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

In the matter of:

WRIT PETITION NO. 3251 of 2020

In the matter of:

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

-And-

In the matter of :

Md. Ziaur Rahman and others

..... Petitioners

Versus-

The Government of Bangladesh and others

..... Respondents

Mrs. Nahid Mahtab, Senior Advocate with
Mrs. Rumana Haque, Advocate
……For the petitioners
Mr. Murad Reza, Senior Advocate with
Mr. Mejbahur Rahman, Advocate
….. For the respondent No. 4
Mr. Salahuddin Dolon, Senior Advocate
Mrs. Sathika Hossain, Advocate
….. For the respondent Nos. 8-24

Heard on 05.12.2021, 06.12.2021, 06.01.2022, 23.01.2022 and Judgment on 10.02.2022

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Iqbal Kabir

Md. Ashfaqul Islam, J:

This Rule under adjudication, at the instance of the petitioners, issued on 09.03.2020, was in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why Memo No. বিউ-বা(কর্ম)/২/বিবিধ-৬৮/৯৭ (২য়

খঙ) dated 20.01.2000 issued by respondent No. 6, Directorate of Personnel, Bangladesh Power Development Board, appointing 31 contractual engineers by a decision passed in 871st Board Resolution dated 18.01.2000 without any open advertisement in national newspaper and the seniority by the respondents showing the contractual engineers senior to the petitioners (Annexure-D & D-1) and as to why the refusal/failure of the respondents to give seniority to the petitioners over the contractual appointees in gross violation of the petitioners fundamental rights and provisions of the Bangladesh Power Developments (Employees) Service Rules, 1982 should not be declared to have been made and passed without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this court may seem fit and proper."

At the time of issuance of the Rule a direction was given by this Court upon the respondent No. 4, Chairman, Bangladesh Power Development Board to dispose of the representation dated 18.12.2019.

Mrs. Nahid Mahtab, the learned Senior Advocate appearing with Mrs. Rumana Haque, the learned Advocate for the petitioners, Mr. Murad Reza, the learned Senior Advocate appearing with Mr. Mejbahur

Rahman, the learned Advocate for the respondent No. 4 and Mr. Salahuddin Dolon, the learned Senior Advocate appearing with Mrs. Sathika Hossain, the learned Advocate for the added respondent Nos. 8-24.

At the very outset Mrs. Nahid Mahtab, the learned Senior Advocate submits that she does not want to cross sword on the first part of the Rule which relates to the appointment of 31 contractual Engineers pursuant to a decision passed in 871st Board Resolution dated 18.01.2000. Now she comes for a direction with regard to the 2nd part of the Rule which relates to the seniority of the petitioners over the contractual appointees.

The background leading to the Rule is that the petitioners along with other candidates submitted their application before 19.10.1999 and accordingly, a written and viva examination was held. Pursuant to a memo dated 05.03.2000 a total number 144 including the petitioners were appointed as Assistant Engineers of Bangladesh Power Development Board (hereinafter referred to as BPDB) and accordingly the petitioners along with others joined in their service on different dates. In the process of appointment on the basis of advertisement dated 09.09.1999 a memo dated 25.10.1999 was issued appointing 20 Assistant Engineers in BPDB on contractual basis which according to

the statement made in the writ petition was made without having any prior permission from the authority and without an open advertisement in any National newspaper.

However, by a Memo dated 20.01.2000 issued by the respondent No. 6, the Director, Directorate of Personnel, BPDB 31 contractual Engineers were appointed by a decision passed in 871st Board Resolution dated 18.01.2000.

In paragraph 8 to 16 of the application the petitioner's grievances in respect of appointment of 31 contractual appointees and the question of their seniority have been discussed with reference to the laws and Rules connected thereto.

In paragraph 14 of the petition it has been stated that the petitioners came to know in 2011 that during the pendency of the open advertisement for appointment of Assistant Engineers, the Respondents have appointed 25 Assistant Engineers without complying with the appointment Rules and gave them seniority over the regular appointees. Being aggrieved by that seniority list the regular appointed Assistant engineers filed writ petition No. 5640 of 2016. The Hon'ble High Court Division upon hearing the same passed judgment and order dated 05.06.2017 by giving a direction to the respondents to take necessary steps to publish proper seniority list in accordance with law within 60

days from the receipt of the judgment. The said Judgment was affirmed by the Hon'ble Appellate Division and subsequently the seniority list of the 116 Assistant Engineers were re-fixed by a memo No. 27.11.0000.210-18.001.19.344 dated 08.12.2019 (Annexure-'G, G-1 and G-2).

