

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

**CIVIL PETITION FOR LEAVE TO APPEAL NO.1566 OF 2023 WITH
CIVIL PETITION FOR LEAVE TO APPEAL NO. 1547 OF 2023 AND 1559
OF 2023.**

(From the judgment and order dated the 30th day of March, 2023 passed by the High Court Division in Writ Petition Nos.8594 of 2021 and 11803 of 2021).

Jasmin Ara Begum and others	:	. . . Petitioners (In C.P. No. 1566 of 2023)
Lailun Najma Begum and others	:	. . . Petitioners (In C.P. No. 1547 of 2023)
Marzina Yesmine and others	:	. . . Petitioners (In C.P. No. 1559 of 2023)
-Versus-		
Bangladesh, represented by the Secretary, Ministry of Women and Children Affairs, Bangladesh Secretariat, Dhaka and others	:	. . . Respondents (In C.P. No. 1566 of 2023)
Jasmin Ara Begum and others	:	. . . Respondents (In C.P. No. 1547 of 2023)
Laila Nasrin Jahan and others	:	. . . Respondents (In C.P. No. 1559 of 2023)
For the Petitioners (In C.P. No. 1566 of 2023)	:	Mr. Anwarul Azim Khair, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record
For the Petitioners (In C.P. Nos. 1547 of 2023 & 1559 of 2023)	:	Mr. M. K. Rahman, Senior Advocate, with Mr. ABM Siddiquir Rahman Khan, Senior Advocate, instructed by Mr. Md. Helal Amin, Advocate-on-Record
For Respondent Nos. 5-10 & 22-23 (In C.P. No. 1566 of 2023)	:	Mr. A.M. Amin Uddin, Senior Advocate, with Mr. Mohammad Saiful Alam, Advocate, instructed by Ms. Sahanara Begum, Advocate-on-Record
For Respondent No.56 (In C.P. No. 1547 of 2023)	:	Mr. A.M. Amin Uddin, Senior Advocate, with Mr. Mohammad Saiful Alam, Advocate, instructed by Ms. Sahanara Begum, Advocate-on-Record

For Respondent Nos. 1-2, 5, 7, 21, 29 & 49 : Mr. Anwarul Azim Khair, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record
(In C.P. No. 1547 of 2023)

For Respondent Nos. 1-4 : Mr. A.M. Amin Uddin, Senior Advocate, with Mr. Mohammad Saiful Alam, Advocate, instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record
(In C.P. No. 1559 of 2023)

Respondent Nos. 1-4, 11-21& 24-55 : Not represented
(In C.P. No. 1566 of 2023)

Respondent Nos. 3-4, 6, 8-20 : Not represented
22-28, 30-48, 50-55 & 57-75
(In C.P. No. 1547 of 2023)

Respondent Nos. 5-9 : Not represented
(In C.P. No. 1559 of 2023)

Date of hearing and judgment : The 28th day of January, 2024

JUDGMENT

M. Enayetur Rahim, J: Civil Petitions for Leave to Appeal Nos.1566 of 2023 and 1547 of 2023 are directed against the judgment and order dated 30.03.2023 passed in Writ Petition No.8594 of 2021, and Civil Petition for Leave to Appeal No.1559 of 2023 is directed against the judgment and order of the same date passed in Writ Petition No.11803 of 2021 by the High Court Division disposing of the Rules with observations and direction.

The subject matter of all the civil petitions for leave to appeal are same and those are heard together and disposed of by this common judgment.

The relevant facts leading to the filing of the present civil petitions for leave to appeal are that, the present petitioners in C.P. No. 1566 of 2023 and respondents in C.P. No. 1559 of 2023 filed two separate writ petitions before the High Court Division challenging the gazette notification dated 13.12.2018 so far as it relates to amending serial No.3 of the schedule- 'Ga' of "কর্মকর্তা ও কর্মচারী (মহিলা

বিষয়ক পরিদপ্তর) নিয়োগ বিধিমালা, ১৯৯০" (in short, the Rules, 1990) by substituting new serial No.3 in place of earlier serial No.3 as being *ultra vires* the Constitution and prayed for a declaration that the terms and conditions of their service shall be governed by the original Rules, 1990 and all the actions taken including belated up-gradation of the post of the writ petitioners in Class-1 post with effect from 15.08.2019 published in the Official Gazette on 15.08.2019 by applying the amended Rules instead of promotion are without lawful authority and is of no legal effect. The petitioners further prayed for a direction upon the writ respondents to give them promotion in the post of Deputy Director with effect from the date they became eligible under the original Rules.

On 30.09.2021 the High Court Division issued a Rule *Nisi* in Writ Petition No. 8594 of 2021 and on 12.12.2021 issued a Rule *Nisi* in Writ Petition No. 11803 of 2021.

Added respondent No.5-30 in Writ Petition No. 8594 of 2021 and writ respondent No.3 of Writ Petition No. 11803 of 2021 contested the Rule.

The High Court Division after hearing both the Rules by a common judgment and order disposed of the same with the following observations and directions:

"(a) The amended schedule to the Service Rules did not adversely affect the rights of the petitioners. Hence, the same is not struck down and accordingly, declared to be *intra vires* the Constitution prospectively. However, the writ petition is maintainable for the reasons discussed in paragraph No. 21 above.

(b) The final gradation list approved, vide Memo dated 27.07.2022 so far as it relates to the petitioners and Program Officers are declared to have been made without lawful authority and of no legal effect.

(c) The concerned respondents are directed to prepare a new gradation list so far as it relates to the holders of the posts, namely Upazilla Women Affairs Officer (UWAO) and Program Officer in accordance with the gradation list dated 14.12.2004 in light of the observations made in paragraph Nos. 25 and 27 above.

