

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

WRIT PETITION NO. 3883 OF 2023.

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-And-

IN THE MATTER OF:

Mohammad Mahbub Alam and others
... ..Petitioners.

-Versus-

The Government of the People's Republic of
Bangladesh, represented by the Secretary,
Ministry of Education, Secondary and Higher
Education Division, Bangladesh Secretariat,
Dhaka and others.

...Respondents.

Mr. A.B.M. Altaf Hossain, Senior Adv. with
Mr. A.H.M. Anamul Haque, Advocate and
Mr. Md. Arif Chowdhury, Advocates
.....For the petitioners

Mr. Muhammad Rafiul Islam, Advocate
..... For the respondent No.7.

Mr. Sk. Shaifuzzaman, DAG with
Ms. Rehana Sultana, AAG and
Mr. Md. Salim Azad, AAG and
Mr. Md. Samiul Alam Sarkar, AAG and
Ms. Zulfia Akhter, AAGs

.... For the respondents

Present :

Mr. Justice K.M. Kamrul Kader

And

Mr. Justice Khizir Hayat

Heard & Judgment On : 06.12.2023.

K. M. Kamrul Kader , J :

On an application under Article 102 of the Constitution of the
People's Republic of Bangladesh Rule Nisi was issued on 28.03.2023, in
the following terms:-

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the Memo vide No. ৩৭.০০.০০০০.০৭২.০৬.০২১.১৬(অংশ-১).২২, তারিখঃ ১৬.০১.২০২৩ issued under the signature of the respondent No.4 amending the Rule 14 of the “স্কুল এন্ড কলেজ (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তির নীতিমালা, ২০২২” (Annexure-H) retrospectively limiting the admission quota to 5% among the students applying for admission of sibling through lottery should not be declared to have been issued without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this court may seem fit and proper.”

Facts relevant for disposal of the Rule, are that the Respondent No.3 published a memo on 14.11.2022, for admission in all Government and Non- Government (Private) Schools for the academic year of 2023. Accordingly, the Respondent No.7 has published a notice with online application details for admission in the Viqarunnisa Noon School and College (hereinafter referred as ‘VNSC’) for the academic year of 2023, from Class-I to class-IX stating that the online application process would be started on 15.11.2022 and it would be continuing up to 06.12.2022.

It is also stated that on 08.12.2022, the Respondent No.2 issued a policy along with a set of guidelines namely the "Guideline for Student Admission in Non-Government School, School and College (Secondary, Lower Secondary and Combined Primary Level)-2022" for admission to the secondary, junior secondary and combined primary sections at private schools, school and colleges, wherein Rule 14 of the said policy provides that in cases of brother/sister or twin siblings of the student applying in

any institutions is currently enrolled in the respective institution, the admissions committee of the respective institution will check and examine the applications and will take necessary step to admit the sibling applicants in the respective institution. It is also stated that the daughter of the petitioners are the applicants for admission in Class-I(one) of the VNSC for the academic year 2023, who have existing siblings currently studying in various classes in VNSC. Hence, they are eligible for the admission. Accordingly, they made online application, after fulfilling the requirements and paying all necessary fees within the timeframe for getting admission in VNSC under sibling quota. Subsequently, on 13.12.2022, the digital lottery for non- government schools were took place. The daughters of the petitioners were devastated to find out that their names were not in the admission list. Thereafter, on 21.12.2022, the Respondent No.3 published another memo with regard to the admission of students in sibling quota, wherein it was stated that in order to simplify and ease the admission process, examining and selecting applicants in sibling quota, a sub-committee will be formed consisting of the Principal/Headmaster, Assistant Headmaster/Senior Teacher and Assistant Teacher of the concerned schools. The committee will examine the applications of the applicants in sibling category who could not be selected for admission. The unsuccessful applicants would make an application to the concerned schools with affidavit, birth certificate, student ID of the sibling student and other necessary documents. It also sets out a deadline on 15.01.2023 for resolving the application process. The memo issued by the Respondent No.3 is referred to the previous

