

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique, C. J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 446 OF 2019

(From the judgement and order dated the 17th day of July, 2018 passed by the High Court Division in Writ Petition No.5549 of 2018).

The Office of the Controller : . . . Appellants
General of Accounts, CGA
Building, Shegunbagicha,
Dhaka-1000 and others.

-Versus-

Omar Faruque and others : . . . Respondents

For the Appellants : Mr. Tabarak Hossain, Senior Advocate,
instructed by Mr. Mohammad Ali Azam,
Advocate-on-Record

For Respondent Nos. 1-140 : Mr. Md. Nurul Amin, Senior Advocate,
with Mr. M. Sayed Ahmed, Senior
Advocate and Mr. Shah Monjurul Haque,
Advocate, instructed by
Mr. M. Ashrafuzzaman Khan,
Advocate-on-Record

Respondent Nos.141-142 : Not represented

Date of hearing : **The 1st, 7th and 15th day of February, 2023**

Date of judgment : **The 22nd day of February, 2023**

JUDGMENT

M. Enayetur Rahim, J: The civil appeal, by leave, is directed against the judgment and order dated 17.07.2018 passed by the High Court Division in Writ Petition No.5549 of 2018 disposing of the Rule with direction.

The relevant facts, for disposal of this civil appeal in brief, are that the writ petitioners-respondents herein after obtaining graduation from different Public Universities had applied for the post of Auditor in the Office of the Controller General of Accounts in response of

a Recruitment Circular dated 10.04.2011 vide memo No.সিজেএ/প্রশা-২/নিয়োগ/২০১০/৭১১/৩৩২২ by writ respondent No.5 seeking application from eligible candidates to fill up অযোষিত কর্মচারীগণের শূন্য পদ সমূহ for the post of Auditor in the office of the Controller General of Accounts. The writ-petitioners having requisite qualifications applied for the abovementioned post and after scrutiny of the applications they were given admit cards to sit for the written examination. The writ-petitioners have successfully passed in the said written examination and the result was also published on 07.12.2017 and as many as 3478 candidates passed in the written examination including the writ-petitioners.

The viva-voce examination was held and final result of the candidates who appeared in the viva-voce examination was also published on 29.03.2019. Among the candidates who passed in the viva-voce, 615 candidates were selected for direct recruitment in the post of Auditor in the office of the Controller General of Accounts. It has been stated in the application that one of the writ-petitioners Subrata Chakroborti on 01.04.2018 applied to writ-respondent No.5, the Deputy Controller General of Accounts (Administration) for getting the information and relevant documents of the list of candidates who have successfully passed viva-voce. The writ-respondents orally stated that the information would not be provided since the matter is of secrecy and accordingly did not provide the information as asked for.

On 18.06.2017, writ-respondent No.5 published a list of manpower in the office of writ-respondent No.3 as on 01.01.2016 to 31.12.2016. The number of sanctioned post for Auditor is 3539 and the total number of existing manpower in

the post of Auditor is 2193 (Male 1864 + Female 329) and the vacant posts remained $3539-2193=1346$ as on 31.12.2016. Although 1346 posts remained vacant, writ-respondent No.5 recommended only 615 candidates in violation of the appointment circular dated 10.04.2011. It has also been stated in the writ petition that some of the writ-petitioners who are the sons of freedom fighters were not recommended for the post of Auditor in the office of the Controller General of Accounts and the writ-respondents did not comply with the "Quota" and thereby violated the provisions. Some of the writ-petitioners have also filed representation to the Minister and the Secretary of the Ministry of Liberation War Affairs. It has been further stated that the writ-respondents have recommended more persons in some Districts compared to other Districts for the post of Auditor in the office of the Controller General of Accounts in violation of principles of equality. Some of the writ-petitioners have crossed their age of 30 years and are not qualified to apply for any Government job.

Being aggrieved by and dissatisfied with the inaction and failure of the writ-respondents to recruit the writ-petitioners who have successfully passed for the post of Auditor in the Office of the Controller General of Accounts, the writ-petitioners filed Writ Petition No.5549 of 2018 before the High Court Division and obtained Rule *Nisi*.

