

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.406 OF 2019

(Arising out of Civil Petition No.430 of 2019)

(From the judgment and order dated the 1st November, 2018 passed by a Division Bench of the High Court Division in Writ Petition No.10919 of 2011)

Government of Bangladesh and : . . . Appellants
others

-Versus-

Kazi Mofizul Haque and others : . . . Respondents

For the Appellants : Mr. Mehedi Hasan Chowdhury,
Additional Attorney General with Mr.
Md. Mujibur Rahman, Assistant
Attorney General instructed by Mr.
Haridas Pual, Advocate-on-Record

For the Respondent Nos.24-27 : Mr. Farid Ahmed, Senior Advocate
instructed by Mr. Zainul Abedin,
Advocate-on-Record

For the Respondent Nos.1-22 : Mr. Abdun Noor, Advocate with
Khandokar Md. Moshfiqul Huda,
Advocate instructed by Mrs. Sufia
Khatun, Advocate-on-Record

For the Respondent No.23 : Not represented

Date of Hearing : **The 01st day of February, 2023**

Date of Judgment : **The 07th day of February, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 01.11.2018 passed by a Division Bench of the High Court Division in Writ Petition No.10919 of 2011 making the Rule absolute.

The relevant facts, for the disposal of this appeal, are that the writ petitioners-respondents filed the writ petition No.10919 of 2011 in the High Court Division challenging the letter communicated under memo No.মপ্রাম/ম-১/ডিপিসি-০১/১১/৮৫৯ তারিখ ১৫/১২/২০১১ issued by the Senior Assistant Secretary, Ministry of Fisheries and Livestock, and for a direction upon the respondents to finalize the amendment of the schedule of B.C.S. (Fisheries), Recruitment Rules, 1981 as per recommendation dated 17.12.2003 under Memo No.প্রশা-১৫-৮৫(৫ম খণ্ড)/১১৭৯ and decision taken by the authority dated 24.11.2001, 14.11.2001 and 25.08.1992 to provide 1/3rd appointment by promotion to the entry level cadre post from the feeder post of the 2nd Class Gazetted Officers according to seniority of the gradation list, Directorate of Fisheries (Annexure-C to the writ petition) and resolution dated 28.07.1987 and 17.05.1999 taken by the Ministry of Fisheries and livestock and Resolution dated 11.11.2001 taken by the Ministry of Public Administration.

In the writ petition, it is contended that the writ-petitioners getting appointment as Fishery Survey Officers, Assistant Farm Managers, Technical Assistants, have been serving in their respective services for about 15 to 27 years but they did not get any promotion. On 28.07.1987, a meeting was held presided over by the Secretary, Ministry of Fisheries and Livestock with an agenda to amend B.C.S (Fishery) Recruitment Rules, 1981 and it was decided that in entry level, 2/3rd post

should be recruited directly and the rest 1/3rd post should be filled up by way of promotion. Accordingly, the proposal of amendment of B.C.S. Recruitment Rules was sent to Public Service Commission. On 25.08.1992, the Public Service Commission sent a letter to the Secretary, Ministry of Public Administration stating that the proposal of the amendment of the Rules has been accepted with some modification. On 10.11.2001 another meeting was held presided over by the Secretary, Ministry of Public Administration and it was decided in the said meeting to amend the schedule of the Recruitment Rules, 1981 providing the provision that 1/3rd post should be appointed in the entry level by way of promotion from the feeder post. On 24.11.2001, Ministry of Public Administration issued a letter addressing the Ministry of Fishery and Livestock requesting them to execute the decision of the Ministry of Public Administration held on 10.11.2001. On 17.12.2003, the Director General, Department of Fishery issued a letter addressing the Secretary, Ministry of Fishery and Livestock stating that the schedule of the B.C.S (Fishery) Recruitment Rules, 1981 has been amended. Accordingly, it was provided to appoint 1/3rd to the entry level from the feeder post by way of promotion. But the Ministry of Fisheries failed to take any positive step. In such view of the matter, the writ-petitioners, compelled to file the writ petition.

The High Court Division, by the impugned judgment and order, made the said Rule absolute.

Thus, the Government and others had filed civil petition for leave to appeal No.430 of 2011 and leave was granted.

Hence, the present appeal.