It has been further stated that the petitioners for the first time became aware of their rights in respect of seniority over 31 contractual appointees mainly from the said decision and right thereafter they filed the instant writ petition and obtained the present Rule and order of direction.

Mrs. Nahid Mahtab, the learned Senior Advocate appearing with Mrs. Rumana Haque, the learned Advocate upon placing the writ petition, supplementary affidavit, an application for direction to keep seniority of the petitioners and other materials on record mainly submits that in utter disregard of BPDB employees service Rules 1982 this 31 contractual Engineers were appointed along with the petitioners and they got promotion from assistant engineer to executive engineer and got seniority over the petitioners in violation of BPDB service Rules 1982 clause 6(1)(2) Annexure-'F'.

The petitioners, as she submits, have been discriminated and have become victim of arbitrary power of the authority in respect of

promotion of the contractual Engineers prior to the petitioners in violation of the gazette published on 08.07.1985 under amended Bangladesh Civil Service Seniority Rules, 1983 and therefore, the same is illegal and liable to be declared to have been passed without lawful authority having no legal effect.

In elaborating her submissions she contends that under the circumstances the question of seniority indeed depends on the whims of the official of a particular department and as such the same has curtailing effect of the law and hence the same is liable to be declared to have been passed without lawful authority and is no legal effect.

She tried to impress upon us that under the similar circumstances the decision as referred to above was delivered and this Division decided the seniority of the petitioners of that writ petition which was also affirmed by the Hon'ble Appellate Division in Civil Petition for Leave to Appeal No. 3197 of 2017. She has cited the decision of 72 DLR AD 188 wherein it has been observed as under:

> *"If if is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be*

made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of the his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

Mr. Murad Reza, the learned Senior Advocate by filing affidavit-in-opposition and affidavit in reply has vehemently opposed the Rule contending that all the added respondents Nos. 8-24 were appointed in accordance with law. Each and every time of promotion added respondents were senior to the petitioners as the respondents were

appointed before the petitioners. Secondly, he submits that the petitioners neither raise any objection nor made any complain before the BPDB in any manner whatsoever challenging the aforesaid selection grade or promotion at any point of time.

The added respondents were appointed absolutely in accordance with the service Rule as he submits. Respondent No. 6, the Director, Directorate of Personnel, BPDB published an advertisement in the "Daily Sangbad" dated 30.03.1998 and the "Daily Bhorer Kagoj" dated 02.04.1998 for appointment of the posts of Assistant Engineers and Deputy Assistant Engineers. Accordingly a total 882 (eight hundred Eighty two) candidates have participated in the written examination on 24.07.1988 and after passing written examination 329 candidates participated in the Viva-voce examination during 06.12.1998 to 10.12.1998 as per clause 8 of service Rule. Thereafter, the Board in 839th meeting held on 31.05.1999 selected total 52 candidates including 3 candidates under freedom fighter's quota for the posts of Assistant Engineers and the Board also created a panel of list of 83 Electrical Engineers and 43 Mechanical Engineers with rest of the candidates for future appointment as an Assistant Engineers in BPDB. He has referred Annexures-16, 17, 18, 19 and 20 of the affidavit-in-opposition and categorically explains how this 31 Engineers have been gradually, on

different phases got promotion and finally pursuant to 871st Board meeting held on 18.01.2000 it was decided to regularize those contractual 31 employees subject to no objection Certificate (NOC) from the government.

He further submits that in writ petition No. 5640 of 2016 respondents 22 (twenty two) Engineers were appointed on the basis of "no work no pay basis" and no circular was published in the Daily Newspaper and they did not appear in any examination for the appointment. Therefore, the judgment and order of the said writ petition is not applicable in the instant writ petition in as much as the added respondents as it has been already referred to above were appointed on the regular basis having been found qualified in written and viva voce examination.

Another limb of submissions is that the writ petition fails due to filing of the same after a long laps of time. In the instant writ petition added respondent Nos. 8-24 joined their service on 20.01.2000 and the petitioners joined their service on 05.03.2020 and the writ petitioner herein filed this writ petition after 20 years and no explanations have been offered by the writ petitioner for this inordinate delay in filing the writ petition. In support of his contention he has relied in the decision of

Abdul Hashem vs. State 52 DLR AD 116 and Delwar Hossain vs. Bangladesh 54 DLR 494.

Therefore, he submits since the writ petitioner filed the instant writ petition after 20 years of the appointment of the added respondent Nos. 8-24 this writ petition is liable to be discharged.

