

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CIVIL PETITION FOR LEAVE TO APPEAL NO.4549 OF 2018
(Arising out of C.M.P. No.1161 of 2018)

(From the judgment and order dated the 1st day of August, 2018 passed by a Division Bench of the High Court Division in Writ Petition No.8599 of 2018)

Government and others : Petitioners
Petitioners

-Versus-

Md. Mainul Haque and others : Writ Petitioners
Respondents

For the Petitioners : Mr. Sk. Mohd. Murshed, Additional Attorney General instructed by Mrs. Sufia Khatun, Advocate-on-Record

For the Respondents : Mr. Murad Reza, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record

Date of Hearing and order : **The 22nd day of May, 2022**

ORDER

M. Enayetur Rahim, J: Delay in filing the civil petition for leave to appeal is hereby condoned.

This civil petition for leave to appeal is directed against the judgment and order dated 01.08.2018 passed by the High Court Division in Writ Petition No.8599 of 2018 disposing the Rule with a direction to enlist the name of the writ petitioners-respondents in the monthly pay order (MPO) from the date of their joining within 01(one) month from the date of receipt of this order without any fail.

The facts, relevant for disposal of the instant leave petition are as follows:

The present respondents as petitioners filed writ petition No.8599 of 2018 under article 102 of the constitution of the People's Republic of Bangladesh before the High Court Division seeking direction upon the present petitioners (hereinafter referred to as writ-respondents) to release the monthly pay order (MPO) with arrear and other service benefits from the date of their joining.

In the writ petition it is contended that the writ petitioners were appointed on different dates and joined in the vacant posts on different dates in different Schools as per the বেসরকারী শিক্ষাপ্রতিষ্ঠা-নর (স্কুল ও ক-লজ) জনবলকাঠা-মা ও এম,পি,ও নীতিমালা-২০১৩ to জনবলকাঠা-মা ও এম,পি,ও নীতিমালা-২০১৩) by following proper procedures, but the concerned authority has not yet released monthly pay order (MPO) of the writ petitioners despite their repeated request to the writ-respondents.

It is further contended that the writ-petitioners have spent long time in service with an unblemished service records and they fulfill all requirements for getting MPO as per বেসরকারী শিক্ষাপ্রতিষ্ঠা-নর (স্কুল ও ক-লজ) জনবলকাঠা-মা ও এম,পি,ও নীতিমালা-২০১৩ which has created "Legitimate expectation" in their favour to be enlisted under MPO. No proceeding was drawn against them. So, they are entitled to get the MPO and as such a direction should be given to the writ-respondents to take necessary steps for giving MPO to the petitioners.

The present petitioners, writ-respondents did not file any affidavit-in-opposition.

A Division Bench of the High Court Division after hearing the said Rule by the impugned judgment dated 01.08.2018 disposed of the same with a direction upon the writ-respondents to enlist the name of the writ petitioners in the monthly pay

order from the date of their joining within a period of 1(one) month on receipt of the order without any fail.

Feeling aggrieved by the said judgment, the writ-respondents have filed this leave petition.

Mr. Sheikh Mohd. Morshed, learned Additional Attorney General, appearing for the petitioners having assailed the impugned judgment has made the following submissions:

- I) the High Court Division without considering the provisions of relevant law/Nitimala directed the writ respondents to release the Government Portion of salary MPO of the writ petitioners from the date of their joining;
- II) the writ petitioners were very much concerned about the law that there is no scope for the writ petitioners to get MPO, because as per 'Janobol Khathamo' the writ petitioners did not had/have any right to enjoy MPO benefit as their respective appointment was a temporary/conditional one;
- III) the writ petitioners were appointed as an additional section teacher in different subjects in different institutions and in clause 6.11(b) of Janobol Khathamo-2013 it is clearly stated as per the pattern of 'Janobol Khathamo' one subject teacher already got MPO benefit, therefore, for the same subject there is no scope to include another teacher in the MPO scheme, thus their prayer for MPO was rightly rejected;
- IV) the MPO benefit depends upon the financial capacity of the government; it is a policy decision of the Government. After proper scrutiny when it was proved that the writ petitioners were out of patterns teacher, thus they are not entitled to get MPO;
- V) as per pattern of the MPO scheme there is no vacant post in the said schools; the teachers and staffs who

had requisite qualifications and patterned teachers, they have already been included in the MPO scheme, hence it is not possible to include the writ petitioners in MPO benefit.

