

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

Present

Madam Justice Kashefa Hussain

And

Madam Justice Kazi Zinat Hoque

Writ Petition No. 2346 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. Jahidul Islam and others
..... Petitioners.

Vs.

Government of the People's
Republic of Bangladesh and
others.

.....Respondents.

Mr. Mohammad Najmul Huda, Advocate

.....for the petitioners

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

with Mr. Prahlad Debnath A.A.G

with Mr. Md. Hafizur Rahman A.A.G

with Ms. Farida Parvin Flora, A.A.G

... for the respondent No. 1

Heard on: 23.10.2022 and judgment on:

25.10.2022.

Kashefa Hussain, J:

Rule nisi was issued calling upon the respondents to show cause as to why they should not be directed to published the gradation list/seniority list of the Health Assistants including the petitioners for promotion in the post of medical Technologist (Sanitary Inspector ship) and also directed to consider the cases of the petitioners in giving promotion to the said post in accordance with the provisions of

বাংলাদেশ স্বাস্থ্য বিভাগীয় নন-মেডিকেল কর্মচারি নিয়োগ বিধিমালা, ২০১৮ 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 petitioners are citizens of Bangladesh having permanent addresses shown in the cause title of the Writ petition. The respondent No. 1 is the Secretary, Ministry of Health and Family Welfare, Bangladesh Secretariat, Shahbag, Dhaka, the respondent No. 2 is the Director General (DG), Directorate General of Health Services (DGHS), Mohakhali, Dhaka-1212, The Director (Health), Dhaka Division, 105-106, Motijheel, C/A, Dhaka and the respondent No. 4 is the Deputy Director (Health) and Chairman of Gradation List Committee, Office of the Director (Health), Dhaka Division, 105-106, Motijheel C/A, Dhaka.

The petitioners' case inter alia is that the petitioners after joining the post of Health Assistant have been serving the respondents and other authority concerned satisfactorily and they are still in the same position, that is , Health Assistant without having any promotion. They have been serving in the aforementioned post for more than 15 years without any promotion whatsoever. That the petitioners were appointed after following the procedure laid down in the Bangladesh Health Services (Non-Medical Officers and Employees) Recruitment Rules, 1985. In the year 2018 government has promulgated new Rules through gazette notification being SRO No. 91-Ain/2018 dated March 24, 2018 by repealing the Rules of

1985 in the name of বাংলাদেশ স্বাস্থ্য বিভাগীয় নন-মেডিকেল কর্মচারি নিয়োগ বিধিমালা, ২০১৮ . It transpires from the said Rules that the petitioners are eligible to be promoted in the post of Medical Technologist (Sanitary Inspector ship) from the post of Health Assistant having served in the said post for at least 3(three) years. At serial No. 95 of the Schedule-1 to the Rules of 2018 made it clear that the petitioners are in the 'Feeder Post' for promotion in the post of Medical Technologist (Sanitary Inspectorship). However, it is a matter of great regret that the respondents for some reasons are not considering the cases of the petitioners for promotion which is arbitrary, malafide and the same is a sign of administrative highhandedness. That after publication of the new Rules of 2018 the office of the respondent No. 2 issued a letter under the signature of its Director (Administration) vide memo No. স্বা:অীধ:/প্রশা-৩/নিয়োগ/ছাড়পত্র/৯৭/১৭৫৬ তারিখ: ১৫/০৪/২০১৮ খ্রি: asking the concerned offices that the vacant posts in third and fourth class employees would be filled up in accordance with the provisions of the Rules of 2018. In compliance to the said letter the office of the Director (Health), Dhaka Division, the respondent No. 3 issued a letter vide memo No. পরি: স্বা:/ঢাকা/প্রশা/পদোন্নতি-/২০১৮/৭৭১ তারিখ- ১০/০৫/২০১৮ খ্রি: asking all Civil Surgeons and others concerned to submits necessary papers for promotion in the said post. Subsequently, another reminder was given by the respondent No. 3 vide memo No. পরি: (স্বা:)/ঢাকা/প্রশা/পদোন্নতি/২০১৮/৮৩৫/১৬ তারিখ- ২১/০৫/২০১৮ খ্রি:.. That after receiving the aforementioned letters from

