

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique
-Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Ms. Justice Krishna Debnath

CIVIL APPEAL NOS.234-238 OF 2018

(From the judgment and order dated 15.11.2018 passed by this Division in Civil Review Petition Nos.338-342 of 2016).

Sultana Zahid Parvin and others.Appellants.
(In all the appeals)

=Versus=

S.M. Fazlul Karim and others. :Respondents.
(In C.A. No.234/2018)

Mohammad Shahidul Islam and others. :Respondents.
(In C.A. No.235/2018)

Md. Helal Uddin Bhuiyan and others. :Respondents.
(In C.A. No.236/2018)

Bangladesh, represented by the Secretary, :Respondents.
Ministry of Social Welfare, Bangladesh
Secretariat, Ramna, Dhaka and others. (In C.A. No.237/2018)

Md. Safyet Hossain Talukder and others. :Respondents.
(In C.A. No.238/2018)

For the Appellants. : Mr. Shafique Ahmed, Senior Advocate
(In C.A. Nos.234, 236-237 of 2018) (with Mr. Mamtaz Uddin Fakir, Senior Advocate with Mr. M. Qumrul Haque Siddique, Advocate and Mr. Mahbub Shafique, Advocate) instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Appellants. : Mr. Shafique Ahmed, Senior Advocate (with
(In C.A. Nos.235 & 238 of 2018) Mr. Mamtaz Uddin Fakir, Senior Advocate with Mr. M. Qumrul Haque Siddique, Advocate and Mr. Mahbub Shafique, Advocate) instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.

For the Respondent Nos.1-4. : Mr. Mohammad Sayed Ahmed, Senior
(In C.A. No.234 of 2018) Advocate instructed by Ms. Madhumalti Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.5-9. : Not represented.
(In C.A. No.234 of 2018)

- For Respondent No.1. : Mr. Probir Neogi, Senior Advocate
(In C.A. No.235 of 2018) (with Mr. Md. Moklesur Rahman, Advocate and Mr. Md. Ekramul Hoque, Advocate) instructed by Ms. Madhumalti Chowdhury Barua, Advocate-on-Record.
- For Respondent Nos.2-6. : Not represented.
(In C.A. No.235 of 2018)
- For Respondent Nos.1-2. : Mr. Probir Neogi, Senior Advocate
(In C.A. Nos.236, 238 of 2018) (with Mr. Md. Moklesur Rahman, Advocate and Mr. Md. Ekramul Hoque, Advocate) instructed by Ms. Madhumalti Chowdhury Barua, Advocate-on-Record.
- For Respondent Nos.3-8. : Not represented.
(In C.A. No.236 of 2018)
- For Respondent Nos.3-7. : Not represented.
(In C.A. No.238 of 2018)
- For Respondent Nos.1-5. : Mr. Saiful Alam, Assistant
(In C.A. No.237 of 2018) Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
- Date of Hearing. : **The 20th & 26th July, 2022.**
- Date of Judgment. : **The 28th July, 2022.**

J U D G M E N T

Borhanuddin,J: These civil appeals arises out of the leave granting order dated 15.11.2018 in Civil Review Petition Nos.338-342 of 2016 for review of the judgment and order dated 08.02.2016 passed by this Division in Civil Appeal Nos.88-95 of 2013 allowing the appeals.

The facts, relevant for disposal of the civil appeals, are that the appellants herein as petitioners filed separate writ petitions challenging inaction of the writ-respondents to regularize their service in the

revenue budget long after their absorption from the development project and also challenged constitutionality/validity of Rule-5 of the "উন্নয়ন প্রকল্প হইতে রাজস্ব বাজেটে স্থানান্তরিত পদের পদধারীদের নিয়মিতকরণ ও জ্যেষ্ঠতা নির্ধারণ বিধিমালা, ২০০৫ (hereinafter referred to as 'Rules of 2005')". Common case of the writ petitioners in all the writ petitions are that the petitioners were initially recruited in different development projects and after the end of those projects they were absorbed in the revenue budget long ago; The petitioners were recruited in the permanent revenue budget from temporary development project considering their efficiency, competency and proficiency; The petitioners make several representations to the respondents authority to regularize their service but to no avail; The respondent no.2 Director General, Directorate of Social Welfare vide memo dated 03.02.2005 requested the writ-respondent no.1 to regularize the service of the writ-petitioners through the Public Service Commission admitting the fact that the petitioners have been serving the Government for last 20 years and it was extremely necessary to regularize their