Mr. Mehedi Hasan Chowdhury, learned Additional Attorney General appearing with Mr. Md. Mujibur Rahman, Assistant Attorney General submits that the writ petitioners are public servants and the instant dispute is in respect of the terms and conditions of their service in the Republic and the same is to be adjudicated by the Administrative Tribunal, so the writ petition was not maintainable, He further submits that the writ petitioners having appointed in the project and subsequently regularized in the revenue set up in 2001 and the service of the writ petitioners having guided by Gazetted and Non-Gazetted Employees (Department of Fisheries) Recruitment Rules, 1984 and according to the said Rules a gradation list has already been prepared and some of the writ petitioners have already been promoted to the upper post and as such the writ-petitioners had no locus-standi to file the writ petition. He further submits that the High Court Division while making the Rule absolute failed to consider that the impugned recommendation dated 17.12.2003 along with other letters are internal communications of the Government and those do not confer any right to the writ petitioners, the High Court Division exceeded its limit in directing the Government to amend the B.C.S. (Fisheries) Recruitment

Rules, 1981 with retrospective effect and, as such, the judgment and order of the High court Division is liable to be set aside. He further submits that in the B.C.S. (Fisheries) Recruitment Rules, 1981 there is provision for 100% direct recruitment to the entry level post of 'Upazila Fisheries Officer' and the required qualification is B.Sc. Fisheries (Hon's) degree, but the qualifications of the writ petitioners are General Graduation which is not a professional degree and if the writ petitioners are promoted to the said post there will be serious anomaly in the Department of Fisheries and thus, the judgment and order of the High Court Division is liable to be set aside.

Per contra Mr. Faird Ahmed, learned Senior Advocate appearing for the respondent Nos.24-27, in his submission supported the impugned judgment and order passed the High Court Division.

In the instant case the writ-petitioners-respondents relying on an internal communication that is recommendation dated 17.12.2013 by the Public Service Commission along with some other letters, i.e. inter ministerial communications had filed the writ-petition to implement the said recommendation.

It is by now well settled that an interdepartmental/divisional communication do not finally determine any right or obligation of the parties.

In the cases of **Bangladesh Vs. Dhaka Steel Works Ltd.**, 45 DLR(AD), page-69 and **Secretary, Internal**

Resources Division, Ministry of Finance and Chairman, National Board of Revenue Vs. Nasrin Banu and others, 48 DLR(AD), 171 this Division has held that Inter ministerial/divisional communications made in the process of reaching a decision, uncommunicated to the affected persons, do not create a legal right in their favour. (Underline supplied)

In the case of **Al-Haj Abul Bashar being dead his heirs Hosne-Ara Begum and other Vs. Bangladesh and others, 50 DLR(AD), Page-11** this Division has held to the effect:

“Since no legal or vested right has accrued in favor of the petitioners by mere Inter-Ministerial Communications the petitioners cannot have any legal right to ask for return of the land. Further, the Inter-Ministerial Communications are merely internal policy decisions and guidelines for the various departments of the Government and the same is not a declared policy decision of the Government. Hence, no abuse of discretion or arbitrariness or unfair treatment can be attributed to the executive government, as there is also no lawful obligation on the part of the Government to act or intend circulars and decisions so far as it relates to the petitioners.”

In the case of **Abdur Rahim Khan and others Vs. Bangladesh and others 1999(7) BLT(AD), Page-313** this Division has also held that:

“The recommendation of a Cabinet Committee cannot be enforced through a writ for simple reason that it is not law. It is as simple as that. The writ-petition was misconceived at the inception.”

The Supreme Court of India in the case of **Laxminarayan R. Bhattad and Ors. Vs. State of Maharashtra and Anr.** MANU/SC/0287/2003: [2003]3SCR409, held that:

“A right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.” (Underlines supplied)

In the case of **Sethi Auto Service Station and Ors. Vs. Delhi Development Authority and others** (MANU/SC/8127/2008 AIR2009SC904, (2009)1SCC180) the Supreme Court of India has observed:

“That the internal noting or communications with the DDA (Delhi Development Authority) are of no relevance and consequences till a final decision was taken and communicated to the concerned parties. In the present case though the proposals of other Government Agencies were considered, no final decision was taken and communicated by the DDA to the appellants. As regards the approval by the Technical Committee or other officials, the stand of the DDA was that till a final decision was taken by the competent authority i.e. the vice Chairman and communicated to the appellants, there was no question of any vested right accruing in

favour of the appellants, merely on the basis of recommendations of the officials of the DDA.”

In the above case it has also been observed to the effect:

“Thus, the first question arising for consideration is whether the recommendation of the Technical Committee vide minutes dated 17th May, 2002 for re-sitement of appellants petrol pumps constitutes an order/decision binding on the DDA?

It is trite to state that noting in a departmental file do not have the sanction of law to be effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department; gets his approval and the final order communicated to the person concerned.

