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. 8251 of 2019

In the matter of:

An application under Article 102(1) and (2) of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

Habiba Aktherrun Nahar and others
……. Petitioners.

Vs.

The Government of Bangladesh and others.
……Respondents.

Mr. Md. Mohiuddin, Advocate
…..for the petitioners.

Ms. Nahid Mahtab, Senior Advocate
.... for the respondent No. 1.

Mr. Md. Abdul Aziz Miah(Minto), Advocate
.... for the respondent No. 2.

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 respondents No. 1-4

Heard on: 25.04.2022, 27.04.2022, 16.05.2022, 22.05.2022, 24.05.2022 and judgment on: 26.05.2022.

Kashefa Hussain, J:

Rule nisi was issued calling upon the respondents to show cause as to why the inaction of the respondents to implement the gazette notification additional issue dated 07.10.1996 for promotion

from the post of Family Welfare Visitor (FWV) to Assistant Family Planning Officer (Annexure-B) in utter violation of Article 26, 27, 29 and 31 of the Constitution of the People's Republic of Bangladesh should not be declared to be without lawful authority and is of no legal effect, and as to why the respondents should not be directed to take immediate action for promotion of the petitioners from the post of "Family Welfare Visitor" (FWV) to "Assistant Family Planning Officer" in accordance with the gazette Notification additional issue dated 07.10.1996 on the basis of seniority in service amongst the "Family Welfare Visitor" (FWV) and/or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioner No.1 Habiba Aktherrun Nahar daughter of Md. Motiar Rahman and Mst. Hosne Ara Begum of Village: Sadar Hospital, Police Station- Rangpur Sadar, District- Rangpur-5400 along with 62 (Sixty two) petitioners who are all citizens of Bangladesh and have been doing government service since more than 13 years. The respondent No. 1 is the Secretary, Ministry of Health and Family Wellfare, Bangladesh Secretariat, Shahbag, Dhaka, respondent No. is the Director General, Family Planning Directorate, 6, Kawran Bazaar, Dhaka, respondent No. 3 is the Director (MCH-Service) & line Director (MC-RAH), Family Planning Directorate, 6, Kawran Bazaar, Dhaka and respondent No. 4 is the Secretary, Ministry of Public Works, Bangladesh Secretariat, Shahbag, Dhaka.

All the petitioners' case inter alia is that the petitioners have been doing Government service as Family Welfare Visitors for more than 13 years, they are doing their job with honesty, sincerity and

efficiently. They are working all over Bangladesh i.e. in every upozila of the country. Their contribution in women health sector is the instance of mile stone. The petitioners work for birth control as well as family planning for the people of Bangladesh at large. They are public servants of 14th selection grade and all the petitioners are members of Family Welfare Association, therefore holding the same address as mentioned in the cause title. At the time of appointment of the petitioners it was verbally assured that if the petitioners can successfully continue their service with good reputation, they will be promoted to Family Welfare Officer from current position i.e. Family Welfare Visitor (FWV). Pursuant to the petitioners' repeated demand to the Government for providing specific guide lines for the promotion criteria of the Family Welfare Visitor (FWV), the Government finally published Gazette Notification on 7th October 1996 specifying the promotion of the Family Welfare Visitor. But 23 years has passed since but the respondents arbitrarily and illegally is not implementing the promotion. That despite completion of 13 years of service by the petitioners, the respondents yet did not take any measures to promote the petitioners. Lot of Family Welfare Visitors went to retirement without promotion as well as upgradation of the selection grade and they did not get the pension benefits of the Assistant Family Welfare officer post which is irrational, malafide and arbitrary. That although the Government finalized the regulation to abolish the ambiguity in the promotion procedure of the petitioners, by publishing gazette notification dated 07.10.1996 since last 23 years but respondents have been depriving the petitioners from their legal