(d) In respect of employees, who hold the post of Assistant Director (Training), Assistant Director (Marketing), Assistant Director (Career Development), Assistant Director (Micro Credit and Audit) and Hostel Superintendent (Temporary) (respondent Nos. 5-10 and 24 of WP No. 8594 of 2021) and whose names have been included in the gradation list, this Court has considered the submissions advanced by the learned Advocates of both sides. Having considered the arguments, this Court has decided to leave the matter with the concerned authority who shall decide the matter in accordance with the applicable laws/rules."

Being aggrieved by the said judgment and order, the petitioners of Writ Petition No. 8594 of 2021 have filed Civil Petition for Leave to appeal No.1566 of 2023, added

respondents No.25-30 of Writ Petition No. 8594 of 2021 have filed Civil Petition for Leave to appeal No.1547 of 2023 and third party have filed Civil Petition for Leave to Appeal No.1559 of 2023 before this Division.

Mr. Anwarul Azim Khair, learned Senior Advocate, appearing on behalf of the petitioners in C.P. No. 1566 of 2023 submits that in observation No.(a) of the judgment and order dated 30.03.2023 of Writ Petition No.8594 of 2021, the High Court Division erroneously observed that the amended schedule to the Service Rules did not adversely affect the petitioners' rights ignoring the settled proposition of law that the service rules in existence at the time of appointment of an employee create a vested right to him which cannot be altered/changed subsequently to his disadvantage, but the amended Service Rules, 2018 just took away the petitioners' accrued or vested rights to qualify for promotion to the post of Deputy Director until 2026 requiring more 5(five) years' service, whereas the petitioners already qualified for such promotion long back in 2021 under Rules, 1990 and thus, such amendment patently disadvantageous to the petitioners' rights.

The learned Advocate further submits that observation No.(a) of the High Court Division is misconceived and erroneous in fact and law both, inasmuch as, the High Court Division failed to appreciate that declaration of the amended schedule to the Service Rules to be *intra vires* the Constitution prospectively would have no bearing in the petitioners' case, rather their accrued and vested rights under Rules, 1990 is taken away by way of giving retrospective effect of the amended Rules, 2018, which so

far relates to the petitioners is required to be declared *ultra vires* the Constitution. He also submits that the High Court Division utterly failed to consider that the post of Assistant Director (Training), Assistant Director (Marketing), Assistant Director (Career Development), Assistant Director (Micro Credit and Audit) and Hostel Superintendent (Temporary) have not been brought in permanent organizational set up, have not been made permanent, rather have kept on yearly retention basis and would be abolished automatically in case of death, retirement, termination etc. of the post holders and no new manpower would be recruited in those posts are not included in the feeder post of Deputy Director under both the Rules, 1990 and the amended Rules, 2018 and thus their inclusion in the gradation List, 2022 downgrading the petitioners' position is *ex-facie*, illegal, arbitrary, *mala-fide* and *void ab-initio*, which is liable to be declared without lawful authority, instead of leaving the matter at the whim of the Authority, who already took side with those post holders prejudicing the Petitioners' interest.

The learned Advocate finally submits that the High Court Division did not consider the material fact that the petitioners were appointed under Rules, 1990 and their promotion, qualification and seniority would be determined in accordance with the provision of Rules, 1990 and amended Rules, 2018 bringing change in those events shall have no bearing against the petitioners, which this Division settled repeatedly, but as in the petitioners' case, since the Respondent No.4 persistently refusing such proposition, the High Court Division erred in law in not declaring the

petitioners' service to be governed by কর্মকর্তা ও কর্মচারী (মহিলা বিষয়ক পরিদপ্তর) নিয়োগ বিধিমালা, ১৯৯০ under which they were appointed.

Mr. A.M. Amin Uddin, learned Senior Advocate, appearing for respondent Nos.5-10 and 22-23 in C.P. No. 1566 of 2023, respondent Nos.56 in C.P. No.1547 of 2023 and respondent Nos.1-4 in C.P. No. 1559 of 2023 made submissions in support of the impugned judgment and order of the High Court Division.

Mr. Anwarul Azim Khair, Senior Advocate, appearing for respondent Nos.1-2, 5, 7, 21, 29 and 49 in C.P. No. 1547 of 2023 also makes submissions in support the impugned judgment and order of the High Court Division.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and order of the High Court Division and other connected papers available on record.

It appears from the impugned judgement that the High Court Division did not struck down the Service Rules holding that the Service Rules did not adversely affect the rights of the writ petitioners but the High Court Division gave relief to the petitioners holding that the writ petition is maintainable.

Admittedly, the High Court Division did not declare the law *ultra vires*, rather it held that the law is *intra vires*; however, the High Court Division gave benefit/relief to the writ petitioners holding the writ petition is maintainable. Admittedly, the writ petitioners are the Government servant, if they are aggrieved by any action, their remedy lies in the Administrative Tribunal. The findings of the High Court Division that the writ petition is amenable, when it itself

found that the Service Rules is *intra vires*, is suffers from legal infirmity and illegality.

It is well settled that the Government servants cannot be entitled to invoke writ jurisdiction when their remedy is available in the Administrative Tribunal. Mere challenging Service Rules *ipso facto* does not make it amenable to the writ jurisdiction.

In passing the impugned order, the High Court Division failed to consider and appreciate the 'doctrine' that what cannot be done directly cannot also be done indirectly.

Having considered above, we do not find any merit in these leave petitions. All the leave petitions are misconceived.

Accordingly, the impugned judgment and order of the High Court Division is set aside.

However, the writ petitioners may approach before the Administrative Tribunal for their grievance, if any, and if they will approach to the Administrative Tribunal, law of limitation will not stand as a bar for dealing before the Administrative Tribunal.

In the light of the above, all the civil petitions for leave to appeal are disposed of.

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