On the other hand Mr. Murad Reza, learned Senior Advocate, appearing for the writ-petitioners-respondents having supported the impugned judgment has submitted that-

- i) the High Court Division on proper consideration of the relevant law/Nitimala as well as the facts and circumstances of the present case rightly and lawfully has made the Rule absolute;
- ii) the petitioners in response to the advertisement of NTRCA of the different posts participated in written and viva voce examination and successfully passed in the examination; annexure-A to writ petition shows that they are eligible to be appointed as Assistant Teacher of the respective subject at any Junior Secondary, Higher Secondary School, Madrasa in Bangladesh and according to section 10 of the Non-Government Teacher Registration and Certification Authority Act, 2005 that বেসরকারী শিক্ষাপ্রতিষ্ঠান শিক্ষক নি-য়া-গর তালিকা প্রণয়ন, ২০০৫ one must be registered and certified by the authority and then they can be appointed as such the High Court Division legally directed the writ-respondents to enlist the name of the petitioners in the MPO for ends of justice.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and other materials as placed before us.

The High Court Division in making the Rule has observed that-

"we have found that no proceeding has been pending against the petitioners nor any adverse

report could be found against them and their colleagues/all teachers and staffs of their institution are enjoying monthly payment order (MPO) for same service they are same status like the petitioners. But even then the respondents remained silent without considering the petitioners claim and even did not give any reply. We have also found that the petitioners have been performing their duties till today. In that view of the matter we find substance in the Rule for consideration."

Upon perusal of the impugned judgment it transpires that the High Court Division made the Rule absolute directing upon the writ-respondents to enlist the name of the petitioners in the MPO mainly on the view that their colleagues have already been enjoying MPO for same service and they were duly appointed in the service by the competent authority.

As per the relevant Nitimala there is no scope to give MPO to a teacher who has been appointed out of pattern and the writ petitioners having been appointed as a non-MPO post against the section teacher and their claimed of MPO benefit by avoiding the said 'Nitimala' cannot be enforced.

Further, in the case of Government represented by the **Secretary, Ministry of Education and others Vs. Md. Saidur Rahman** in Civil Petition for leave Appeal No.2584 of 2018 and **Government of Bangladesh and others Vs. Md. Nazrul Islam and others**, reported in 27 BLT page-167(AD) this Division has settled the issue involved in the present case and observed to the effect;

"In the case in hand, the petitioners did not allege that the writ-respondents have violated any legal

right of them. The granting of MPO is the policy decision of the Government. Therefore, the petitioners could not claim the same as of right. This Division is of the view that teachers and staffs of the Non-Government School and College could not claim the MPO as a matter of right and as such, direction could not be given unless infringement of legal right or violation of law."

Similar view has been expressed by this Division in the case of Government represented by the **Secretary, Ministry of Education and others Vs. Md. Saidur Rahman** in Civil Petition for Leave Appeal No.2584 of 2018;

In the above case it has been held that:

"Here, in this case, the High Court Division in fact, passed the impugned order to compel the executive to pay Government portion of salaries in as much as the Government did decide as yet to pay salaries to them or even did not assure them that the Government would pay the same. In absence of the statutory obligation, the High Court Division under Article 102 of the Constitution is not justified in issuing mandamus for payment of salary since a mandamus cannot lie in the absence of a legal right based on the existence of statutory duty. The mere fact that recognition and institution have been granted to an institution or, for that matter, for conducting new course or subject a financial sanction. A financial liability cannot be foisted on the Government to reimburse the salary payable to the teachers and staffs of

such presumption. No mandamus can issue for payment of salary by the Government in the absence of the prior sanction of the Government."

"Accordingly to "Dicey", Judges are not allowed to decide a case on the basis of whatever they consider just and fair. They are constrained by definite principles of law and by binding precedent."

The High Court Division in passing the impugned judgment did not at all consider the above settled proposition of law and thus committed serious error of law in making the Rule.

In view of the above, we find merit in leave petition.

Accordingly, the leave petition is disposed of.

The judgment and order dated 01.08.2018 passed by the High Court Division in Writ Petition No.8599 of 2018 is hereby set aside.

C.J.

J.

J.