rights unlawfully and illegally. That the petitioners several times and on several occasions visited the respondents' office concerning their promotion but the respondents remained silent on the issue. The respondents are intentionally ignoring the petitioners. The petitioners gave a written representation on 28.06.2018 to the respondent No. 2 which however could not bring out any result regarding the petitioners promotion. 3 months after the application dated 28.06.2018 when the respondents yet did not dispose of the petitioners' application, the petitioners applied to the respondent No. 1 with another representation to accommodate the petitioners' promotion. That after repeated demands of the legal rights of the petitioners, the respondents No. 1 published a circular dated 04.12.2018 vide memo No. 59.00.0000.110.99.006.17-474 addressing the (Director General) respondent No. 2 to finalize a complete proposal to find out the vacant post for the petitioners but the respondents No. 2 did not take any measures and kept silent without giving any reasons which conduct is illegal and unreasonable. That after publication of the circular dated 04.12.2018 by the respondents No. 1 no action was taken by the concerned respondents. The petitioners further applied to the respondent No. 1 and 2 on 19.06.2019 demanding establishment of their legal rights which they obtained through gazette notification dated 07.10.1996 but the respondent No. 2 did not take any measures and kept silent without assigning any reasons which is illegal and unreasonable. That after publication of the circular dated 04.12.2018 by the respondent No. 1, no action was taken by the respondents. The petitioners further applied to the respondent No. 1 and 2 on

19.06.2019 for their legal rights which they obtained through gazette notification dated 07.10.1996 but the respondents did not dispose of the petitioners application nor assigned any reason which conduct is arbitrary and illegally.

Learned Advocate Mr. Md. Mohiuddin appeared on behalf of the petitioners while learned Senior Advocate Ms. Nahid Mahtab appeared for the respondent No. 1, learned Advocate Mr. Md. Abdul Aziz Miah (Minto) appeared for the respondent No. 2 and learned D.A.G Mr. Noor Us Sadik Chowdhury with Mr. Md. Awlad Hossain, learned A.A.G along with Mr. Rashedul Islam, learned A.A.G appeared for the respondents No. 1-4.

Learned Advocate for the petitioners submits that the inaction of the respondents in implementing the gazette notification additional issue dated 7.10.1996 for promotion of the petitioners, such inaction of the respondents is completely unlawful and without lawful authority. He submits that by such inaction of the respondents in granting promotion to the petitioners which they are eligible for by way of the gazette notification dated 7.10.1996, the petitioners are being deprived of their fundamental rights. He submits that the petitioners are lawfully entitled to be promoted from the post of Family Welfare Visitor to the post of Assistant Family Planning Officer by dint of the gazette notification dated 7.10.1996. He contends that even though the gazette notification dated 7.10.1996 expressly and categorically mandates the promotion of the petitioners along with some other categories of Family Planning employees holding different posts, but nevertheless the respondents most

arbitrarily promoted others to the post of Assistant Family Planning Officer while they unjustly and unlawfully left out the petitioners from the promotion list. He submits that the provisions of the constitution relying inter alia on Article 27 and 29 mandates equality of all before law irrespective of the status, or class of persons. He particularly relies on Article 29 of the Constitution and argues that the spirit of Article 29 contemplates that there can not be any discrimination between the same classes and persons in matter of service, entailing particularly terms and condition, promotion inter alia other factors. He reiterates that although in this case it is clear that the gazette notification dated 7.10.1996 states that the petitioners as Family Welfare Visitors are entitled to promotion to a proportion at the rate of 8% from the particular group to be promoted, but however none of the petitioners from the group of Family Welfare Visitor have been promoted. He points out to Annexure –B of the writ petition and takes us to the schedule which set out the categories of employees and the criteria of promotion. He particularly points out to serial No. 3 and draws attention of this court to the category of employees who have been listed to be entitled to be promoted. From serial No. 3 he attempts to show that to be promoted to the position of Assistant Family Planning Officer, some categories has been created and the petitioners belong to column 3ক (3) of the category. He submits that while other categories which includes field trainers, Office superintendents, Assistant Family Planning (including the instant petitioners who are family Welfare Visitor) has also been included in the category and the petitioners have been expressly allocated a