process and admission guideline-2022 set out by the authority relating to the admission of students in sibling quota and requested to take necessary steps with this regard. Thereafter, on 23.12.2022 the Respondent No.7 has published the first waiting list on 23.12.2022 and some of the petitioners' daughters names were in the list which raised the hope of the students. However, they weren't successful in their endeavors. Subsequently, the Respondent No.7 published a further notice on 28.12.2022, echoing the memo issued by the Respondent No.3 dated 21.12.2022 and requested the petitioners to submit their application with affidavit, birth certificate, student ID of the sibling student and other necessary documents within 03.01.2023. It is also stated that the daughters of the petitioners' submitted their applications and affidavit in accordance with the notices dated 21.12.2022 and 28.12.2022 within the time frame dated 03.01.2023. Subsequently, on 15.01.2023 the office of Respondent No. 3 again issued a memo in reference to the memo dated 21.12.2022, extending the deadline for resolving the application in sibling quota till 31.01.2023. Subsequently, all on a sudden on 16.01.2023, the Respondent No.4 issued the Memo No.37.00.0000.072.06.021.16(Ask-1).22 dated 16.01.2023 amending Rule 14 of the "Guideline for Student Admission in Non- Government School, School and College (Secondary, Lower Secondary and Combined Primary Level)- 2022". The amended Rule 14 of the said guideline stated that an additional 5% of the total number of seats in an institution, including entrance category for the academic year 2023 only, may be allowed, from the candidates for admission in sibling quota. However, if there are more

applications than the admissions Committee may choose the 5% of students through a lottery (Annexure-‘H’ to the writ petition). It is also stated that in the meantime, the classes of academic school year 2003 has already started and refusing the applicant-students to admit in Class-I in VNSC is detrimental to the interest of the applicant-students which caused irreparable losses and injuries in their formation / academic year.

Being aggrieved by and dissatisfied with the impugned Memo vide No.৩৭.০০.০০০০.০৭২.০৬.০২১.১৬(অংশ-১).২২,তারিখঃ ১৬.০১.২০২৩ issued by the respondent No.4 amending the Rule 14 of the “স্কুল এন্ড কলেজ (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তির নীতিমালা, ২০২২” retrospectively, limiting the admission quota to additional 5% among the students applying for admission as sibling through lottery, finding no other alternative and efficacious remedy, the petitioners have preferred this writ petition before this court and obtained the instant Rule with an order of direction.

Mr. A.B.M. Altaf Hossain, learned senior counsel appearing on behalf of the petitioners and submits that the decision taken by the respondents to amend the admission guidelines retrospectively by inserting quota percentage and lottery system, after the admission process had already started is arbitrary, irrational and *malafide* and as such, the Memo dated 16.01.2023 issued under the signature of respondent No.4 amending the Rule 14 of the "বেসরকারি স্কুল, স্কুল এন্ড কলেজে (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তি নীতিমালা, ২০২২" is liable to be declared to have been issued without lawful authority and is of no legal effect. He

further submits that the siblings of the applicants have been studying in the respondent No.7 School in different Classes and accordingly, they applied for admission in the said category in accordance with the extant guidelines, therefore, the daughter of the petitioners has vested rights as well as legitimate expectation to continue her schooling in the respective institution like other students and as such, the respondents are required to be directed to allow the daughter of the petitioners to get admission in Viqarunnisa Noon School and College, Dhaka and all other accessible facilities like other students. Due to non-admitting the daughters of the petitioners in class-I of the said school, the fundamental right of the daughter of the petitioners as guaranteed under Article 27 and 28(3) of the Constitution has been infringed, inasmuch as the impugned Memo is discriminatory and as such, the amended Rule 14 of the Memo dated 16.01.2023 is liable to be declared to have been issued without lawful authority and is of no legal effect and the respondents should be directed to allow the daughter of the petitioners for admission in Viqarunnisa Noon School and College and all other accessible facilities like other students and prays for making the Rule absolute. To substantiate his submission the learned Advocate for the petitioner placed reliance in the decision of *United Commercial Bank Limited another -Vs.- Rahimafrooz Batteries Ltd. and others*, reported in 7 BLC (AD) (2002)73.

