

Present:  
Mr. Justice Shamim Hasnain  
and  
Mr. Justice Md. Ruhul Quddus

Writ Petition No.7426 of 2011

with

Writ Petition 9407 of 2008

Mrs. Shaheba Khatun  
...Petitioner in Writ Petition No. 7426 of 2011

Md. Ayub Ali  
...Petitioner in Writ Petition No. 9407 of 2008

-Versus-

Government of Bangladesh and others  
...Respondents in both the writ petitions

Mr. A. K. Mohammad Ali with Mrs. Fatema Begum,  
Advocates  
... for the petitioner in Writ Petition No.7426 of 2011

Mr. Md. Humayun Kabir, Advocate  
... for the petitioner in Writ Petition No. 9407 of 2008

Mrs. Ishrat Jahan with Mrs. Kashefa Hussain,  
Assistant Attorney Generals (with leave of the Court)  
... for the Government-respondents

Judgment on 14.03.2013

*Md. Ruhul Quddus,J:*

These two writ petitions have been heard together, and are being disposed of by one judgment inasmuch as common questions of law and facts are involved in the cases.

In both the Rules the writ petitioners, who are teachers of two different educational institutions, have sought for direction upon the respondents to pay their arrear salaries.

The petitioner in Writ Petition No.7426 of 2011 is an Assistant Teacher of Bamondanga Naser Mamud Di-Mukhi High School at Kurigram. On being appointed by a letter of appointment dated 08.03.2005, she joined the school on 10.03.2005 and her name was included in monthly pay order (in short MPO) with effect from September, 2006 against index No.1034095. Subsequently the Government portion of her salary was stopped from March, 2007 on a dispute with the Managing Committee of the School and her name was dropped from the MPO. Thereafter, the dispute was dissolved and her name was included in the MPO again from January, 2011. In spite of several representations and service of notice demanding justice upon the respondents, she did not get her arrear salary for the period of March, 2007 to December, 2010.

The petitioner in Writ Petition No.9407 of 2008 joined Naldoani Abdus Salam Dakhil Madrasah at Dumki Police Station under Patuakhali District as its Superintendent on 17.10.1994. During his service in the Madrasah, he was implicated in a criminal case for which the Managing Committee of the Madrasah by its resolution dated 22.04.2002 suspended him from service. During the period of suspension, he drew subsistence allowance i.e. 50% of salary. After being exonerated from the criminal case the Managing Committee of the Madrasah by its resolution dated 31.12.2003 reinstated him in service. After reinstatement he claimed his arrear salary i.e. the remaining 50%. In the meantime, he joined as

Superintendent of Kalagachia Asmatia-Entazia Madrasah at Mirzagonj Police Station under Patuakhali District on 02.05.2004. However, the petitioner filed an application dated 03.11.2008 to the Director General, Directorate of Secondary and Higher Education (herein respondent No.2) requesting him to pay the remaining 50% of Government portion of his salary for the period of his suspension i.e. from 23.04.2002 to 31.12.2003, but without any result.

Mr. A. K. Mohammad Ali, learned Advocate for the petitioner in Writ Petition No.7426 of 2011 submits that she has been continuously serving the school from her date of joining on 10.03.2005. The Head Master-in-charge asked her not to attend the school and sign the attendantsqbook by an illegal order, challenging which she instituted a suit before a competent civil Court and obtained an order of temporary mandatory injunction on 07.10.2007. Subsequently the suit was decreed on compromise on 27.07.2010. In pursuance thereof, the petitioner has been getting her salary from January, 2011 though it was stopped from March, 2007. So it is her right to get the salary for the period of March, 2007 to December, 2010 and the respondents are bound to give it.

Mr. Humayun Kabir, learned Advocate for the petitioner in Writ Petition No.9407 of 2008 submits that it has been decided in so many cases that after withdrawal of suspension order, the teachers of private school/madrasah, who were getting Government portion of their salary before suspension, will get arrear salary. With reference to annexure-E to the supplementary affidavit, he further submits that under similar circumstances respondent No.2 gave arrear salary to one Md. Delowar Hossain, Headmaster of Dogree Ismail Hossain High School, but

discriminated against the petitioner in payment of his arrear salary. In support of his contention Mr. Kabir refers to the case of Md. Shahjahan Mia Vs. The Government of Bangladesh and others, 1 LNJ 547 and an unreported decision passed in Writ Petition No.3572 of 2010 (Md. Hafiz Uddin Vs. The Secretary, Ministry of Education and others).