proportion of 8% to be entitled to obtain promotion to the post of Assistant Family Planning Officer. He agitates that there is a clear mandate in the gazette notification which has the force of law but however the respondents most arbitrarily promoted others in the serial from the same group which include Field Trainers, Office Superintendents etc but have most unlawfully left out the petitioners Family Welfare Visitors depriving them from their lawful right to promotion. He submits that by way of the gazette notification which has the force of law the petitioners are lawfully entitled to obtain promotion along with others in the group. He agitates that however discrimination have been made from within the same group under serial 3. He contends that depriving the petitioners from their promotion which they are entitled to relying on serial 3 is in direct violation of their fundamental rights.

Upon a query from this bench regarding writ being not maintainable in this matter since the administrative tribunal constituted under Article 117 is the proper forum in service matters inter alia against any action, decision and orders of the authorities in service of the republic, he controverts and submits that in the instant writ petition the petitioners did not challenge any action or decisions or orders of the authorities rather the petitioners have challenged the inaction of the respondents in implementing the express mandates of the gazette notification.

He points out to section 4(2) of the Administrative Tribunal Act 1980 and particularly draws attention to the proviso. He asserts that the proviso of section 4(2) of the Administrative Tribunal Act, 1980

expressly contemplate that an application which may be entertained by the Administrative Tribunal must be in respect of an order or decisions or orders by the authorities. He submits that section 4(2) of the Act has categorically set out the criteria and the circumstances in which an application in the administrative tribunal may be entertained. He argues that nowhere in the scheme of section 4(2) of the Administrative Tribunal nor anywhere in the Administrative Tribunal Act, 1980 is it contemplated that in case of inaction also the Administrative Tribunal shall entertain such application. He persists that in this case the writ petitioners did not challenge any pro-active action rather they have challenged the inaction of the respondents. He submits that therefore since the provision of the Administrative Tribunal Act, 1980 does not contemplate any application filed by an aggrieved person in case of inaction of the authorities to be heard by the Administrative Tribunal, therefore the only forum left to the petitioner is the writ forum in judicial review. He reiterates that in this case there has been a direct prima facie violation of fundamental rights of the petitioner which is palpable from the express mandate of the gazette notification dated 7.10.1996 and which gazette notification the respondents themselves enacted but violated by not complying with the express criteria of promotion in the gazette notification. He agitates that the conduct of the respondents in not granting promotion to the petitioners while granting promotion to others in the categories from the column 3, such conduct is discriminatory arbitrary and violative of the fundamental rights of the petitioners and ought to be declared unlawful.

There were several queries from this bench regarding the limited scope of judicial review of service related matters particularly following a decision of our Appellate Division and principle set out in the case reported in 21 BLC(AD)(2016) 94 in the case of Bangladesh versus Sontosh Kumar Saha. He categorically submits that the fact of this writ petition and the facts of the 21 BLC(AD)(2016) 94 case are not same since in the 21 BLC(AD)(2016) 94 case the petitioners could not show violation of fundamental rights. He agitates that in the instant case the petitioners' fundamental rights have been directly affected by the arbitrary inaction of the respondents refraining from implementing the gazette notification and discriminating the petitioners by affording promotion to other employees belonging to the same group while leaving out the petitioner. He points out to paragraph No. 27 of the 21 BLC(AD)(2016) 94 decision and particularly points out to the portion in paragraph No. 27 where in our Apex court held that

> "Fundamental right for challenging the vires of a law will seek remedy under article 102(1), but in all other cases he will be required to seek remedy under article 117(2) "

He submits that therefore the 21 BLC(AD)(2016) 94 decision did not oust the power of judicial review if there is any violation of any of provision of fundamental rights of any person. He submits that therefore since in this case it is clear that the petitioners right to be promoted have been violated by way of non implementation of column 3(ক) of the gazette notification, therefore the respondents

committed a gross error in low and such error ought to be rectified in judicial review. He continues that the petitioners have earned a vested right to be promoted by dint of the gazette notification which has the force of law. He submits that the respondents did not implement the gazette notification arbitrarily. He further contends that the respondents' inaction manifest deviation from the prescribed rules which they themselves formulated setting the criteria for promotion. The learned Advocate for the petitioners cited a few decision including in the case of Roads and Highway Department Vs. Md. Mujibur Rahman reported in XVI ADC(2019) 583 including some other unreported decisions. Summing up his submissions he concludes upon assertion that therefore the inaction of the respondents in implementing the gazette notification being arbitrary and malafide the Rule bears merit ought to be made Absolute for ends of justice.