In the above case in paragraph 13 it has been observed to the effect:

“In Bachhittar Singh Vs. The State of Punjab MANU/SC/0366/1962: AIR1963SC395,

a Constitution Bench of this Court had the occasion to consider the effect of an order passed by a Minister on

a file, which order was not communicated to the person concerned. Referring to the Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said Article and was then communicated to the party concerned. The court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed that Court, that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the "order" of the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person concerned. (Underlines supplied)

In the case of **Jasbir Singh Chhabra and Ors. Vs. State of Punjab and others** MANU/SC/0152/2010=(2010)4SCC, **192** the Supreme Court of India has observed that:

"It must always be remembered that in a democratic polity like ours, the functions of the Government are carried out by different individuals at different levels. The issues and policy matters which are required to be decided by the Government are dealt with by several functionaries some of whom may record nothings on the files favouring a particular person or group of persons. Someone may suggest a particular line of action, which may not be conducive to public interest and others may suggest adoption of a different mode in large public interest. However, the final decision is required to be taken by the designated authority keeping in view the larger public interest."

In the case of **State of Urrisha and Ors. Vs. Masco Still Ltd. and Ors. (2013 4SCC 340)** it has been held by the Supreme Court of India that:

"A writ petition shall not be maintainable unless it having been filed against such order which finally determine any right or observation of parties."

In this particular case the recommendation of the Public Service Commission (PSC) for amending the Service Rules i.e. the schedule of the B.C.S. (Fishery) Recruitment Rules, 1981 providing to appoint 1/3rd to the entry level from the feeder post of 2nd class Gazetted Officer by way of promotion, which approved by the Ministry of Public Administration also, was never finalized by the Ministry concerned i.e. Ministry of Fisheries publishing any gazette notification and

further, the said recommendation was never communicated to any of the writ petitioners.

Upon consideration of the facts and circumstance of the present case coupled with the above propositions of law, we have no hesitation to hold that the High Court Division committed grave error in making the Rule absolute directing the writ-respondents-appellants to give promotion to the writ-petitioners-respondents amending the relevant Rules with retrospective effect within a period of 60 (sixty) days from the date of receipt of the judgment and also pay them the arrear salary and other benefits.

The High Court Division in making the Rule absolute also held that the writ-petitioners have got the legitimate expectation to be promoted as per the proposed amendment of the Rules.

In the case of **Secretary, Ministry of Fisheries and Livestock & others Vs. Abdul Razzak and others reported in 71 DLR(AD) 395** this Division has held as under:

“Before applying the principle the Courts have to be cautious. It depends on the facts and recognized general principles of administrative law applicable to such facts. A person who bases his claim, on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation, that is, he has locus standi to make such claim. Such claim has to be determined not according to the claimants perception but in the public interest.

The doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. The theory of legitimate expectation cannot defeat or invalidate a legislation which is otherwise valid and constitutional. Legitimate expectations must be consistent with statutory provisions. The doctrine can be invoked only if it is founded on the sanction of law. (Hear statutory words override any expectation, however well-founded.

It is open to the Government to frame, reframe, change or re-change its policy. If the policy is changed by the Government and the court do not find the action malafide or otherwise unreasonable, the doctrine of legitimate expectation does not make the decision vulnerable. The choice of policy is for the decision maker and not for the Court. While dealing with public policy in juxtaposition with the doctrine of legitimate expectation, the following observations of Lord Diplock in *Hughes Vs. Department of Health & Security* (1985) 2 WLR 866 must always be kept in view by a Court of law:

“Administrative policy may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such Changes is something that is inherent in our constitutional form of government.”

An expectation, fulfillment of which requires that a decision maker should not take an unlawful decision

cannot be said to a legitimate expectation. This is based on the doctrine that can be no estoppels or legitimate expectation against a statute (wade: Administrative Law, (2005) pp-376."(Underlines supplied)

In the said case it has been further held that the legitimate expectation would not override the statutory provision.

In the case of **National Buildings Construction Corporation V.S. Raghunathan and others.** **MANU/SC/0550/1998: AIR1998SC2779**, the Supreme Court of India has observed as under:

"The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant

in the same way as claims based on promissory estoppels". (Underlines supplied)

In the case of **Punjab Communications Ltd. Vs. Union of India and ors. MSNU/SC/0326/1999: [1999]2SCR1033**, the Supreme Court of India referring to a large number of authorities on the question, observed that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury" reasonableness. The decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Therefore, the choice of the policy is for the decision maker and not for the Court. The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse one which on reasonable person could have made. (Underlines supplied)

In **Jitendra Kumar and Ors. v. State of Haryana and Anr. MANU/SC/8192/2007: (2008)2SCC161**, it has been reiterated by the Supreme Court of India that a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters. (Underlines supplied)

In view of the above propositions, the findings of the High Court Division that the writ petitioners have got a right by way of legitimate expectation to be promoted on the basis of proposed amendment of the service Rules, which never attained in its finality has got no legal basis.

In view of the forgoing discussions, we are of the view that the High Court Division committed grave error in passing the impugned judgment and order making the Rule absolute.

Thus, we find merit in the appeal.

Accordingly, the appeal is allowed.

The judgment and order dated 01.11.2018 passed by the High Court Division is hereby set aside.

C.J.

J.

J.