Harping on the same tune the learned Senior Advocate Mr. Salahuddin Dolon appearing with Mrs. Sathika Hossain, the learned Advocate made his written submissions. He has drawn our notice to Para 7, 8, 10 and 11 to 15 of the affidavit-in-opposition filed by him on behalf of added respondent Nos. 8-24. In support of his contention he has referred to the decision of Dr. Khairun Nahar and others vs. Prof. Dr. Iqbal Arshalan 25 BLT AD 249. In paragraph 15 of the said decision the Hon'ble Appellate Division observed as under:

> *"It is to be mentioned here that almost all the appellants were earlier appointed either on contractual or adhoc basis. In the advertisement dated 18.10.2005 the then University authority in a most unclean manner stated "পদের সংখ্যা কিছু সংখ্যক" which clearly indicated that the then authority of the University did not proceed with the appointment process properly. Moreso, in order to give special privilege to the candidates who had been serving on*

contract or adhoc basis, the University authority provided special opportunity to the applicants. It was mentioned in the advertisement that, "বিশ্ববিদ্যালয়ে চুক্তিভিত্তিক কর্মরত চিকিৎসকগনকে অগ্রাধিকার দেয়া হবে।" Giving such privilege the authority selected the appellants for appointment. Question is, why should the University would depart from the normal rule and indulge such process. Whenever, a selection is to be made on the basis of merit performance involving competition and possession of any additional qualification or factor is envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worh or proven inter see merit and suitability, duty assessed by the authority. There is no question of eliminating all others preventing thereby even an effective and comparative consideration or merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered. This Court always insisted the Government and autonomous bodies for making regular and proper recruitments and not to encourage or shut its eyes to the

persistent transgression of the rules of regular recruitment. Article 29 of the Constitution guarantees equality of opportunity for all citizens in matters relating to employment or appointment to the office of the Republic. The University authority must obey its rules and not to flaw its own rules and would confer undue benefits on a few at the cost of many waiting to complete. Though learned Counsel for the respondent University brought those irregularities in the notice of this Court but in the High Court Division the then authority of the University in its affidavit-in-opposition supported those appointments. It is desirable and this Division repeatedly observed that every appointment in any post under the Government or autonomous body can only be made after a proper advertisement inviting applications from eligible candidates and holding of selection following rules and by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter see merit of the candidates who have applied in response to the advertisement made. Unless the

appointment is made in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If the services of the appointees who had put in few years of service are to be terminated, the authority shall follow the principles: (a) satisfaction in regard to the sufficiency of the materials collected so as to enable the University authority to arrive at its satisfaction that the selection process was tainted; (b) determine the question that the illegalities committed go to the root of the matter which vitiate the entire selection process; (c) whether the sufficient materials present enable the authority to arrive at satisfaction that the officers in majority have been found to be part of the fraudulent purpose or the system itself was corrupt. Satisfaction as to the sufficiency of materials are required to be gathered by reasons of a thorough investigation in a fair and transparent manner. In the case in hand the University authority did not do so. A professor of the University filed writ petition challenging the appointments. But finally as syndicate member he approved the decision for confirmation of the services of the appointees. On the other

hand, in the High Court Division the University supported the appointee-appellants."

We have heard the learned Senior Advocate Mrs. Nahid Mahtab appearing for the petitioners and the learned Senior Advocate Mr. Murad Reza for the respondent No. 4 and the learned Senior Advocate Mr. Salahuddin Dolon for the respondent Nos. 8-24 at length and considered their submissions carefully. We have also perused the writ petition, supplementary affidavit, application for direction, affidavit-in-opposition filed by the respondent No. 4 together with the reply and affidavit-in-opposition filed by the respondent Nos. 8-24 and other materials on record meticulously.

The only question that is left for consideration by this Division in this writ petition is whether under the facts and circumstances of the instant case the ratio decidendi in writ petition No. 5640 of 2016 will apply.

It is admitted that the chart that has been given in Para 13 of the affidavit-in- opposition filed by the respondent Nos. 8-24 has confirmed the position in respect of appointment of the petitioners and the added respondents.

Further as it appears from Para 14 and the chart of the gradation list that the added respondents had shown as senior to the petitioners on

the gradation list and their appointment was also made pursuant to the advertisement in the “Daily Sangbad” and the “Daily Bhorer Kagoj” dated 30.03.1998 and 02.04.1998 respectively. It has been already discussed the chronological appointment process of the added respondents already.