On the other hand learned Senior Advocate Ms. Nahid Mahtab appearing for the respondent No. 1 vehemently opposes the Rule. He agitates that the Rule is not maintainable in limine since the proper forum for hearing of essentially service matters particularly regarding the terms and condition of service is the administrative tribunal under Article 117 of the constitution. She continues that consequently judicial review in such matters does not lie. In support of her submissions she particularly relies on the decision of our Apex court reported in 21 BLC(AD)(2016) 94. She contends that by dint of this judgment the scope of judicial review relating to service matter following the principles held therein has been confined and limited. Upon elaborating she argues that promotion is not a vested right and

involve disputed matters of fact and law which may not be entertained in judicial review by way of invoking of Article 102 of the Constitution.

She controverts the contention of the learned Advocate for the petitioners upon arguing that only by way of a gazette notification grouping the petitioners and some other persons in the same group(who have received promotion) does not automatically create any vested right of the petitioner to be promoted and does not prima facie place than in the same category as others in the group. She contends that whether the petitioners are at all entitled to the benefit of promotion to the proportion of 8% from their class is also essentially a disputed matter of fact which can only be settled by the administrative tribunal. She further elaborates that promotion not being a vested right such promotion shall also depend on the service record, experience, competence by examinations of other reports, documents and other factors which cannot be looked into in judicial review under Article 102 of the Constitution. She reiterates that whether the instant petitioners are at all entitled to be promoted shall inter alia depend on an objective assessment of service record, requisite qualifications and other factors. She argues that whether any fundamental rights has at all been violated still remains a disputed matter of fact in this case.

She next pursuades that the petitioners' contention that the Respondents committed discrimination by granting promotion to other employees from the same group that is column 3(ক) of the gazette notification, such claim of discrimination also remains a disputed matter of fact. In the same strain she continues that in the petitioners

case whether the conduct of the Respondents at all amount to violation of Article 29 of the constitution including other Articles can only be determined after assessment from factual aspects.

To substantiate her argument she draws attention to para 150 of the 21 BLC(AD)(2016) 94. She submits that in Sontosh's case the principle has been expounded that if violation of fundamental rights alleged by the claimant is mixed up with disputed facts and law, then certainly the jurisdiction of the High Court Division to entertain such petition will be ousted and the remedy of the applicant is with the Tribunal. She draws the analogy in the instant case in this decision with the instant case before us and reasserts that this case also clearly manifests that whether at all any fundamental right of the petitioner have been violated or not still remains a disputed matter of fact, depending on evidences and other factual aspects which must be determined by the administrative tribunal. She submits that it is clear that in this case the petitioners could not yet prove that any of their fundamental right has actually being violated. She next points out to another decision of our Apex court in the case of Bangladesh Krishi Bank Vs. Arun Chandra reported in 71 DLR(AD)(2019) 1. She submits that in the 71 DLR(AD)(2019) 1 decision, our Apex court has even more elaborately decided the matter finally on the issue of when Article 102 may be invoked challenging violation of fundamental rights. She takes us to para 13 and para 16 of the 71 DLR(AD)(2019) case and argues that it has held therein that even in case of allegation of malafide such malafide is also a disputed matter of fact and law in

service matter and must be settled by the tribunal. She points out to para No. 16 of the 71DLR(AD)(2019).

She pursuades that it is clear that even in case of allegations of malafide the only resort for redress is the administrative tribunal which may entertain an application arising out of such allegations.