Mr. Sk. Shaifuzzaman, learned Deputy Attorney General appearing on behalf of the respondents and opposes the Rule.

Mr. Muhammad Rafiul Islam, learned Advocate appearing on behalf of the respondent No.07 by filing an affidavit-in-opposition opposes the Rule and submits that the respondent No.4 issued the impugned memo amending the Rule 14 of the said Guideline. As per the impugned memo/amended Guideline, the institute can admit an additional 5% of total number of seats of the institution and therefore, the respondent neither curtail nor limit any rights of the petitioners, but increase the number of the total seat for the sibling quota and as such, the instant rule is liable to be discharged for ends of justice. He further submits that this Court directed to the respondent No.7 to admit the petitioners in Class-I in the academic Year-2023, subject to availability of the seat in accordance with law, whereas, the respondent No.7 is the Principal of the Viqarunnisa Noon School and College, Dhaka, which is non-government school and college and the School is neither a statutory body nor a local authority. On the other hand, the VNSC is purely non-government school and college and as such, the instant writ petitioner is not maintainable and hence, the instant Rule is liable to be discharged for smooth functioning of the school and college without any complexity. He also submits that since there is no available vacant seat to admit a new student in the said school and if the daughter of the petitioners are admitted to the particular class in the said school as prayed for at the last stage of the academic year-2023, it will pose a serious difficulty in the whole academic activities and as such, the instant Rule is liable to be discharged. To substantiate his submission the learned Advocate for the respondent No.07 placed reliance in the decision of *Upazilla Nirbahi*

Officer –vs.- Abu Saleh Md. Harunar Rashid and others, reported in 14 MLR(AD)(2009)309.

Heard the learned Advocates of both sides and perused the writ petition, affidavit-in-opposition, supplementary affidavits and other materials on record available thereto.

In the instant writ petition, the petitioner challenging the Memo No. ৩৭.০০. ০০০০.০৭২.০৬.০২১.১৬(অংশ-১).২২,তারিখঃ ১৬.০১.২০২৩ issued by the respondent No.4 amending the Rule 14 of the “স্কুল এন্ড কলেজ (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তির নীতিমালা, ২০২২” retrospectively limiting the admission quota to additional 5% among the students applying for admission of sibling through lottery. Learned Senior Counsel appearing on behalf of the petitioners argued that the respondent No.7, the Principal of the Viqarunnisa Noon School and College, Dhaka, limiting the admission of sibling in the said school, due to this notification issued by the Ministry of Education. As the decision was taken by the respondents- Ministry of Education to amend the admission guidelines retrospectively by inserting quota percentage and lottery system, after the admission process had already been started and the respondent No.7 has acted on basis of the amended the Rule 14 of the “স্কুল এন্ড কলেজ (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তির নীতিমালা, ২০২২” issued by the respondent No.4. Considering this aspect of this matter, we are of the view that the instant writ petition is maintainable.

It appears from the record that at the time of issuance of this Rule, this Court directed the respondent No.7, Principal of Viqarunnisa Noon

School and College, Dhaka to admit the daughter of petitioners in Class-I in the Academic Year-2023, subject to availability of the seat in accordance with law.

