

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

Writ Petition No. 6606 of 2015

In the matter of:

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

AND

In the matter of:

Md. Motahar Hossain

..... **Petitioner.**

-Versus-

Government of the People's Republic of
Bangladesh, represented by the Secretary,
Ministry of Education, Bangladesh
Secretariat, Shahbag, Dhaka and others,
... **Respondents.**

Mr. Bivash Chandra Biswas, Advocate

...For the **petitioner.**

Mr. Bepul Bagmar, D.A.G.

...For respondent No.1.

Mr. Md. Humayun Kabir, Advocate with

Mr. Sarwar Ahmed, Advocate with

Mr. Utpal Biswas, Advocate and

Mr. Songjukta Dobay, Advocate

.. **For Respondent Nos. 7-9.**

Judgment on: 13.12.2023

Present:

Mr. Justice Md. Khasruzzaman

and

Mr. Justice K M Zahid Sarwar

MD. KHASRUZZAMAN, J.:

In an application under article 102 of the Constitution, on
29.06.2015 the *Rule Nisi* under adjudication was issued in the
following terms:

*“Let a Rule Nisi be issued calling upon the respondents to show
cause as to why the impugned inaction in not passing any*

order by the respondent No.2 for cancelling the salary sheet forwarded to the Rupali Bank Limited, Satkhira Branch by the governing body, Satkhira Ayenuddin Mohila Alim Madrasha, Satkhira for the month of April, 2015 fixing the salary and other allowances of this petitioner amounting to Taka 18,835/- instead of Taka 22,065/- should not be declared to have been passed/ without lawful authority and is of no legal effect and/or such other or further order or orders as to this Court may seem fit and proper.”

Facts, necessary for disposal of the *Rule Nisi*, in short, are that as per appointment notice published in the daily newspaper namely, Jonobarta dated 03.10.1995, the petitioner applied for appointment in the post of Lecturer of Islamic History of Satkhira Ayenuddin Mohila Alim Madrasha. Thereafter, the petitioner faced for the written and viva voce examination vide Annexure-D to the writ petition. When the petitioner applied for appointment, the examination of Master of arts could not be held in time and consequently, the result of the examination was not published in due time. The Principal of the madrasha vide letter dated 06.12.1995 appointed the petitioner in the post of Lecturer of Islamic History on condition to submit his Master degree certificate within next 03 years. As per appointment letter, the petitioner joined the said madrasha on the same day on 06.12.1995 vide Annexures- F and F-1 to the writ petition. The result of the M.A. examination was published in the first part of 1999 and the petitioner on obtaining the M.A. degree certificate submitted the

same to the madrasha authority. Thereafter, the name of the petitioner was enlisted in the monthly pay order (MPO) against Index No.582441 with effect from 01.07.2002 which is evident from the monthly pay order of October, 2002 (Annexure-G). Since then he has been serving as a Lecturer of the said madrasha to the satisfaction of the concerned authority.

It is stated that on 17.12.2010 the petitioner along with three other Lecturers of the madrasha submitted their respective applications to the Principal of the madrasha for promotion to the post of Assistant Professor vide Annexures- H, I, I(1) and I(2) to the writ petition. Ultimately, a Selection Committee constituted by the madrasha authority having considered the Paripatra dated 28.11.2010 of the Ministry of Education recommended the petitioner for giving him promotion to the post of Assistant Professor (Annexure-J). The Governing Body of the madrasha vide resolution dated 14.02.2013 accepted the report of the Selection Committee (Annexure-K) and thereby promoted him to the post of Assistant Professor. Thereafter, relevant papers were sent to the respondent No.2 for consideration of the promotion of the petitioner. The respondent No.2 accepted the promotion of the petitioner and his name was enlisted in the monthly pay order fixing his salary at Taka 18,365/- [Annexures-L, L(1) and L(2)]. While the petitioner was serving in the said post, the respondent No.9 Md. Sharifuzzaman filed an application to the madrasha authority for giving him promotion as Assistant Professor in place of the petitioner. It is stated that the selection committee by its