Regarding the petitioners contention that Section 4(2) of The Administrative Tribunals Act, 1980 does not contemplate entertaining any application by the Administrative Tribunal in case of inaction of the respondents, she controverts upon assertion that the spirit of the 21 BLC(AD)(2016) 94 case also contemplate inaction and asserts that in all cases whether action, inaction, orders whatsoever must be challenged before the proper forum that is the administrative tribunal, particularly if it involves disputed matter of fact. She reiterates that the 21 BLC(AD)(2016) 94 case set out the principle that in case of disputed matters of fact and law judicial review shall be ousted and the only forum is the administrative tribunal. She further points out that the 21 BLC(AD)(2016) 94 Sontosh's case mandates that only the vires of a law may be challenged and be entertained under judicial review under Article 102 of the Constitution. In the light of her submissions she concludes that the instant writ petition is not maintainable and the Rule bears no merits ought to be discharged for ends of justice.

Learned Advocate for the respondent No. 2 substantively supports the submissions of the learned Advocate for the respondent No. 1. Learned D.A.G also supports the contention of the learned Advocate for the respondent Nos. 1 and 2 and he submits that in the

light of his submissions the present writ petition is not maintainable since the proper forum is the Administrative Tribunal and the Rule bears no merit ought to be discharged for ends of justice. He also cites a decision reported in 44 DLR(AD)111 our Apex court found that –

> *"A person in the service of the Republic who intends to invoke fundamental right for challenging the vires of a law will seek remedy under article 102(1), but in all other cases he will be required to seek remedy under article 117(2)."*

He concludes his submissions upon assertion that the writ petition is not maintainable and the Rule bears no merits ought to be discharged for ends of justice.

We have heard the learned Advocate for both sides, inter alia perused the application and materials on records.

It is an admitted fact that a gazette notification was published by the respondents setting out a column and criteria for promotion of certain employees from their respective posts to a Higher position. The present petitioners are substantively relying on Annexure B which is the gazette notification vide S.R.O No. ১৭২-আইন/৯৬ dated 7.10.1996. The present petitioners particularly rely on the column setting out the basic criteria for promotion of certain employees from their posts to higher posts. The petitioners here are relying on serial 3, Ka(3). Serial No. 3, Ka(3) in the schedule of the gazette notification dated 7.10.1996 is reproduced below:

ক্রমিক নম্বর	পদের নাম	সরাসরি নিয়োগের ক্ষেত্রে সর্বোচ্চ বয়সসীমা	নিয়োগ পদ্ধতি	ন্যূনতম যোগ্যতা
৩।	সহকারী পরিবার পরিকল্পনা কর্মমর্তা-	৩০ বৎসর	(ক) ৫০% পদ নিম্নোক্ত হারে নিম্নবর্ণিত- দের মধ্যে হইতে পদোন্নতির মাধ্যমে- (১)২% ফিল্ড ট্রেইনার; (২)১০% অফিস তত্বাবধায়ক (৩)৮% পরিবার কল্যাণ পরিদর্শিকা (৪)৩০% পরিবার পরিকল্পনা সহকারী খ) ৫০% পদ সরাসরি নিয়োগের মাধ্যমে।	(ক) পদোন্নতির ক্ষেত্রে:- ফিল্ড ট্রেইনার পদে ০৩(তিন) বৎসরের, অথবা অফিস তত্ত্বাবধায়ক পদের ০৫ (পাঁচ) বৎসরের, অথবা পরিবার কল্যাণ পরিদর্শিকা পদের ১৩(তের) বৎসরের, অথবা এবং থানা পরিবার পরিকল্পনা সহকারী পদে ১৬(ষোল) বৎসরের চাকুরী। খ) সরাসরি নিয়োগের ক্ষেত্রে:- স্নাতকোত্তর ডিগ্রী।

It appears that the present petitioners who are Family Welfare Visitors have been granted upto 8% from the percentage to be promoted in receiving promotion in vacant posts as Assistant Family Welfare Officer. It also appears that 2% shall be selected from the post of Field Trainers, 10% shall be selected from the post of Office Superintendants and 30% shall be selected from the post of Family Planning Assistant and 8% from the petitioners class that is Family Welfare Visitors. The remaining 50% will be selected through direct appointment.