Writ-respondent Nos.3-5 entered appearance in the Rule and contested the Rule by filing affidavit-in-opposition controverting the material statements made in the writ petition. The case of writ-respondent Nos.3-5, in short, is that both the written and viva-voce tests are competitive

examinations. Getting pass marks in the written test cannot be considered to be the only criteria for recruitment. The circular was issued for recruitment of 689 candidates but in the written test total 3478 candidates were passed. Marks of all the candidates were not similar. Some got very high marks and some got only minimum pass marks. Viva-voce examination was necessary and was also held and the candidates who got higher marks than others were selected for recruitments against the said posts and as such there was no irregularity/illegality in selection of the candidates. It has also been stated in the affidavit-in-opposition that a significant number of candidates had applied against one post and as such the candidates who got highest marks were selected for the post or appointed in the said post and as such the authority was not at fault.

It has further been stated that it is evident from the circular dated 05.05.2013, issued by the Ministry of Public Administration that none of the candidates can be selected or appointed against the posts unless they are recommended by the Departmental Selection Committee and the Committee is formed by 5 members 3 of whom came from outside. The advertisement for recruitment of the candidates contained some conditional clauses, wherein, one of the conditions was that decision of the authority is final and the writ-petitioners herein upon accepting the aforesaid conditions applied for the post.

It has also been mentioned that under clause-3(Chha) of the advertisement the authority has the power to increase or decrease the number of posts and the candidates upon accepting that clause had applied for the posts and as such,

they are stopped to invoke the writ jurisdiction under article 102 of the Constitution.

A Division Bench of the High Court Division upon hearing the Rule *Nisi* by the judgment and order dated 17.07.2018 disposed of Rule with direction.

Feeling aggrieved by and dissatisfied with judgment and order passed by the High Court Division, the writ-respondents filed Civil Petition for Leave to Appeal No. 4258 of 2018 before this Division and leave was granted on 22.07.2019.

Hence the present appeal.

Mr. Tabarak Hossain, learned Senior Advocate appearing on behalf of the appellants (writ respondent Nos.3-5) submits that the High Court Division failed to consider that writ-respondent Nos.3-5 have no authority to appoint additional candidates violating the clearance letter dated 26.10.2010 issued by the Ministry of Finance in which definite number of post was permitted to be filled up and it should be further mentioned that the decision of giving clearance by the controlling Ministry is binding upon the CGA Office and the same was done accordingly. He further submits that writ-respondent Nos.3-5 have acted legally and in accordance with law in selecting the successful candidates against the vacant posts and the writ petitioners-respondents herein got lower marks in both the written and viva-voce tests than the successful candidates who were given appointment and thus they cannot claim to be appointed in the posts that became vacant after the advertisement has been issued as a matter of course and that the appellants appointed successful candidates in the selected posts and as such it is not

possible to comply with the direction given by the impugned judgment. Mr. Hossain lastly submits that in order to give appointment to the posts of Auditors a clearance for recruitment in the vacant posts is required to be obtained from the Ministry of Finance and the clearance obtained by the office of Controller General of Accounts in respect of vacant posts of 689 Auditors and that the posts having been filled up, there is no scope to fill up the posts with the writ-petitioners who participated in the written test but obtained very low marks and as such, they could not succeed in getting appointment.

Mr. Md. Nurul Amin and Mr. M. Sayed Ahmed, learned Senior Advocates appearing for the writ petitioners-respondents submit that the recruitment circular dated 10.04.2011 was issued stating “ অঘোষিত কর্মচারীগণের শূন্য পদ সমূহ পূরণের নিমিত্ত”, as on 21.12.2016 the total number of existing manpower in the post of Auditor is 2193 (Male 1864 + Female 329) and the vacant posts remained $3539-2193=1346$ and the office of the appellants issued a letter to the Secretary, Ministry of Finance, Bangladesh Secretariat wherein it is stated that the vacant posts remained in 3rd Class posts are 2010 as on 10.09.2018 thus there are available posts vacant remained in the posts of Auditor, but the appellants did not recruit the respondents (writ petitioners) even though they have successfully passed in written and viva voce examination, as such they are entitled to get appointment in service and the appeal is liable to be dismissed. They have further submitted that despite having sufficient numbers of successful passed and eligible candidates for the position of Auditor in the Office of the Controller General Account and

