

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

WRIT PETITION No. 5726 OF 2021

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. Mokarrom Hossain and others
....Petitioners

-Versus-

The Secretary, Ministry of Industries
Government of the People's Republic of
Bangladesh, 91 Motijheel Commercial Area,
Dhaka and others

..... Respondents

Mr. Md. Ataur Rahman, Advocate

..... For the Petitioners.

Mr. Mohammad Abbas Uddin, A.A.G.

. For Respondent No. 1.

Mr. Mohammad Shafiqul Islam, Advocate.

... For Respondent No. 2.

Judgment on: 09.12.2021

Present:

Mr. Justice Md. Khasruzzaman

And

Mr. Justice Md. Mahmud Hassan Talukder

Md. Khasruzzaman, J:

On an application under article 102 of the Constitution, on
09.12.2015 the *Rule Nisi* was issued in the following terms:

*“Let a Rule Nisi be issued calling upon the respondents to show
cause as to why the promotion of the petitioners should not be
given as per gazette notification dated 20 June 2005 Rule 5*

(3)(4)(5) so far it relates to একাধিক উন্নয়ন প্রকল্প হইতে একই পদে দুই বা ততোধিক কর্মকর্তা বা কর্মচারীকে নিয়মিত করা হইলে সেই ক্ষেত্রে উন্নয়ন প্রকল্পে যোগদানের তারিখের ভিত্তিতে জ্যেষ্ঠতা নির্ধারিত হইবে and/or pass such other or further order or orders as this Court may seem fit and proper.”

The facts relevant for disposal of the case in short are as follows:

That all the writ petitioners were appointed in the post of Credit Supervisor of the four Poverty Alleviation Projects of Bangladesh Small & Cottage Industries Corporation (BSCIC), namely, (1) Women Entrepreneurship Development Programme, (2) Self-Employment Project through Small and Cottage Industries, (3) Poverty Alleviation Project through Income Generation of Rural Industries and (4) Revitalization of Rural Economy Project through the Development of Rural Industries on different dates in the years of 1999, 2000 and 2001. Subsequently, the Government amalgamated the four projects forming Small Micro and Cottage Industries Foundation (SMCIF) under section 28 of the Companies Act, 1994 which has been published in the Gazette Notification dated 28.08.2014 (Annexure-A) and the writ petitioners were appointed in the aforesaid Foundation on different dates in the years of 2015, 2016 and 2017 and subsequently, they were made permanent along with others by the Foundation on 30.04.2017 (Annexure-G). It is stated that in case of appointment as permanent staff of the Foundation, the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ shall be followed and as per provision of the Small Micro and Cottage Industries Foundation

Employees Service Probidhanmala, 2015, the employees are to be promoted on the basis of their service experience. But without following the aforesaid provisions of the Rules and without publishing the gradation list, the authority concerned promoted other Credit Supervisor and Accountants illegally who are junior to the writ petitioners (Annexure-F). Thus the petitioner No.1 filed an application on 10.12.2020 before the Co-ordinator of Gradation List Publication Committee detailing all the facts with a prayer for promotion of the writ petitioners. But without considering the same, the authority again promoted some other employees who are junior to them on different dates (Annexure-K).

Under such circumstances, the writ petitioners filed this writ petition and obtained Rule Nisi in the form of mandamus as to why promotion should not be given as per rules 5(3)(4)(5) of the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005.

The notices of the *Rule Nisi* having been served upon the respondents, respondent No.2 has entered appearance and filed affidavit-in-opposition contending *inter alia* that admittedly the petitioners are the employees of a Foundation registered and established under the Companies Act, 1994 which has own service rules namely- the ক্ষুদ্র, মাইক্রো ও কুটির শিল্প ফাউন্ডেশন কর্মচারী চাকুরী প্রবিধানমালা, ২০১৫ for dealing with the service of the employees of the Foundation along with the petitioners and as such the promotion of the petitioners will be guided as per probidhan 9.3 along with 19.2 read with Schedule 1 of the aforesaid Small Micro and Cottage Industries

Foundation Employees Service Probidhanmala, 2015 and hence, the claim of the petitioners to promote them as per provision of the Service Rules, 2005 is not maintainable and the *Rule Nisi* is liable to be discharged.