It is the petitioners' contention that while others which include the Field Trainers, Office Superintendants and Family Welfare

Assistants that is serial no. 1, 2 and 4 have been promoted from the serial No. 3 column Ka that is the petitioners even though it clearly manifests from Serial 3(ক) (3) that they have been allotted for purposes of promotion to a proportion of 8% , nevertheless they have been arbitrarily left out from being granted promotion without assigning any reason. It is also the petitioners contention that depriving the petitioners from being granted promotion while other categories belonging to the same group have been promoted according to their percentage is in direct violation of the petitioners' fundamental rights under Article 27,29,31 and 40 of the constitution.

It is also the petitioners contention that the respondents themselves placed the petitioners being Family Welfare Visitors with Field Trainers, Office Superintendants and Family Planning Assistants in the same group for purposes of promotion. It is the petitioners' further contention that therefore leaving the petitioner arbitrarily refraining from granting them promotion while granting promotion to other categories of employees in the same group violates the provision of SRO 7.10.1996 serial 3(ক) and is malafide and arbitrary.

The petitioners also contended that the instant case is different and distinguishable from the 21 BLC(AD)(2016) 94 and which decision the respondents particularly relied upon.

After going through all the materials on record it is however evident that although the learned counsel petitioners repeatedly claimed that they have been discriminated against by promoting others from that same group that is 3(ক) and not complying with the specific guideline in gazette notification but however as such there is

nothing on record by way of factual materials/ documents which may indicate that the petitioners inspite of their entitlement did not receive promotion.

Pursuant to relying upon the 21 BLC(AD)(2016) 94 case which is also binding on us, our considered view is that entitlement to be granted promotion is not an isolated issue nor a vested right on its own, rather it depends on various factual aspects. Factual aspect entails the petitioners requisite qualifications, service records, past record etc. which materials are not before us. It is our considered view that only a mere gazette notification which groups the petitioners into to a particular category along with some others even though such group may on the surface it appear that the employees categorised in the same group (column 3 ক in the instant case) are all on the same footing for purposes of promotion , but reality is whether they actually stand on the same footing with others who have been promoted can only be determined and ascertained after assessment of documentary evidences pertaining to their requisite qualifications, past service record etc. inter alia whatsoever other documents and evidences may be necessary to assess their entitlement for being granted promotion. In this particular case whether a fundamental right of the petitioners has at all been violated or not we are not aware of yet. Violation of fundamental rights in this case can only be ascertained after assessment of documents which must be examined including any other evidentiary aspects that may be necessary thereto. We are not in a position to settle upon such factual matters and which are disputed matters of fact and law. Keeping this in mind we are

inclined to draw upon a principle in the 21 BLC (AD) (2016) 94 case wherein our Apex court held that:

> *"The constitution being the Supreme Law of the country, if the violation of fundamental rights alleged by the claimant is mixed up with disputed facts and law, then certainly the jurisdiction of the High Court Division to entertain such petition will be ousted and the remedy of the applicant is with the Tribunal. "*

As mentioned hereto before in this case also we are not yet aware whether there has been any violation of fundamental rights and which can be looked into by the Administrative Tribunal only which has been constituted under Article 117 of the Constitution. Terms and condition of service also include promotion which is essentially a part of terms and condition of service. Therefore only a gazette notification setting out a criteria for promotion stating the percentage to be promoted does not ipso factor create any vested right nor does it automatically entitle any person to be promoted to a higher post while their eligibility to be promoted yet remains to be ascertained upon assessment of factual aspects.