report dated 04.11.2013 found the promotion of the petitioner to be correct [Annexures-O, O(1) and O(2)]. The respondent No.9 Md. Sharifuzzaman again on 31.12.2014 filed an application to the President of the Governing Body of the madrasha for promoting him as Assistant Professor in place of the petitioner. The selection committee vide their report dated 19.03.2015 opined that the respondent No.9 Md. Sharifuzzaman is fit for promotion to the post of Assistant Professor in place of the petitioner [Annexures- P and P(1)]. As per the report of the selection committee, the Governing Body of the Madrasha vide its resolution dated 05.04.2015 decided to cancel the promotion of the petitioner by giving promotion to Md. Sharifuzzaman, Lecturer of Arabic in the post of Assistant Professor[Annexure-M(1)]. This decision of the Governing Body was communicated to the petitioner vide letter dated 13.04.2015(Annexure-M).Thereafter, the madrasha authority illegally selected the monthly salary and other allowances of the petitioner at Taka 18,835/- instead of Taka 22,065/-. It is stated that without issuing any show cause notice the madrasha authority took decision to demote him to the post of Lecturer from the post of Assistant Professor which is illegal and without lawful authority.

Afterwards, the petitioner filed an application along with legal opinion of an Advocate to the Governing body of the madrasha for reconsider the decision of cancelling the promotion of the petitioner (Annexures- Q and R). But they did not do anything on the same. Thereafter, the petitioner filed an application to the respondent

No.2 for redress (Annexure-U). But the respondent No.2 also did not make any response to the said application.

Under such circumstances, the petitioner moved this Court under article 102 of the Constitution challenging the inaction of the respondents and thereby obtained the present *Rule Nisi*.

Respondent No.9, Md. Sharifuzzaman filed *affidavit-in-opposition* denying all the material allegations made in the writ petition contending *inter-alia* that the respondent No.9 along with three others including the petitioner applied to the concern authority for promotion in the post of Assistant Professor but, the authority of the Madrasha most illegally promoted the petitioner in the post of Assistant Professor based on the so-called report dated 20.08.2012 (Annexure-J). In the said report dated 20.08.2012 it is opined that as per Nitimala dated 24.10.1995 the respondent No.9 did not have required educational qualification and experience at the time of joining by ignoring the fact that the advertisement for appointment in the post of Lecturer was published before the said Nitimala of 1995 came into force and as such the report is not a report in the eye of law. Rather, the petitioner did not have required qualification because at the time of appointment on 06.12.1995 he did not pass the Master degree examination which he obtained in 1999. So, it is crystal clear that the report dated 20.08.2012 is a biased report. But the madrasha authority based on such report promoted the petitioner in the post of Assistant Professor. As such, the respondent No.9 lastly, applied to the governing body of the madrasha on 31.12.2014 and the matter was investigated by the

enquiry committee who opined that the respondent No.9 was the most suitable candidate for promotion as per Nitimala, 2012 [Annexure-P(1)]. Thereafter, the governing body vide its resolution dated 05.04.2015 cancelled the promotion of the petitioner and promoted the respondent No.9 to the post of Assistant Professor. The decision of the governing body was communicated to the petitioner vide letter dated 13.04.2015. The joining date of all the candidates for promotion is on 06.12.1995. The enlistment date of all the candidates in the monthly pay order is on 01.07.2002. So, as per clause 13 of the Nitimala, 2012 the respondent No.9 is senior than the other candidates including the petitioner since his date of birth is on 15.02.1971. So, there is no illegality on the part of the respondents to promote the respondent No.9 in the post of Assistant Professor. It is stated that on 06.05.2015 the Principal of the Madrasha vide its Memo dated 06.05.2015 requested the respondent No.2 for dropping out the name of the petitioner from the salary Code No. VI. Before the matter being finalized by the respondent No.2, the petitioner filed this writ petition on 21.06.2015 and obtained the Rule Nisi on 29.06.2015.

However, on the basis of the said letter dated 06.05.2015 sent by the Principal of the madrasha, the office of the respondent No.2 vide letter dated 09.09.2015 asked the Principal of the madrasha, the petitioner and respondent No.9 to be present before the respondent No.2 along with all relevant papers. The petitioner vide letter dated 04.10.2015 requested the respondent no.2 not to take any step in the matter due to pendency of the writ petition.