Challenging the said order the petitioner Mohammad Mahbub Alam and others had preferred Civil Petition for Leave to Appeal No.1753 of 2023 wherein learned Advocate appearing on behalf of the petitioner argued that the words stated in the impugned order ‘subject to availability of the seat in accordance with law’ has made the Rule infructuous since the respondent No.7 refused to admit the daughters of the petitioners in particular class mentioning there is no seat available in the particular class to accommodate the daughter of the petitioners. Therefore, the impugned order is required to be modified. On the other hand, the learned Additional Attorney General for the respondents argued that if the impugned order is modified as prayed for at the last stage of the academic year 2023 and the petitioners’ daughters are allowed to get admitted in particular class it will pose a serious difficulty in the whole academic activities. After hearing the parties their Lordships held that,

“Considering the facts and circumstances of the case, we are inclined to direct the High Court Division presided over by Mr. K.M. Kamrul Kader, J, to hear the matter and dispose of the Rule itself in accordance with law as expeditiously as possible, preferably within 01(one) month from the date of receipt of this order giving special importance to the children’s interest in getting admission into the particular class and school this year or next year.”

It transpires from the record that the daughters of the petitioners are the applicants for admission in Class-I (one) of the Viqarunnisa Noon School and College for the academic year 2023 as per guidelines namely the "Guideline for Student Admission in Non-Government School, School and College (Secondary, Lower Secondary and Combined Primary Level)-2022". The respondents had amended the admission guidelines retrospectively by inserting additional 5% quota and lottery system, after the admission process had already been started which actually limiting to 5% quota for admission of siblings in Class-I (one) in the VNSC. The authority can change admission guidelines / procedure at any time, but it cannot give retrospective effect unless authorized by the parent legislation. However, we do not find any no legal basis for giving retrospective effect of the amended the guidelines. Thus, the Memo dated 16.01.2023 issued under the signature of respondent No.4 amending the Rule 14 of the "বেসরকারি স্কুল, স্কুল এন্ড কলেজে (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তি নীতিমালা, ২০২২" is liable to be declared to have been issued without lawful authority and is of no legal effect. We find support of this contention in the case of *United Commercial Bank Limited another -Vs.- Rahimafrooz Batteries Ltd. and others*, reported in 7 BLC (AD) (2002), page-73 where their lordships held that,

“Subordinate legislation cannot give retrospective effect unless authorised by the parent legislation. In the instant case the new sub-rule 4A of Rule 10 neither says that it will have retrospective effect nor there is any authority from the parent law that is the Bangladesh Abandoned Property (Control, Management and

Disposal) Order 1972 (President's Order No.16 of 1972) to make Rules with retrospective effect. Therefore the auction sale having taken place before the amendment of Rule 10 by inserting sub-rule (4A) the sale would be governed by the law as it existed then which is sub-Rule 4 of Rule 10.”

In view of the above discussions, we are of the view that the Rule has got merit to succeed.

We also noticed that the daughter of the writ petitioners have lost one year from their academic life. Since, the child of the petitioners has already been lost one year i.e. the academic year of 2023. Considering the children's interest, facts and circumstances of the matter, we are of the view that justice would be better served if we direct the respondent No.07 to admit the child of the petitioners, if any, in the academic year of 2024, without fail.

In the result, the Rule is made absolute without any order as to costs. The impugned Memo vide No.৩৭.০০.০০০০.০৭২.০৬.০২১.১৬(অংশ-১).২২,তারিখঃ ১৬.০১.২০২৩ issued under the signature of the respondent No.4 amending the Rule 14 of the “স্কুল এন্ড কলেজ (মাধ্যমিক, নিম্ন মাধ্যমিক ও সংযুক্ত প্রাথমিক স্তর) শিক্ষার্থী ভর্তির নীতিমালা, ২০২২” (Annexure-H) retrospectively limiting the admission quota to additional 5% among the students applying for admission of sibling through lottery is hereby declared illegal and without lawful authority and the respondent No.7 is directed to admit the child of the petitioners in the academic year 2024, within

07(seven) days from the date of receipt of this order, in accordance with law, without fail.

Communicate the judgment and order at once.

Khizir Hayat, J:

I agree.