Mrs. Ishrat Jahan, learned Assistant Attorney General opposes the Rules without filing any affidavit-in-opposition. She refers to clause 17 (3) of the বেসরকারী স্কুল/মাদ্রাসা শিক্ষক কর্মচারী বেত-নর সরকারী অংশ ও জনবল কাঠা-মা-১৯৯৫, which provides no arrear salary or a part thereof to be paid to the teachers or employees of private school/madrasah, and submits that the respondents are not under any legal obligation to pay the arrear salary to the writ petitioners. Learned Assistant Attorney General further submits that in case of inaction on the part of the respondents or stopping payment, the petitioners could have approached the Government by preferring an appeal under clause 18 of the said guideline and in that count the writ petitions are not maintainable because of not exhausting the alternative remedy provided in the guideline, which is having the force of law.

In turn of reply, Mr. Humayun Kabir submits that the remedy of appeal as provided in the guideline having not been published in official gazette and any procedure of filing the appeal having not been prescribed therein, it cannot be held to be an alternative remedy. On this point he refers to the case of Mongal Paita Perkhiddah College Vs. Government of Bangladesh and others, 15 BLT 481.

The contentions of the writ petitioners are supported by some documents, which are annexed with their respective writ petitions and supplementary affidavits thereto.

The petitioner in Writ Petition No.7426 of 2011 got her name included in the MPO from September, 2006 and accordingly she was getting Government portion of her salary, which was stopped from March, 2007. The Head Master-in-charge of the school by a letter dated 09.06.2007 asked her not to sign the attendantsq book, which she challenged in Title Suit No.119 of 2007 praying mandatory injunction to continue with payment of her salary. The Head Master-in-charge, Chairman of the Managing Committee and District Education Officer, Kurigram were made defendants therein. Ultimately the suit was decreed on compromise and a mandatory injunction was passed to that effect (vide annexure-F series to the supplementary affidavit affirmed on 19.06.2012). In compliance therewith, the petitioner started getting her salary from January, 2011.

The suspension order against the petitioner in Writ Petition No.9407 of 2008 was withdrawn by the Managing Committee in its meeting held on 31.12.2003 (vide annexure-B to the writ petition) and he was exonerated from the criminal case by order dated 14.10.2004 (vide annexure-F to the supplementary affidavit affirmed on 11.10.2011).

The notices of the Rules have been served upon all of the respondents, but no one has appeared to controvert the facts placed in the writ petitions or to challenge authenticity of the documents annexed thereto.

In 15 BLT case, under similar circumstances, the respondent's lawyer argued in same line that the petitioner failed to exhaust the provision of appeal. But the High Court Division held the writ petition maintainable relying on the case of Tafijul Islam Sarker Vs. Bangladesh and others, 3 BLC (AD) 135 and observed:

*“... In fact, in proper cases, the petitioner is entitled to file writ petition without exhausting the provision of appeal....an alternative remedy by way of appeal under a statute will not be a bar to a writ petitioner under article 102(2) of the Constitution if there is non-relaxable precondition for bringing the appeal. Moreover, the Nitimala, 1995 was not published in the Government gazette. Therefore, the Nitimala 1995 are for its internal administration of the Ministry of Education.”*

In 1 LNJ, 547 and the unreported decision passed in Writ Petition No.3572 of 2010, two different Benches of the High Court Division under similar circumstances issued mandamus for releasing arrear salaries of the petitioner-teachers, who were suspended from service. We do not find any reason to differ with their lordships' view expressed in the said cases.

Suspension from service is not a punishment and as such because of putting the petitioners on suspension, which did not culminate to any order of dismissal, they cannot be deprived of their salary.

In view of the discussions made above we find substance in the Rules and accordingly these are made absolute. The Government of Bangladesh represented by the Secretary, Ministry of Education and the Director General, Directorate of Secondary and Higher Education, Dhaka

(respondents No.1-2 in both the writ petitions) are directed to pay the arrear salaries and other benefits, if any to Shaheba Khatun, daughter of Md. Mojibur Rahman, Assistant Teacher of Bamandanga Nasr Mamud Di-Mukhi High School, Nageswari, Kurigram (petitioner in writ petition No.7426 of 2011) for the period, March, 2007 to December, 2010 and pay the remaining 50% of salary and other benefits, if any to Md. Ayub Ali, former Superintendent of Naldoani Abdus Salam Dakhil Madrasah, Police Station Dumki, Patuakhali (petitioner in writ petition No.9407 of 2008) for the period from 23.04.2002 to 31.12.2003 within 3 (three) months from the date of receipt of this judgment.

Communicate the judgment.

Shamim Hasnain, J:

I agree.