the office of the respondent Nos. 2 and 3, all the Civil Surgeons and others concerned submitted necessary papers of third and fourth class employees who are eligible for promotion as asked for. The offices of the petitioners that is concerned Civil Surgeons submitted their documents to the respondent No. 3 along with the applications of the petitioners vide memo Nos. সিএস/গোপ/২০১৮/৩০৩৬ তারিখ: ২৭/০৫/২০১৮ খ্রি: এবং সি.এস. মাদা/প্রশাসন/২০১৮/ তারিখ: ২৮/০৫/২০১৮ খ্রি: requesting the respondent Nos. to consider their case in giving promotion to the post of Medical Technologist (Sanitary Inspectorship) as they are serving in the post of Health Assistant being feeder posts for about 15 years. That as per the instruction of the Directorate General of Health Services (the respondent Nos. 2), the office of the Director (Health), Chattogram issued a letter vide memo No. প:স্বা:চ/পদোন্নতি-কর্মচারী/২০১৮/৭৯৮২ তারিখ: ১১/০৪/২০১৮ ইং asking all concerned to submit necessary papers for publishing gradation list/ seniority list for promotion in Grade XI to XX. Similar letters have also been issued from other offices of the Director (Health) of various Divisions. That after receiving necessary papers, the office of the respondent No. 3 published a draft gradation list / seniority list for promotion in different post vide memo No. পরি:(স্বাস্থ্য)/ ঢাকা/ প্রশা/পদোন্নতি/২০১৮/১৩৩১/২৫ তারিখ ৪/৮/২০১৮ and the same was circulated to different offices. However, the respondents with a malafide intention most arbitrarily and illegally have not published the gradation list of the petitioners to be promoted in the post of Medical Technologist (Sanitary

Inspectorship.) That the respondents have given promotion in different posts in the light of the aforementioned gradation list in Dhaka Division and in this regard different orders have been made by the Director (Health), Dhaka Division, the respondent No. 3 vide memo Nos. পরি: (স্বা:)/ঢাকা/প্রশা/পদোন্নতি/২০১৯/১৯১/২(২৫০) তারিখ- ২৯/০১/১৯, পরি:(স্বা:)/ঢাকা/প্রশা/পদোন্নতি/২০১৯/১৯২/২(১৫০) তারিখ- ২৯/০১/১৯ এবং পরি:(স্বা:) ঢাকা/প্রশা/পদোন্নতি/২০১৯/৬৯৩/১(৪২৫) তারিখ: ২৪/০৮/২০১৯ খ্রি:. By the said orders the respondent No. 3 has promoted 189 Assistant Health Inspectors to the post of Health Inspector, 314 Health Assistants to the post of Assistant Health Inspector and as many as 46 employees in various posts. However the respondents have neither published the gradation list of the instant petitioners nor have they considered their promotion as yet which is discriminatory and violative of the fundamental rights as guaranteed by the Supreme Law of the land. That the office of the Director (Health), Khulna Division and Chattogram Division have promoted two of their health Assistant to the post of Medical Technologist (Sanitary Inspectorship) pursuant to the directions of the Ministry of Health and Family Welfare as well as Directorate General of Health Services (DGHGS) in the light of the provision of বাংলাদেশ স্বাস্থ্য বিভাগীয় নন-মেডিকেল কর্মচারি নিয়োগ বিধিমালা, ২০১৮ vide momo Nos. পস্বা/খুবি/শা-২/২০১৮/১৮৯৯ (৫) তারিখ: ০৬/১২/২০১৮ ইং and প:স্বা:চ:/ডিপিসি-লক্ষীপুর/প্রশা-১৮/১৩৯৪৪/১(৮) তারিখ-০৮/০৭/২০১৮ ইং. That the petitioners have been waiting long for promotion in the post of Medical Technologist (Sanitary Inspectorship) for about 15 years and

as per their service Rules they are eligible to be promoted in the said post after serving in the post of Health Assistant for at least 3 years being “Feeder Post” holder. It may be noted that all the petitioners have completed 3 years’ Diploma in Medical Technology (Sanitary Inspectorship) from different institutes of health technology under the Directorate of Health. Stating all those facts they have applied to the respondent NO. 2 on 13.01.2019 requesting him to consider their cases and promote them in the post of Medical Technology (Sanitary Inspectorship) by publishing a gradation list/ seniority list. The copy of the same has also been forwarded to the respondent Nos. 1 and 3 as well as the concerned Civil Surgeons. However, the respondents concerned have not paid heed to it nor have they taken any positive steps publishing their gradation list and promotion yet.