Mr. Md. Ataur Rahman, the learned Advocate appearing on behalf of the writ petitioners submits that the petitioners are entitled to get promotion as per provision of the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠ্যতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005 since the petitioners have joined their respective posts in their respective projects much earlier than the other junior employees who were promoted by Annexures- F and K to the writ petition and Annexures-P, P-1 and P-2 to the supplementary affidavit and as such non consideration of the promotion of the petitioners at the time of giving promotion to the other junior employees is illegal and without lawful authority and is of no legal effect. He also submits that articles 27, 29 and 31 of the Constitution provides equal opportunity in the public employment and as such for non consideration of the promotion of the petitioners the equal opportunity guaranteed under the aforesaid articles of the Constitution has been infringed and as such he has prayed for making the *Rule Nisi* absolute with direction to be issued upon the respondents to give promotion to the petitioners as per the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠ্যতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005.

Mr. Mohammad Shafiqul Islam, the learned Advocate appearing on behalf of the respondent No.2 submits that admittedly the petitioners are the employees of the aforesaid Foundation which has its own service rules namely- ক্ষুদ্র, মাইক্রো ও কুটির শিল্প ফাউন্ডেশন কর্মচারী চাকুরী প্রবিধানমালা, ২০১৫ and the matter of promotion of the employees of the Foundation including the writ petitioners are guided by probidhan 9.3 along with 19.02 of the said Service Probidhanmala, 2015 and as such the petitioners under no circumstances can claim promotion as per provision of the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005 and as such the Rule Nisi is liable to be discharged. He also submits that the Foundation in which the petitioners are employed is not a local authority or is not performing the functions in connection with the affairs of the Republic within the meaning of article 102 of the Constitution and as such writ petition under article 102 of the Constitution is not maintainable and the Rule Nisi is liable to be discharged.

Having heard the learned Advocates appearing on behalf of their respective party and on perusal of the writ petition, affidavit-in-opposition along with all papers annexed thereto.

It appears that the petitioners claim promotion as per Gazette Notification dated 20 June 2005 rules 5(3)(4)(5) so far it relates to একাধিক উন্নয়ন প্রকল্প হইতে একই পদে দুই বা ততোধিক কর্মকর্তা বা কর্মচারীকে নিয়মিত করা হইলে সেই ক্ষেত্রে উন্নয়ন প্রকল্পে যোগদানের তারিখের ভিত্তিতে জ্যেষ্ঠতা নির্ধারিত হইবে stating that in case of promotion of the staff of the Foundation, the উন্নয়ন প্রকল্প হইতে রাজস্ব

বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ shall be followed.

Admittedly all the writ petitioners were appointed in the post of Credit Supervisor of the four Poverty Alleviation Projects of Bangladesh Small & Cottage Industries Corporation (BSCIC), namely, (1) Women Entrepreneurship Development Programme, (2) Self-Employment Project through Small and Cottage Industries, (3) Poverty Alleviation Project through Income Generation of Rural Industries and (4) Revitalization of Rural Economy Project through the Development of Rural Industries on different dates in the years of 1999, 2000 and 2001 and thereafter the Government established Small Micro and Cottage Industries Foundation (SMCIF) under section 28 of the Companies Act, 1994 which has been published in the Gazette Notification dated 28.08.2014 by accumulating and amalgamating the aforesaid four projects (Annexure-A) and then the writ petitioners were appointed in the aforesaid Foundation on different dates in the years of 2015, 2016 and 2017 and subsequently, they were made permanent along with others by the Foundation on 30.04.2017 (Annexure-G).

In the meantime the *Small Micro and Cottage Industries Foundation Employees Service Probidhanmala, 2015* has been made for the purpose of regulating the service of the employees of the Foundation.

The learned Advocate for the respondent No.2 has submitted that for all matters relating to the service of the employees of the Foundation *the Small Micro and Cottage Industries Foundation*

Employees Service Probidhanmala, 2015 shall be followed not the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005.

