IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Refaat Ahmed

Chief Justice

Mr. Justice Md. Ashfaqul Islam

Mr. Justice Zubayer Rahman Chowdhury

Mr. Justice Md. Rezaul Haque

Mr. Justice S.M. Emdadul Hoque

CIVIL APPEAL NO.84 OF 2024

With

CIVIL APPEAL NO.85 OF 2024

With

CIVIL APPEAL NO. 86 OF 2024

(From the judgment and order dated 11.07.2010 passed by the Appellate Division in Civil Petition for Leave to Appeal Nos.512, 513 and 514 of 2010.)

Mohammad Sohel Rana and others	:	Appellants. (In C.A No.84/24)
Abul Fazal Mohammad Tarit Hosain Khan and others	:	Appellants. (In C.A No.85/24)
Sanjoy Debnath and others	:	Appellants. (In C.A No.86/24)

=Versus=

The Public Service Commission, represented by its Chairman, Bangladesh Public Service Commission Secretariat, P.S. Tejgaon, District-Dhaka and others: Respondents. (In all the appeals)

For the appellants (In all the appeals)	:	Mr. Zainul Abedin, Senior Advocate with Mr. A.M. Mahbub Uddin, Senior Advocate, Mr. Md. Salah Uddin Dolon, Senior Advocate, Mr. Md. Ruhul Quddus, Senior Advocate and Mohammad Shishir Monir, Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the appellants (Added appellant No.90) (In C.A. No.84/24)	:	Mrs.Madhumalati Chowdhury Barua, Advocate-on-Record.
For the Respondent Nos. 1, 2, 6 & 7 (In all the appeals)	:	Mr. Muhammad Khalequzzaman Bhuiyan, Advocate, instructed by Mrs.Madhumalati Chowdhury Barua, Advocate-on-Record.
For the Respondent Nos.3-5 (In all the appeals)		Mr. Mohammad Aneek R Haque, Additional Attorney-General

	with Mr. Md. Zahirul Islam Summon, Deputy Attorney-General, Ms. Fatima Akhter, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.
For Respondent Nos.9-40: (In C.A.No.84/24)	Not represented.
For Respondent Nos.8-17: (In C.A.No.85/24)	Not represented.
For Respondent Nos.8-18: (In C.A.No.86/24)	Not represented.

Date of hearing : 15.01.2025, 18.02.2025 & 19.02.2025.

Date of judgment : 20.02.2025

J U D G M E N T

Zubayer Rahman Chowdhury, J:

Pursuant to the Circular dated 28.06.2005, the appellants, having the requisite educational qualifications, applied for taking part in the 27th BCS examination. Upon completion of the primary selection process, they appeared in the preliminary test, held on 18.11.2005, and having qualified in the same, they took part in the written examination, which was held between 18th March, 2006 and 9th April, 2006. On being successful, they were asked to appear in the viva voce examination, which was held between 10th September, 2006 and 20th December, 2006.

The appellants successfully passed the viva voce examination, with the final result being published on 21.01.2007. The Bangladesh

Public Service Commission (hereinafter referred to as BPSC), vide Memo dated 18.02.2007, recommended 3567 successful candidates, including the appellants, for being appointed in different cadres.

In the meantime, some reports were published in different news papers raising certain allegations with regard to the 27th BCS examination, which was, however, refuted by BPSC. Furthermore, in reply to the Ministry of Establishment's letter dated 21.03.2007, the Ministry of Law, Justice and Parliamentary Affairs, by letter dated 27.03.2007, opined that necessary action could only be taken against the persons concerned if specific allegations were investigated and proved under the Commission of Inquiry Act, 1956. However, no such inquiry was conducted by the Ministry of Establishment.

Subsequently, the Medical Examination of the successful candidates including the appellants commenced on 07.04.2007, but it was abruptly postponed on 18.04.2007 without assigning any reason.

In an unprecedented move, the then Caretaker Government decided to cancel the

final result of the 27th BCS which had already been published by BPSC. Accordingly, by Memo dated 12.06.2007, the Ministry of Establishment requested BPSC to retake the viva-voce examination of all the successful candidates of the 27th BCS upon cancelling the result of the previous viva voce examination. Challenging the aforesaid decision, Writ Petition No. 6349 of 2007, Writ Petition No. 6384 of 2007 and Writ Petition No. 6393 of 2007 were filed. However, upon hearing the parties, the Rules were discharged by judgment and order dated 03.07.2008.

Meanwhile, the second viva voce examination was conducted from 29.07.2007 until 18.05.2008 and the result was published on 23.09.2008, recommending 3239 candidates for being appointed in different cadres under the 27th BCS, excluding, however, 1137 candidates including the appellants, who had previously qualified in the first viva voce examination. Accordingly, a notification was published in the Bangladesh Gazette on 10.11.2008.