Learned Advocate Mr. Mohammad Najmul Huda appeared for the petitioners while learned D.A.G Mr. Noor Us Sadik Chowdhury along with Mr. Prahlad Debnath A.A.G along with Ms. Farida Parvin Flora, A.A.G appeared for the respondent Nos. 1.

Learned Advocate for the petitioners submits that the respondents’ inaction in refraining from granting promoting and further refraining from publishing the petitioners gradation list/ seniority list is arbitrary and unlawful and not sustainable. He contends that although the petitioners are eligible to be promoted and other employees in the same post have been promoted but however the respondents arbitrarily excluded the petitioners from being granted due promotion. He submits that such discriminatory act violated the

fundamental right of the petitioners. He contends that although the petitioners made an application to the respondents to grant promotion and also to publish the gradation list but however the respondents ignored their application and did not publish the gradation list/ seniority list. He submits that not publishing the gradation list / seniority list is absolutely unlawful and it is the fundamental right of the petitioners and every other person whom it may concern to be informed of the exact position and exact footing they stand on. He submits that therefore refraining from both their duty of granting promotion and not publishing the gradation list is without lawful authority and such inaction cannot be sustained. He concludes his submission upon assertion that the Rule bears merit ought to be made absolute for ends of justice.

On the other hand learned A.A.G Prahlad Devnath appeared on behalf of the respondent No. 1 opposes the rule. He submits that promotion cannot be claimed as a matter of right since being granted promotion is not a fundamental right of the petitioners and depend on other factors and circumstances of the concerned employees. Upon a query from this bench regarding the respondents inaction in not publishing the gradation list/ seniority list he however concedes that the right to knowledge and to be informed of the exact position of any person including the petitioners is a basic fundamental right and the gradation list ought to be duly published. He concludes his submission upon assertion that the Rule bears no merit ought to be discharged for ends of justice.

We have heard the learned Counsels perused the application and materials on records. In this writ petition the petitioners challenged two inactions by the respondents, first is refraining from granting promotion while others on the same footing have been granted promotion and therefore discriminatory and violative of the fundamental right of the petitioner under Article 29 of the Constitution. Secondly they have challenged the non publishing of the gradation list/seniority list of the petitioners. Regarding the matter of promotion, our considered view is that promotion is certainly not a matter of right and no vested right to be promoted is created on the face of it. The petitioner claims that others on the same footing have been granted promotion while the petitioners have been excluded. Regarding this contention in the absence of any materials on records before us which may indicate that those employees who have been promoted are on the same footing as the petitioners, we are not in a position to give any direction that the petitioners ought to be promoted which is dependant on factors and circumstances which are disputed matter of fact. Therefore we cannot decide on the matter of promotion at this juncture. In writ petition No. 8251 of 2019 in the case of Habiba Aktherrun Nahar and others vs. The Government of Bangladesh and others where one of us was the author judge and is a party in that decision this court gave observation to the effect:

“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 other even though such group may on the surface it appears that the employees categorized in the same group (column 3K in the instant case) are all on the same footing for purposes of promotion, but reality is whether they actually stands 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 weather 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.”

Therefore it is needless to state that the matter of promotion cannot be considered at this juncture.

Regarding the gradation list/ seniority list not being published we are in agreement with the learned Advocate for the petitioners. Publishing of gradation list/ seniority list is certainly both a statutory and fundamental right of the petitioners to be informed of their exact position regarding their seniority whatsoever. It is both a statutory right and fundamental right of the petitioners to have knowledge of their position. It is a statutory right of the petitioner under the provisions of Information Act, 2009 to be informed of their exact position regarding the seniority or any other matter concerning employment. Moreover it is also a fundamental right of the petition to be informed of such. We are of the considered view that publishing the gradation list / seniority list is a mandatory duty of the respondents. The respondents in not considering the application which has been annexed in annexure ‘I’ of the writ petition so far as the publishing of the gradation list/ seniority list such inaction of the

respondents is not desirable and is violative of the legal and fundamental rights of the petitioner.

Under the facts and circumstances we are inclined to dispose of the matter with directions.

In the result, the Rule is disposed of.

The respondents are hereby directed to publish the gradation list/ seniority list of the Health Assistants including the petitioners within a period of 30(thirty) days from the date of receiving of a copy of this judgment.

Communicate this judgment at once.

I agree.

Kazi Zinat Hoque, J:

Arif(B.O)