Admittedly, in the context of the decision as cited above, upon which the petitioner relied, has no manner of application in the facts and circumstances of the instant case. In the cited decision the petitioners claim of seniority upon the respondents was considered in as much as, the respondents in that case were appointed on the basis of “no work no pay” and they did not appear in any examination for appointment pursuant to any circular published in any daily Newspaper whereas the case in hand is absolutely otherwise. The appointment of the added respondents have been explained chronologically in juxtaposition to the petitioners and it has been found from the chart as revealed from the affidavit-in-opposition filed by the added respondent Nos. 8 to 24 that the added respondents though appointed on contractual basis but appointed earlier in point of time to that of the petitioners. And subsequently their appointments were regularized by the authority in the manner as the appointments of the petitioners were done. Therefore, filing of this writ petition after long laps of 20 years on the basis of

submissions that the petitioners for the first time came to learn from the decision of writ petition No. 5640 of 2016 that their seniority should be considered upon the petitioners, have no legs to stand. Under the facts and circumstances of the instant case the said decision cannot be applied. Delay defeats equity is a well known legal maxim. In the case of Abdul Hashem vs. the state 52 DLR AD 116 the Hon'ble Appellate Division observed:

> *"The aggrieved persons cannot wait for an indefinite period for result of their representations but must come to the writ jurisdictions as expeditiously as possible to avoid delay in seeking a summary relief. All of them are guilty of laches, their writ petitions were therefore, rightly rejected although on different ground."*

Same principle was also applied by this Division in the case of Delwar Hossain vs. Bangladesh 54 DLR 494 holding that the writ petition should be rejected on the ground of inordinate delay of filing of the same. This proposition of law has also been settled in the decisions of Sarower Bhuiyan vs. Bangladesh 44 DLR AD 144, Fazlur Rahman and others vs. Bangladesh 52 DLR AD 116, Mohammad Jaan vs. Bangladesh and others DCR 982 AD, Saifur Rahman vs. Certificate

Officer Dhaka 29 DLR SC 32, Yunus Miah and vs. Ministry of Works 45 DLR 498, KM Mahmudur Rahman vs. State 48 DLR 92 and so on.

After discussing plethoras of decisions on this point Mr. Mahmudul Islam in his book 'Constitutional Law of Bangladesh' in paragraph 5.12 has written as follows:

> *"(5.12) The remedy of judicial review is different from the remedy of appeal. In appeal, the appellate authority goes into the merit of the case either on a point of law or on points both of law and fact, re-assess the evidence and can substitute its own decision for that of that of the body appealed from. Thus, if the appellate authority thinks that the victim of a motor accident has been given too small an amount of damages for injuries inflicted by the negligence of the defendant, it can increase the amount. In judicial review the court is concerned with the question whether the action under review is lawful or unlawful and the basic power of the court in relation to an illegal decision is to quash it. If the matter has to be decided again, it must be done by the original deciding authority. Courts exercise the power of judicial review on the basis that powers can be validly exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of*

his authority conferred by the constitution or the laws. For example, if an election tribunal sets aside an election holding, upon consideration of the evidence adduced, that the successful candidate has been guilty of corrupt practices, the appellate, authority upon re-assessment of the evidence can set aside the finding of the election tribunal. If no appeal is provided for, the court on judicial review cannot re-assess the evidence. But if the election dispute has been decided upon an application made by a voter (though the election law permits trial of election disputes upon application only by a candidate) or the election tribunal has proceeded on erroneous view of the law or ignoring a material fact, the court exercising the power of judicial review can quash the decision of the election tribunal because of want of authority or illegality. In the same way, the court can exercise the power of judicial review if the decision is malafide or in violation of the principles of natural justice. The role of the court in judicial review is essentially supervisory and the principle here at work is basically that of ultra vires, which is synonymous with 'outside jurisdiction' or 'in excess of powers'.' The duty of the review court is to confine itself to the question

whether the authority (i) has exceeded its powers; (ii) committed an error of law; (iii) failed to consider all relevant factors or taken into consideration irrelevant factors, (iv) failed to observe the statutory procedural requirements and the common law principles of natural justice or procedural fairness; (v) reached a decision which no reasonable authority would have reached, or (vi) abused its powers. Other grounds like the doctrine of legitimate expectation are in the process of emerging."

That being the situation the inevitable result that follows that this Rule should be discharged being devoid of any substance.

In the result, this Rule is discharged, however, without any order as to cost. Since, the order of direction to dispose of the petitioner's representation that has already been disposed of, we make no comments on that.

Communicate at once.

Md. Iqbal Kabir, J:

I agree.