The present appellants along with several other candidates, who had earlier qualified in the first viva voce examination, filed Writ

Petition Nos.8307 of 2008, 8320 of 2008, 9151 of 2008, 4979 of 2009, 8076 of 2009, 8177 of 2009, 7838 of 2009 and 8254 of 2009 challenging the result published by BPSC on 23.09.2008 as well as the office order dated 20.10.2008. Upon hearing the parties, the High Court Division disposed of the Rules by judgments and orders dated 11.11.2009 and 26.01.2010, directing the concerned respondents to appoint the candidates, including the present appellants, who had been successful in the first viva voce examination, in their respective cadres.

Challenging the said decision, the Government preferred Civil Petition for Leave to Appeal Nos.512, 513 and 514 of 2010. By judgment and order dated 11.07.2010, this Division disposed of the leave petitions upon setting aside the judgment and order of the High Court Division dated 11.11.2009. Being aggrieved thereby, the present appellants preferred Civil Review Petition Nos.197-199 of 2024 and leave was granted by this Division by order dated 07.11.2024, which gave rise to the present Civil Appeals.

Mr. Zainul Abedin, the learned Senior Counsel appearing on behalf of the appellants

in all the appeals, submits that more than three thousand five hundred candidates including the appellants had qualified in the 27th BCS, having been successful in the preliminary, written and viva voce examinations. However, in 2007, pursuant to the directive issued by the then Caretaker Government, BPSC cancelled the result of the first viva voce examination and conducted the second viva voce examination. Resultantly, almost 1,200 candidates, who had earlier qualified in the first viva voce examination, were denied appointment on the ground of being unsuccessful in the second viva voce examination.

Mr. Abedin further submits that previously, another set of writ petitions were filed challenging the cancellation of the result of the first viva voce examination, but the Rules issued therein were discharged. He further submits that the judgment and order of the High Court Division passed in the second set of Writ Petitions was set aside by the Appellate Division without granting leave, which was not only violative of the provisions of the Constitution and the Appellate Division

Rules, but it was also against all norms of fairness and justice. He submits forcefully that merely on the basis of presumption, the result of the first viva voce examination was cancelled for the purpose of 'restoring public confidence' in view of certain adverse reports that had been published in the newspapers.

Mr. Abedin further contends that the instant case is a classic example of miscarriage of justice. Elaborating his submission, he submits that the decision by BPSC to retake the viva voce examination at the dictate of the then Caretaker Government was not only without lawful authority, it was malafide too since neither any law nor any Rules permit the taking of a 'second viva voce examination'. Since every malafide act is a nullity in the eye of law, therefore, according to Mr.Abedin, the instant appeals are liable to succeed and the judgment and order of the High Court Division is required to be affirmed with a direction upon the respondents to appoint all the deprived candidates of the 27th BCS, who had succeeded in the first viva voce examination, in their respective cadres with all attending benefits.

On the other hand, Mr. Muhammad Khalequzzaman Bhuiyan, the learned Advocate appearing on behalf of respondent Nos.1,2, 6 and 7, submits that the Appellate Division had carefully considered all the material facts and legal aspects of the matter in question and disposed of the Civil Petitions for Leave to Appeal and therefore, no interference is called for.

This entire episode, albeit sad and regrettable, owes its origin to certain press reports published in February, 2007 in several national dailies raising allegations of irregularities in the process of recruitment of the 27th BCS, which was conducted by BPSC between November, 2005 and December, 2006. Although the reports were unsubstantiated, nevertheless, the Ministry of Establishment issued the Memo dated 12.06.2007 communicating the Government's decision to cancel the result of the first viva voce examination and directing BPSC to retake the viva voce examination.

Feeling aggrieved by the Government's decision to retake the viva voce examination, several candidates, who had already been

selected on being successful in the first viva voce examination, moved this Court by filing two sets of writ-petitions.

In the first set of writ petitions, namely Writ Petition Nos. 6349 of 2007, 6384 of 2007 and 6393 of 2007, the Rules were issued calling upon the respondents to show cause as to why the decision to cancel the result of the viva voce examination of the 27th BCS examination and the declaration of a new schedule for retaking the viva voce examination should not be declared to be without lawful authority.

In the second set of writ petitions, namely Writ Petition No. 8307 of 2008, Writ Petition No. 8320 of 2008, Writ Petition No. 9151 of 2008 and Writ Petition No. 4979 of 2009, the Rules were issued calling upon the respondents to show cause as to why the result of the viva voce examination, published by BPSC on 23.09.2008 and the office order dated 20.10.2008 should not be declared to be without lawful authority along with a prayer for issuing a direction upon the respondents to consider the petitioners' appointment.