despite having sufficient vacant post, the inaction of the appellants in not recruiting the writ petitioners would result in creating frustration among them. But the appellants are not recruiting them, rather the appellants are trying to appoint in the vacant posts afresh instead of the respondents (writ petitioners), as such the appeal is liable to be dismissed. It has also submitted that the Ministry of Finance issued clearance certificate by letter dated 26.10.2010 to fill up/appoint 689 vacant post of auditors and after recruitment advertisement and after taking written and viva-voce examination the authority concern filled up 615 vacant posts out of 689 vacant posts as per clearance letter without appointing successful and suitable candidates (writ petitioners) though vacant post of auditors are available, rest 74 vacant posts are not filled up as per clearance circular which is a discrimination to the writ petitioners and it is also against the violation of the fundamental rights of the petitioners. It has been submitted that as per mark list two candidates got same marks in the examination but one candidate has been appointed and another candidate namely Md. Rejedul Islam bearing Roll No. 1111601 has not been appointed though both the candidates are in same position, even as per merit list the writ petitioners (present respondents) who obtained higher marks than the appointed candidates, have not been appointed thus the authority-appellants did not follow the merit list, as such the appellants illegally and arbitrarily did not appoint the writ petitioners and as such the appeal is liable to be dismissed. Lastly it has been submitted that

freedom fighter quota and District quota have not been filled up in following the provision of Service Rule.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgments and order of the High Court Division and other materials as placed before us.

From the submissions of the learned Advocates for the respective parties as well as the materials placed before us the following facts have been emerged:

- I. Ministry of Finance issued a clearance letter on 26.10.2010 for recruitment of 689 Auditors;
- II. CGA office published a notification on 10.04.2011 for inviting application from deserving candidates;
- III. a written test was taken on 30.12.2011 but due to allegation of irregularities that was cancelled by order dated 19.11.2015;
- IV. clearance order was alive for one year and then it was renewed up to 30th June, 2018;
- V. fresh written test was held for 70 marks on 03.11.2017 and the said examination was conducted by the Institute of Business Administration, Dhaka University;
- VI. comparative statement of the candidates list prepared by the CGA office according to the serial number of the successful candidate and 689 posts have been filled up.

It is the contention of the appellants that the Ministry of Finance issued a clearance letter for recruitment of 689 Auditors on 26.10.2010; however, in the advertisement for

the alleged recruitment published on 10.04.2011 nothing has been mentioned how many posts will be filled up and it also emerged that after completion of the written and viva-voce examination no final result was published by the writ respondents-appellants.

It is the positive case of the appellants that they having complied all the legal requirements gave appointment of 689 persons as Auditor pursuant to the clearance letter of recruitment issued by the Ministry of Finance. From annexure-1 to the affidavit-in-opposition filed by the writ respondent-appellants we find support of the submission of the learned Advocate for the appellants that Ministry of Finance issued a clearance letter for recruitment of 689 Auditors and, accordingly, the writ respondent-appellants observing all legal formalities appointed 689 Auditors as per the recommendation of the selection committee.

After holding written and viva-voce examination the selection committee recommended for appointment of 689 posts of Auditor and the authority duly appointed them. It is true that no formal list of selected candidates has been published to know who have passed in the viva-voce examination, but on perusal of the record as placed before us we are convinced that no illegality has been committed in appointing said 689 persons.

Merit list as well as different quotas, i.e. Muktijoddha, District and female quota have been filled up in due course. It is the positive case of the appellants that since there were no available posts; there is no scope to appoint the writ-petitioners. Moreover, selection process

has already been completed long before and in the meantime about 05(five) years have been already elapsed.

