several times till the age of 35 years for achieving better marks. He next submits that fixing age limit by the government is a policy matter of the government and cannot be interfered with in writ jurisdiction. Regarding the NTRCA's certificate issued to the petitioner in the year of 2014, however he argues that even if the certificate was issued upon the petitioner in the year 2014, but nevertheless the petitioner does not have any vested right nor does he have any legitimate expectation, since he practiced fraud by adducing false and fraud NTRCA certificate in the year 2010. He concludes his submission upon assertion that the Rule bears no merit ought to be discharged for ends of justice.

The learned Advocate for the respondent No. 4 by way of filing an affidavit in opposition in substance supports the submissions made by the learned D.A.G. Supporting the submissions of the learned D.A.G. Learned Advocate for the respondent No. 4 argues that since the petitioner is not a teacher at all since it was subsequently discovered by the NTRCA and the school that the certificate produced by the petitioner from the year 2010 which is Annexure-J of the affidavit in opposition is forged. He contends that therefore the petitioner neither has any locus standi to challenge the vires of the Rule nor the public notice nor may he have any legitimate expectation to be allowed to apply for the post of MPO listed teacher. He reiterates on the issue that the petitioner is not a teacher at all since his appointment in the year 2011 as temporary teacher was discovered to be void upon subsequent discovery of the NTRCA certificate of the year 2010 being a fraudulent document. He

submits that it is a settled principle of law that fraud vitiates everything, therefore the petitioner has no notice to challenge neither the vires of the rule nor the action of the respondent. He concludes his submission upon assertion that the Rule bears no merits ought to be discharged for ends of justice.

We have heard the learned Advocates for the petitioner and also heard the learned D.A.G and we have heard the learned Advocate for the respondent No. 4. Further we have examined the materials on record including having gone through the relevant rules.

Upon perusal of the materials on records we are of the considered view that before reaching any conclusive finding and depriving a person of any rights which he may have under any Rules or under the constitution a person must be afforded due process and be afforded a chance of being heard. However upon examination of the materials before us, it appears that there is nothing to show which may indicate that before passing the resolution Annexure '4' of the writ petition that the respondents ever gave him a chance to explain his person. It is clear that the petitioner was not afforded any chance by giving an opportunity to explain his position before deciding his fate. It is the constitutional right of the petitioner or any other person to be afforded a chance to explain himself till he is finally convicted or otherwise penalized for any offence. We are of the considered view that even following the principle of natural justice it was the lawful duty of the respondents to issue a show cause notice upon him upon following the other prescribed rules.

In this case it is evident from the materials that the petitioner was never afforded any chance to explain his position.

The relevant Rules pertaining to drawing up departmental proceedings in according to the provisions of the Terms and Conditions of the Service Regulations, 1979 are reproduced hereunder:

14. Procedure for drawing up proceedings.-

(1) When a teacher is to be proceeded against for offences specified in regulation 11, he shall be called upon by a notice to submit a written explanation within seven days as to why the penalty or penalties specified in the notice should not be imposed on him for the alleged offences and asking him if he desires to be heard in person.

*(2) On receipt of the explanation from the teacher and his desire to be heard in person, the authority competent to impose penalty shall constitute a three member enquiry committee with a Chairman: **Provided that** at least one of the members of the committee shall be from teaching profession.*

Both the D.A.G and the learned Advocate for the respondent No. 4 contended that since the NTRCA in its report stated that the petitioner practiced 'fraud' and that the decision of the resolution is correct.

The learned counsel also reiterated that the petitioner is not a teacher at all since he practiced fraud in obtaining appointment to his post. He contended that the petitioner has no right to challenge Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮

dated 12.06.2018. (Annexure_H) nor does he have the right to challenge undated public notice which is Annexure A '1'.

However we are of the considered view that whatever negative report the NTRCA may have been given against the petitioner, but it is necessary to be reminded the NTRCA is not the final authority to dismiss or otherwise relieve him from his post. Therefore no report of the NTRCA can finally determine the fate of the petitioner so far his dismissal is concerned. It was the legal duty of the respondents to follow the procedures laid down in the relevant rules and also relying on the principle of natural justice the petitioner ought to have been afforded a chance to be heard *inter alia* upon initiating departmental proceedings against him upon following the Rules prescribed there of.

Moreover the respondents could not show any formal order of dismissal from the competent authority. It is evident that the resolution Annexure -4 whatsoever passed by the managing committee of the school respondent No.4 or any other institution only cannot constitute a final order of dismissal by the authority upon any person including the petitioner here. Therefore we are of the considered view that it was the respondent's legal duty under the prescribed rules and also under the provisions of our constitution and upon following the principles of natural justice to afford the petitioner a chance to explain himself before reaching any conclusive finding regarding his service.

The learned counsel, for the respondents also drew this Bench's attention to an FIR(First Investigation Report) filed by the Respondent school upon discovery of fraud by NTRCA including GR case which

have been annexed as Annexures 6 and 7 respecting and which case is pending.

Our considered view is that whatever criminal case may be pending against him, nevertheless so far as termination of his service is concerned, no final decision may be reached before affording him the due process by inter alia giving him change to be heard under the prescribed Rules in that behalf.

Regarding the petitioners contention that Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ dated 12.06.2018 and undated public notice is “ultra vires”, we are of the considered view that at this stage since it has not been finally determined whether the petitioner is at all a teacher or not and which is a disputed matter of fact to be decided by the appropriate forum, therefore at this stage the petitioner has no locus standi to challenge the vires of Rule 11.6 of the বেসরকারী শিক্ষা প্রতিষ্ঠানের (স্কুল ও কলেজ) জনবল কাঠামো ও এমপিও নীতিমালা ২০১৮ dated 12.06.2018 nor does he have the right to challenge the undated public notice.

Be that as it may, as discussed elsewhere in this judgment it is the petitioner’s fundamental right to be heard by the competent authority before any final decision may be taken. The respondents are at liberty to issue a show cause notice upon the petitioner upon following the relevant rules and the petitioner may be afforded a chance to be heard in accordance with law.

Under the facts and circumstances and relying on the observations made above we are inclined to disposed of the Rule.

In the result, the Rule is disposed of.

Communicate this judgment at once.

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(Kashefa Hussain, J)

I agree.

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(Fatema Najib, j)

Arif(B.O)