Thereafter, an enquiry was conducted and the enquiry office vide its report dated 03.11.2016 opined that the decision to cancel the promotion of the petitioner from the post of Assistant Professor was lawful. In the said report it was also opined that as per clause 13 of the Nitimala 2012, the respondent No.9 is senior than the petitioner. Thereafter, the authority vide letter dated 07.05.2017 asked the petitioner to reply within 7 days as to why his promotion should not be cancelled for the reason of his illegal promotion in the post of Assistant Professor. The petitioner ultimately vide its reply dated 15.05.2017 stated that since the writ petition is pending, he is unable to make any comment which shows that the petitioner is willfully restraining the respondent No.2 from disposing of the application dated 13.05.2015 and as such, the petitioner is taking double standard and double tongued before the Court. So, the petitioner does not come before the Court with clean hands. Accordingly, it is stated that the *Rule Nisi* is, therefore, liable to be discharged.

Mr. Bivash Chandra Biswas, the learned Advocate appearing on behalf of the petitioner, submits that the petitioner does not have any third division in his education life and he had/has all required qualification for appointment in the post of Lecturer. As such, he was promoted as Assistant Professor since September, 2013 by the Selection Committee appointed by the Governing Body of the Madrasha on due consideration of the Nitimala dated 28.11.2010 circulated by the respondent No.2. Since then he has been performing his duty and withdrawing his salary as Assistant

Professor. Whereas, the respondent No.9 Md. Sharifuzzaman got 3rd division in Alim and Fazil examinations and as such, under no circumstances the respondent No.9 can get promotion in the post of Assistant Professor. But the authority without considering the matter in its true perspective vide resolution dated 05.04.2015 cancelled the promotion of the petitioner and thereby promoted the respondent No.9 in his place illegally and without lawful authority. He further submits that it is a settled principle of law that no man can be penalized unheard. Since he was not served with any show cause notice before cancelling his promotion, the action is completely without lawful authority. Accordingly, he has prayed for making the *Rule Nisi* absolute.

Mr. Bepul Bagmar, the learned Deputy Attorney General appearing on behalf of the respondent government, by referring to clause 13 of the Jonobal Kathamo Nitimala, 2012, submits that the seniority of teachers and staffs would be counted from the date of enlistment in the monthly pay order. But where the enlistment date in the monthly pay order is the same in that case, their seniority would be fixed up considering the joining date of their service. If the joining date is found to be the same, in that case, seniority would be ascertained on the basis of their respective date of birth. So, the law is very clear in this regard. Whether the cancellation of promotion of the petitioner by the governing body of the madrasha is lawful, for this the matter is pending for adjudication. However, the matter could not be reached to its finality by the respondent government due to the action of the petitioner. As such, the writ

petition is premature and the *Rule Nisi* is therefore liable to be discharged.

Mr. Sarwar Ahmed along with Mr. Md. Humayun Kabir, Mr. Utpal Biswas and Mr. Songjukta Dobay, the learned Advocates appearing on behalf of the respondent Nos. 7 to 9 adopted the submissions made by the learned Deputy Attorney General. In addition to the above submissions of the learned Deputy Attorney General, Mr. Humayun Kabir, the learned Advocate submits that the date of birth of the petitioner is on 31.12.1974 and the date of birth of the respondent No.9 is on 15.02.1971. The enlistment date in the monthly pay order of all the candidates is on 01.07.2002 i.e. on the same date. Since the law is very clear in this respect, as such, the governing body of the madrasha did not commit any illegality in cancelling the promotion of the petitioner and promoting the respondent No.9 in the post of Assistant Professor vide resolution dated 05.04.2015 which was communicated to him on 13.04.2015. Thereafter, the madrasha authority sent all relevant papers to the respondents for dropping out his name from the salary Code-VI but the authority could not finalize the matter due to filing of the writ petition and pendency of the same. Referring to the decision in the case of **Kamaluddin (Md) and another Vs. Secretary, Ministry of Land, Bangladesh and others, 56 DLR(AD)212** the learned Advocate for the respondents submits that admittedly, the matter did not reach to its finality and the petitioner apprehending of being affected by the act of the respondents filed the writ petition and obtained the Rule Nisi which

is not maintainable in the eye of law. Hence, he prays for discharging the *Rule Nisi*.