At the outset of the discussion, let us refer to the Memo dated 12.06.2007, which reads as follows:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
সংস্থাপন মন্ত্রণালয়
নব-নিয়োগ শাখা

নম্বর: সম/ননি-০৩/২০০৭-৫১ তারিখ:২৯ জ্যৈষ্ঠ ১৪১৪
১২ জুন ২০০৭

প্রেরক: সোহেল আহমেদ
সিনিয়র সহকারী সচিব
প্রাপক: সচিব
বাংলাদেশ সরকারী কর্ম কমিশন সচিবালয়
পুরাতন বিমান বন্দর ভবন, তেজগাও, ঢাকা।

বিষয়: ২৭তম বিসিএস পরীক্ষা ২০০৫ এর ইত:পূর্বে গৃহীত মৌখিক পরীক্ষা বাতিল করে লিখিত পরীক্ষায় উত্তীর্ণ প্রার্থীদের পুনরায় মৌখিক পরীক্ষা গ্রহণ।

সত্র: বাংলাদেশ সরকারী কর্ম কমিশন সচিবালয়ের পত্র নং-বাসককস/বিসিএস-২৭ (২০০৫) /০৮, তারিখ: ১৮.০২.২০০৭
মহোদয়,

উপযুক্ত বিষয় ও সূত্রের পরিপ্রেক্ষিতে নির্দেশক্রমে জানাচ্ছি যে, ২৭ তম বিসিএস পরীক্ষার মাধ্যমে যোগ্য প্রার্থীদের মনোনয়নের নিমিত্ত ইত:পূর্বে গৃহীত মৌখিক পরীক্ষা বাতিল করে স্বল্পতম সময়ের মধ্যে লিখিত পরীক্ষায় উত্তীর্ণ প্রার্থীদের পূনরায় মৌখিক পরীক্ষা গ্রহণের জন্য সরকার সিদ্ধান্ত্ম গ্রহণ করেছে।

২। এমতাবস্থায়, সরকারের সিদ্ধান্ত্মমতে পরবর্তী প্রয়োজনীয় কার্যক্রম গ্রহনের জন্য বাংলাদেশ সরকারী কর্ম কমিশনকে নির্দেশক্রমে অনুরোধ করছি।

বিনীত
স্বা: অস্পষ্ট
১২/৬/০৭
সিনিয়র সহকারী সচিব
(emphasis added)

While disposing of Civil Petition for Leave to Appeal Nos.512, 513 and 514 of 2010, the Appellate Division held:

> "There is no material on record to arrive at a conclusion that the decision was taken as per pressure of the Government."

Quite clearly, the aforesaid observation is incorrect, particularly in view of the Memo dated 12.06.2007, quoted hereinabove, wherefrom it is evident that the Public Service Commission had acted in accordance with the directive issued by the Ministry of Establishment, communicating the Government's decision to cancel the result of the viva voce examination of the 27th BCS examination and retake the same.

This Division also held that the present writ-respondents had waived and/or relinquished their claim by appearing in the second viva voce examination, which constituted estoppel. As noted earlier, the decision to cancel the result of the viva voce examination was challenged by the present appellants in 2007 by filing Writ Petition Nos. 6349 of 2007, 6384 of 2007 and 6393 of 2007. However, consequent upon all the Rules being discharged, the writ-respondents had no option but to sit for the second viva voce examination under compelling circumstances. Moreover, the writ-respondents, with limited financial means and resources, were facing the mighty Government and, therefore, they had no other option but to sit

for the second viva voce examination. Hence, the finding of this Division that relinquishment of their right by the writ-respondents constituted estopple is not tenable.

Furthermore, this Division held as under:

> "In the present case the decision was taken for the public interest as there was wide spread allegation that the process of recruitment was tainted by irregularities and corruption."

Once again, I am constrained to hold that this observation is not only erroneous, it is misconceived as well, being devoid of any substance. This Division observed that there was "allegations" regarding irregularities and corruption in the process of recruitment. However, no inquiry was conducted by the concerned Authority nor was any report furnished before this Division as to the nature and extent of the irregularities and corruption that is alleged to have been committed. Nevertheless, on the basis of such unsubstantiated press reports, the decision to cancel the first viva voce examination and retake the same was taken, which seriously prejudiced more than one thousand successful candidates.

We have taken note of the fact that at the relevant period, a Member of the Public Service Commission had resigned following the allegation of corruption. However, there is no document on record to indicate that the charge of alleged corruption of the concerned Member was linked with the process of recruitment of the 27th BCS examination.

As noted earlier, the Government preferred Civil Petition for Leave to Appeal Nos.512, 513 and 514 of 2010. By judgment and order dated 11.07.2010, this Division disposed of the leave petitions upon setting aside the judgment and order of the High Court Division dated 11.11.2009.