The petitioners also contended that Article 29 of the Constitution has been violated by the respondents by not implementing the gazette notification. To address this contention we have placed reliance upon paragraph No. 162 of 21 BLC(AD)(2016) 94 case which is reproduced hereunder:

"The expression equal protection of law or equality before law has to be interpreted in its absolute sense. All persons are equal in all respect disregarding different conditions and circumstances in which they are placed. Equal promotion of Law means all persons are equal in all cases. I means the persons similarly situated should be treated equally. The term equality is a dynamic concept with many aspect and diminution and it cannot be confined within traditional and doctrinaire limits. Indian Supreme court taking into consideration article 14 of the Constitution held that article 14 does not forbid reasonable classification for the purposes of legislation. There can be permissible classification provided two conditions are satisfied namely (a) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped t together for other left out for the group; (b) differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis. There cannot be any question of discrimination on the ground of some acts providing for different set up and each must be taken to be a class by itself. The legislature has a right to make such provision for its Constitution as it thinks fit subject always to the provisions of the constitution. "

After perusal of this decision which is binding upon us we are in respectful agreement with the 21 BLC(AD)(2016) 94 case. The instant writ petitioner must also satisfy two conditions to ascertain whether they have been at all been discriminated or not. The classification must be founded on the petitioner's eligibility based on their factual assessment of eligibility also upon comparison with other categories from the group 3(ক) who have been granted promotion whether the respondents arbitrarily left the petitioners out can only be ascertained by the Tribunal relying on the factual aspects related to the criteria of their eligibility.

Reiterating our view that Article 29 is not applicable in the instant case, and the petitioners pursuasion on the equality principle, it is our view that what may on the surface appear to be equal, such perception may be a superficial perception in some cases. In such cases, as in the present case, the equality argument may be accepted only once we go behind the superficial perception (in this case the gazette notification) and delve into the actual facts behind the superficial criteria.

Our considered view is that to avoid anomaly and confusion and for purposes of clarity a duty also lies with the authorities to formulate along with the Rules they ought to also set some objective guidelines manifesting the requisite qualifications, regarding academic qualifications, service records, experience and/or any other prerequisite necessary thereto to make a person eligible to be granted promotion.

The learned Advocate for the petitioners continued persistently that provision of Section 4(2) does not contemplate any application to be entertained by the tribunal except against any decision, nor is there any proactive order in this case. Our considered view is that in this case although the petitioners challenges inaction of the respondents and which term 'inaction' has not been directed referred to in Section 4(2) of the Administrative tribunal Act, but nevertheless since the inaction of the respondents in not affording promotion to the petitioners involve disputed matter of fact and law therefore pursuant to the 21 BLC(AD)(2016) 94 case disputed matters of fact and law ascertaining their requisite qualification, past records etc. cannot be entertained to writ jurisdiction and the only efficacious remedy is the Administrative Tribunal. We have also perused the 71 DLR(AD) (2019) 1 case which decision came following the 21 BLC(AD)(2016) 94 case. In the 71 DLR(AD)(2019)1 our Apex court relying on 21 BLC(AD)(2016) 94 case basically further strengthened the principle set out in the 21 BLC(AD)(2016) case by holding that even in case of illegality, malafide action whatsoever the petitioners shall resort to the Administrative Tribunal since malafide inaction is also a disputed matter of fact and relates to terms and conditions of service of the person.

Whether any fundamental right of the petitioners have been violated or not may have been examined under Article 102 in an appropriate case. But in this case whether a fundamental right of the petitioners have been violated or not are essentially fact based regarding promotion and which claim of the petitioner must be

supported by documents and other evidentiary factors as already mentioned above. Therefore in this case writ is not maintainable and the Administrative Tribunal is the proper forum constituted following provisions of Article 117 of the Constitution.

Under the facts and circumstances and upon hearing the submissions of the learned counsels from both sides and particularly relying on the 21 BLC(AD)(2016) 94 followed by the 71 DLR(|AD)(2019)1 that the instant writ petition is not maintainable. We do not find merits in this Rule.

In the result, the Rule is discharged without any order as to costs with observation. Relying on the provisions of Section 14 of the Limitation Act which contemplates redress in case of resorting to the wrong forum, the petitioners in this case are at liberty to seek redress before the Administration Tribunal if they are so advised.

Communicate this judgment at once.

Fatema Najib, J:

I agree.

Arif(B.O)