We have considered the submissions of the learned Advocates of the respective parties, perused the writ petition, *affidavit-in-opposition* along with all papers annexed thereto as well as the decision referred to above by the learned Advocate for the respondent Nos. 7 to 9.

The dispute between the petitioner and the respondent No.9 is regarding their eligibility for promotion in the post of Assistant Professor. It is claimed by the petitioner that he has no 3rd division in his educational career and he has appointed in the post of Lecturer of Islamic History. His name was enlisted in the monthly pay order with effect from 01.07.2002. Thereafter, he applied for promotion in the post of Assistant Professor along with other three candidates. The madrasha authority appointed a selection committee for scrutiny and recommendation. The selection committee vide its report dated 20.08.2012 considered the paripatra dated 28.11.2010 circulated by the respondent No.2 and recommended the petitioner for giving promotion in the post of Assistant Professor. Based on the said report, the governing body of the madrasha vide resolution dated 14.02.2013 accepted the report of the selection committee and promoted the petitioner to the post of Assistant Professor. Thereafter, his name was enlisted in the monthly pay order as Assistant Professor fixing his salary at Taka 22,065.00. But the governing body being influenced vide its resolution dated 05.04.2015 cancelled the promotion of the

petitioner and promoted the respondent No.9. It is also claimed that the governing body took decision to demote the petitioner which is not sustainable in law. No show cause notice was issued to him and as such, the action of the Governing Body is illegal and without lawful authority.

On the other hand, the respondent No.9 Md. Sharifuzzaman by filing *affidavit-in-opposition* stated *inter-alia* that at the joining in the post of Lecturer of Islamic History in 1995, the petitioner did not have required qualification because admittedly he obtained master degree certificate in 1999. Even then, he was appointed in the said post condition to submit Master Degree certificate within the next three years. It is stated that the joining date of the petitioner was on 10.12.1995 as found from the enquiry report dated 03.11.2016, and he tempered the joining date and made it 06.12.1995 instead of 10.12.1995. Regarding the required qualification it is stated that the advertisement for appointment was published on 03.10.1995 which is much earlier than the *Jonobol Kathamo 2010* came into operation. As such, question of having 3rd division in educational career as per *Nitimala 2010* is immaterial in respect of the respondent No.9. It is stated that the joining date and the enlistment date in the monthly pay order for both the petitioner and the respondent No.9 are same i.e. on 06.12.1995 and 01.07.2002 respectively. But the date of birth of the petitioner and the respondent No.9 is 31.12.1974 and 15.02.1971 respectively. By referring to clause 13 of the *Nitimala 2012* it is stated that the respondent No.9 is senior than the

petitioner and as such, the madrasha authority did not commit any illegality in cancelling the promotion of the petitioner and in promoting the respondent No.9 as Assistant Professor. Finally it is stated that the writ petition is pre-mature since the matter has not reached to its finality by the respondent government.

These are the claims and counter-claims of the petitioner and the respondent No.9 regarding their eligibility for getting promotion in the post of Assistant Professor as noted above. Since the question of pre-maturity of the writ petition i.e. maintainability of the same has been raised by the respondents it would be wise and profitable to address the said issue. If it is found that the writ petition is pre-mature and not maintainable at the threshold of article 102 of the Constitution, then it would be meaningless and redundant to go into the merit of the writ petition.

It appears from the writ petition that on 21.03.2015 and 28.03.2015 the petitioner moved the governing body of the madrasha for cancelling the promotion of the respondent No.9 as Assistant Professor by re-instating the petitioner in the said post. Being failed to get any redress, the petitioner thereafter on 13.05.2015 moved the respondent No.2 i.e. Director General, Directorate of Secondary and Higher Secondary Education, Shikkha Bhaban, Dhaka for redress. But the respondent No.2 did not make any response to the same.