At this juncture, we are called upon to address a pertinent issue, namely, the recent practice of the Appellate Division of setting aside the judgment and order passed by the High Court Division or the Administrative Appellate Tribunal, as the case may be, at the stage of hearing a petition seeking leave to appeal. This leads me to pose a very basic question- what is the purpose of granting leave?

Generally understood, leave is granted to consider the appellant(s) case on certain

grounds of law and facts, giving an opportunity to the concerned respondent(s), in whose favour the impugned judgment had been passed, to have an opportunity to reply, in writing, to the grounds upon which the appellant(s) case is predicated. This is in accordance with the constitutional mandate of "due process", as enshrined in Article 31 of our Constitution.

Hence, the practice of setting aside any judgment and/or order passed by the High Court Division or the Administrative Appellate Tribunal, as the case may be, without granting leave, is not only a gross violation of the principle of natural justice, it also deprives the concerned respondents from placing their case before the apex Court, a fundamental right granted to them under the Constitution. The principle *audi alteram partem* –no man should be condemned unheard- is now so well entrenched in the judicial system that any deviation therefrom is bound to be interfered with, even at the stage of review.

This novel, not to mention undesirable, practice ought to be 'nipped in the bud', that is, if it can still be regarded as being in the 'budding stage', since, regrettably, this

practice has been prevalent for some years now, particularly on and from 2015. I am reminded of an old adage- 'Justice hurried, Justice buried'.

The foregoing discussion leads me to discuss another recent phenomenon of this Division -the practice of discharging a Rule issued by the High Court Division under Article 102 of the Constitution at the time of hearing a petition challenging an interim order. In my view, this is absolutely "without lawful authority", as this Division has no power or authority to adjudicate and dispose of any application filed under Article 102 of the Constitution. Let me elaborate.

Article 102 of the Constitution reads as under:

> "102.(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
>
> (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-
>
> (a) on the application of any person aggrieved, make an order-
>
> (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is

not permitted by law to do or to do that which he is required by law to do;
or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect ; or

(b) on the application of any person, make an order-

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

(3)Notwithstanding anything contained in the forgoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies.

(4)Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of-

(a)prejudicing or interfering with any measure designed to implement any development programme, or any development work; or

(b) being otherwise harmful to the public interest,

the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause(b).

(5) In this article, unless the context otherwise requires, “person” includes a statutory public authority and any court or

> tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies."

On a careful perusal of the constitutional provision quoted above, it is apparent that the High Court Division has been vested with exclusive jurisdiction to decide an application filed by an 'aggrieved person' under Article 102 of the Constitution. It is equally apparent that this jurisdiction has not been extended or granted to the Appellate Division. Hence, any order passed by this Division discharging any Rule issued by the High Court Division under Article 102 of the Constitution shall be deemed to be void ab initio, being in gross violation of the Constitution. In my considered view, this is judicial anarchy-plain and simple.

Of late, it has become an unfortunate episode that in certain cases, Judges tend to lean towards the Government and pass decisions which are ex facie contrary to the Constitution. In my view, in addition to the concept of procedural fairness, time has now come for the Judges to act and discharge their duties in accordance with "judicial fairness", which implies that Judges must not only act

according to law, they must also act fairly and diligently towards the litigants in the dispensation of justice.

As has been so aptly stated by the Supreme Court of India in the case of Sadhuram Bansal vs Pulin Bihari Sarker and others, reported in AIR (1984) (SC) 1471,

> "We would do well to remember that justice - social, economic and political- is preamble to our Constitution. Administration of justice can no longer be merely protector of legal rights but must whenever possible be dispenser of social justice.
>
> (per S.Murtaza Fazal Ali, J)

Be that as it may, having regard to the foregoing discussion, by a unanimous decision of this Court, all the appeals are allowed.

Consequently, the judgment and order of this Court dated 11.07.2010 passed in Civil Petition for Leave to Appeal Nos.512, 513 and 514 of 2010 are hereby set aside.

Resultantly, the judgment and order of the High Court Division dated 11.11.2009 passed in Writ Petition Nos.8307 of 2008, 8320 of 2008, 9151 of 2008, 4979 of 2009 and the judgment and order dated 26.01.2010 passed in Writ Petition Nos. 8076 of 2009, 8177 of 2009, 7838 of 2009 and 8254 of 2009 stand revived and duly affirmed.

The application for addition of party stands allowed.

The concerned respondents are directed to comply with directive passed by the High Court Division in the judgments and orders dated 11.11.2009 and 26.01.2010 forthwith.

C.J.

J.

J.

J.

The 20th February, 2025.
H.B.R. / words-3472/