On perusal of the Foundation Employees Service Probidhanmala, 2015, it appears that under the short title and application of the Probidhanmala it has been stated in probidhan 2.1 that এই প্রবিধানমালা ক্ষুদ্র, মাইক্রো ও কুটির শিল্প ফাউন্ডেশন এর কর্মচারী চাকুরী প্রবিধানমালা, ২০১৫ নামে অভিহিত হবে। In probidhan 2.2 of the Probidhanmala it has been stated that এই প্রবিধানমালা কার্যকরী হওয়ার পর তফসিলে উল্লিখিত পদে সমাগু ৪(চার) টি প্রকল্প থেকে নিয়োগকৃত কর্মচারী এবং ভবিষ্যতে নিয়োগকৃত সকল কর্মচারীর প্রতি প্রযোজ্য হবে। In the definition provided in probidhan 3.1 it has been stated that এই প্রবিধানমালা বলতে “ক্ষুদ্র, মাইক্রো ও কুটির শিল্প ফাউন্ডেশন’ এর কর্মচারীদের চাকুরী প্রবিধানমালাকে বুঝাবে।” It further appears from probidhan 9.1 relating to direct appointment wherein it is stated that “.....ফাউন্ডেশনের জন্য প্রণীত চাকুরী প্রবিধানমালায় উল্লিখিত জ্যেষ্ঠতা, শিক্ষাগত যোগ্যতা, গ্রেডভুক্ত শূন্য পদ ও অন্যান্য শর্তাবলী অনুসরণপূর্বক বিসিকের বর্ণিত সমাগু চারটি প্রকল্পের কর্মকর্তা/কর্মচারীদের মধ্য হতে এ জনবল নিয়োগ করা হবে। Thereafter, appointment by promotion has been provided in probidhan 9.3 of the aforesaid Probidhanmala, 2015. So, the aforesaid Probidhanmala of 2015 is the complete code for the employees of the Foundation and the petitioners being the employees of the said Foundation shall be governed and guided by the aforesaid Probidhanmala of 2015 which has been made pursuant to clause 93 of the Articles of Association of the Foundation wherein it is provided that *the SMCIF may, subject to the directives of the Board of Directors from time to time in this regard, appoint or employ such persons (officers and employees) as it*

consider necessary for the efficient performance of its operation on such terms and condition as may be prescribed by regulations. But at first appointment will be made from the manpower of the closed four projects then outsider. In Probidhanmala 1.7 under Preface of the Probidhanmala, 2015 it has been stated that ফাউন্ডেশনের *Memorandum of Association* এর ৮ ধারা মোতাবেক ফাউন্ডেশনে ২০ সদস্য বিশিষ্ট একটি সাধারণ পর্ষদ এবং *Articles of Association* ৩৭ ধারা মোতাবেক ৮ সদস্য বিশিষ্ট একটি পরিচালক পর্ষদ থাকিবে। আর্টিকেলস অফ এসোসিয়েশন এর ৯৩ ধারা মোতাবেক এই ফাউন্ডেশনে কর্মকর্তা/কর্মচারীদের নিয়োগ দেয়া এবং তাদের পরিচালনার জন্য এই চাকুরী প্রবিধানমালাটি প্রণয়ন করা হলো।

In probidhan 19.2 of the Probidhanmala, 2015 wherein চাকুরীর ধারাবাহিকতা has been provided stating that ফাউন্ডেশনের নির্ধারিত পদে নিয়োগের পর সকল কর্মকর্তা/কর্মচারীর চাকুরী নতুন নিয়োগ হিসেবে বিবেচিত হবে। পূর্বের চাকুরীর হিসাব গণনা করা হবে না। ফাউন্ডেশনের নির্ধারিত পদে নিয়োগের পর নিয়োগকৃত ব্যক্তিকে তার পূর্ব পদের আহরিত বেতন-ভাতাদির ধারাবাহিকতা (*pay protection*) প্রদান করা হবে না।

So, it is clear that all matters relating to the service of the employees including the petitioners of the Foundation shall be guided and regulated by the provision of *the Small Micro and Cottage Industries Foundation Employees Service Probidhanmala, 2015.*

Moreover, the Foundation in which the writ petitioners are employed is not a development project within the meaning of rule 2(a) of the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠ্যতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005 and the petitioners could not establish his claim of applicability of the aforesaid provision of the Rules, 2005. When probidhanmala 19.2 of the Foundation Employees Service

Probidhanmala, 2015 provides that after being employed by appointment in the service of the Foundation, the service of the officers/employees shall be treated as new/fresh appointment in the Foundation and their previous service shall not be counted. As such, we are of the view that the petitioners have nothing to deal with the উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠ্যতা নির্ধারণ বিধিমালা, ২০০৫ as published in the Gazette Notification dated 20 June 2005 which is not applicable in the case of the petitioners. The petitioners at best could agitate the bar employed in the provision of the Foundation Employees Service Probidhanmala, 2015.

For the reasons and discussions made hereinabove, we do not find any substance in the submissions of the learned Advocate for the petitioners as well as in the merit of the *Rule Nisi* which is liable to be discharged.

In the result, the *Rule Nisi* is discharged without any order as to costs.

Communicate the order.

Md. Mahmud Hassan Talukder, J:

I agree.