However, after cancelling promotion of the petitioner, the Principal of the madrasha vide its Memo dated 06.05.2015

requested the respondent No.2 to drop out the name of the petitioner from the Salary Code VI and when the matter is in progress for the steps to be taken, the petitioner filed the instant writ petition on 21.06.2015 and obtained the Rule Nisi on 29.06.2015. In the reply to the show cause notice dated 07.05.2017 the petitioner clearly mentioned that against the resolution dated 05.04.2015 taken by the governing body of the madrasha regarding cancellation of petitioner's promotion by promoting respondent No.9 as Assistant Professor, the petitioner has filed Writ Petition No.6606 of 2015 before the High Court Division. Though the writ petition has been filed against the decision of the governing body but the same has not reached to its finality till date.

From the terms of the *Rule Nisi* order dated 29.06.2015, it is clear that the petitioner challenged the inaction of the respondent No.2 to cancel the salary sheet forwarded to Rupali Bank Limited, Satkhira Branch, Satkhira by the governing body for the month of April, 2015 fixing salary and other allowances of the petitioner amounting to Taka 18,835.00 instead of Taka 22,065.00.

Governing Body of a Non-Government Educational Institute is not connected with the affairs of the Republic or of a local authority. Since the decision of the governing body is subject to approval by the respondent Board and since while the matter was in progress before the respondent Board, the petitioner filed this writ petition which shows that before the decision of the governing body of the madrasha being finalized by the respondent Board the writ petition was filed. On similar situation, the Appellate Division

in the case of **Kamaluddin (Md) and another Vs. Secretary, Ministry of Land, Bangladesh and others, 56 DLR (AD) 212** held as follows:

“.....The law is now settled that unless final order is passed in a matter, person interested in the matter or persons apprehensive of being affected by the act of functionaries performing functions in connection with the affairs of the Republic or of a local authority is not entitled to invoke the writ petition as against the intermediate steps as a preclude to the making of that order seeking declaration as to the legality or otherwise of the intermediate or ad-interim order(s).”

The decision as quoted above is squarely applicable in the facts and circumstances of the present case. As such, we do not have any option but to subscribe the same view of the Appellate Division that the writ petition is premature and not maintainable against the decision of the governing body of the madrasha since the same has not yet been reached to its finality under the provision of law. Moreover, there is a long line of the decisions of our apex Court that no writ lies against the decision of the governing body of the madrasha since the governing body is not connected with the affairs of the Republic or of a local authority.

In this respect, we are to examine what are the constitutional provisions employed in article 102(2)(a)(ii) of the Constitution under

which the instant writ petition has been filed before this Court which is quoted below:

“102(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).....

(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”

Having gone through the aforesaid constitutional provision it is clear that writ petition is maintainable only when the action or the proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority.

In the instant case, on reading of the terms of the *Rule Nisi*, it appears that the petitioner is aggrieved by the decision of the governing body of the madrasha. It further appears that the petitioner has categorically admitted in the writ petition as well as in the reply to the notice of the respondent Board as mentioned above that against the decision of the governing body dated 05.04.2015 he has filed the writ petition. And before the decision being finalized by the respondent Board, the decision remains as the decision of the governing body of the madrasha. The Appellate Division in the case of **Noor-e-Alam Jahangir(Md) English Teacher, Rifles Public School and College Vs. Government of**

Bangladesh, represented by the Secretary, Ministry of Education and others, 60 DLR(AD)12 has held at paragraph No.2 (relevant portion is quoted below):

“.....the impugned order has not been passed by any statutory body or local authority and further, admittedly the Principal of the above Rifles Public School and College is also not in the service of the Republic and accordingly, the writ petition is not maintainable.”

In view of the above findings, we are of the view that the writ petition is premature and not maintainable under article 102 of the Constitution. Hence, the *Rule Nisi* is liable to be discharged.

Accordingly, the *Rule Nisi* is discharged. The interim direction granted earlier is hereby recalled and vacated.

There will be no order as to costs.

Communicate the order.

K M Zahid Sarwar, J.

I agree.