In the case of **Managing Director, Rupali Bank Limited, Head Office, Dhaka vs. Md. Shahrier Perves and others** reported in **25 BLC (AD) 136** it has been held that:

“There may be vacancies but, for financial constraints (wrongly typed as constrains), the appointing authority may not in a position to initiate the selection process for making appointments. It is left at the discretion and wisdom of the employer. Looking to the need, administrative exigency, financial capability, availability of infrastructure for the post, in question, and/or such other relative aspects, the appointing authority may not think it fit to fill up all the vacancies, if any, vacancy of the post is one thing and advertisement to fill up the vacancy is altogether another thing. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is not obligatory on the part of the appointing authority that whatever is the vacancy of the post, must be filled up and correspondingly there is no right, vested in the writ petitioners that even they are in waiting list, they can recalculate the vacancies and transgress waiting listed candidates into the list of the selected candidates.”

The Constitutional discipline requires that the High Court Division should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates.

From the materials produced before us it is fully established that there was no arbitrariness whatsoever on the part of the banks in filling up the posts which were made from the waiting list as referred by the learned Counsel for the respondents. Since the

advertised vacancies had been filled up according to merit and following the quota system, therefore, selection process in that respect stood exhausted. The waiting list does not survive.

Moreover, in absence of any statutory provision one year can be considered as reasonable period for validity (wrongly typed as validly) of a waiting list. Since the validity of the select penal has come to an end of the affix of time, therefore, there cannot be any order to appoint the persons from such select list prepared about 4/5 years ago.

The writ petitioners-respondents have not acquired any enforceable right to be appointed. It is settled principle that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the writ petitioners directing the Bank is to appoint the writ petitioners since they failed to establish that they have acquired an enforceable legal right to be appointed in the Banks since their names were empanelled and that the Banks have legal duty to appoint them.” (Underlines supplied)

In the case of **S.S. BALU AND ANOTHER versus STATE OF KERALA AND OTHERS** reported in **(2009)2 SCC 479** the Supreme Court of India has held that:

“A person does not acquire a legal right to be appointed only because his name appears in the select list. The State as an employer has a right to fill up all the posts or not to fill them up. Unless a discrimination is made in regard to filling up of vacancies or arbitrariness is committed, the candidate concerned will have no legal right for obtaining a writ of mandamus. Even selected

candidates do not have legal right in this behalf.” (Underline supplied)

If we consider the present case in the light of the above proposition of law then we have no hesitation to come to a definite conclusion that no legal right has been created in favour of the writ petitioners to get appointment though they are the successful candidates.

In the case of **GUJARAT STATE DY. EXECUTIVE ENGINEERS' ASSOCIATION versus STATE OF GUJARAT AND OTHERS** reported in **(1994) Supp (2) Supreme Court Cases 591** it has been held that:

“A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound.”

In the case of **Public Service Commission vs Ripon Chandra Shil and others** reported in **72 DLR (AD) 225** it has been held by this Division to the effect that:

“If a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed against the existing vacancies. Ordinarily the notification merely amount to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the state

*is under no legal duty to fill up all or any of the vacancies. The aforesaid views have been expressed in the case of **Shankarsan Dash vs. Union of India**, reported in **(1991)3 SCC 47**. The selection process by way of requisition an advertisement can be started for clear vacancy but not for future vacancy. In the instant case since the name of the writ petitioners were empanelled they had not acquired any vested right to get appointment. In the notification for employment there was no stipulation that any such panel was to be prepared for future appointment in future vacancies.” (Underlines supplied)*

Mr. Nurul Amin, learned Advocate appearing on behalf of the writ petitioners-respondents has tried to convince us that there were some irregularities and arbitrariness in the result sheet. We have meticulously examined the result sheet as placed by the learned Advocate for the appellants, and upon examining the same we do not find any substance in the said submission of the learned Advocate for the writ petitioners-respondents.

Having considered and discussed as above, we find merit in the appeal. Accordingly, the appeal is allowed. The judgment and order of the High Court Division is hereby set aside. There will no order as to costs.

C. J.

J.

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