service through the Public Service Commission (PSC); The respondent no.2 after obtaining recommendation from the Public Service Commission in 2006 regularize the service of the petitioners in phases; The writ-respondents knowing fully well that seniority of the petitioners would be counted from the date of regularization according to Rule 5 of the Rules delayed regularization of the respondents long after their absorption in the revenue budget; In the circumstances, the petitioners vide letter dated 31.12.2007 requested the writ-respondent no.1 by sending a letter through the writ-respondent no.2 to bring necessary amendment to Rule 5 of the Rules of 2005 so that the petitioners could get equal opportunity with those who were recruited directly by the PSC, in respect of promotion and other seniority related matters; The writ-respondent no.2, appreciating the necessity of this amendment, forwarded the letter with recommendation to the respondent no.1 but without any response; The respondent no.2 again by letter dated 26.08.2008 requested the respondent no.1 to bring necessary change in the Rule 5 of the Rules of 2005 but

no step has been taken to amend the Rule; Hence, the petitioners invoke the writ jurisdiction under Article 102 of the Constitution.

Upon hearing the writ-petitioners, a Division Bench of the High Court Division issued Rule Nisi in all the writ petitions in the following manner:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the respondent's failure to regularize the service of the petitioners until 2006, i.e. even after 21 years of their recruitment shall not be declared to have been without lawful authority and is of no legal effect and also as to why regulation 5 of the regulation dated 20.06.2005 relating to the determination of the regularization and seniority of the officers who have been transferred from development project to revenue budget (Annexure-'A'), read with Rule 6 of the gazetted post (Department of Social Welfare), Recruitment Rules, 1979 (Annexure-'B'), shall not be declared to have been made without lawful authority and is of no legal effect."

The writ-respondents contested the writ petition by filing affidavit-in-opposition stating interalia that the writ-petitioners were appointed in a development project by a project director on a temporary basis for the posts

of the development project with clear terms and conditions that the service of the project personnel is temporary and will be terminated on the completion of the said project; After completion of the said project the jobs of project personnel including the writ-petitioners were terminated vide memo dated 20.07.2002; Later on, the Finance Division, Ministry of Finance with a view to absorbing and creating posts in the revenue budget accorded permission vide memo dated 24.11.2003 to transfer 752 posts of "সম্প্রসারিত পল্লী সমাজকর্ম পর্ব-৫ প্রকল্প" to the Department of Social Services under revenue budget; Upon the recommendation of PSC the service of the petitioners was regularized as per Rules 2005 which takes effect from 05.07.2007; The same Rule (Rule,2005) being the only gateway to absorb the petitioners from development project to revenue budget, the concerned authority had no other alternative but to count their service tenure from the date of regularization; Thereafter, in compliance with all rules and regulations the petitioners were placed in the gradation list from the date of their regularization in the service i.e. 05.07.2007 as per

Rules 2005; The officers directly recruited in the year 2000 and 2006 are senior to the petitioners since the petitioners' joined in the development project and their service was regularized on 05.07.2007 upon the recommendation of PSC. These civil appeals are liable to be dismissed.

After hearing the parties, different Benches of the High Court Division made the Rules absolute by different judgments.

Being aggrieved, the writ-respondents filed separate civil petitions for leave to appeal before this Division and leaves were granted.

Upon hearing the parties and considering the materials on record, this Division allowed the appeals by majority decision vide judgment and order dated 08.02.2016.

Feeling aggrieved, the writ-petitioners preferred 5(five) civil review petitions before this Division and obtained leave granting order on 15.11.2018 to consider the following submissions:

"The Appellate Division seriously erred in law, which error resulted in an error on the face of the record in that in view of the fact that when the project profile expressly provides a specific provision for absorption of the employees in the revenue budget and has been serving under the revenue budget, whether due to a law this time served under the revenue budget can be disregarded and/or not to be counted/added towards an employee's tenure of service is at all tenable in law.

The Appellate Division seriously erred in law, which error resulted in an error on the face of the record in that whether calculation of the length of service of an employee should in anyway be at the mercy or whim of PSC and/or of any other authority, it should be fixed and must be calculated from the date of entry in the revenue budget bearing in mind that the action of PSC is merely a routine administrative device for those who were transferred from Development Budget.

The Appellate Division seriously erred in law, which error resulted in an error on the face of the record in that whether a law can be promulgated curtailing tenure of service already rendered to the authority without any fault of the service rendering employee.

The Appellate Division seriously erred in law, which error resulted in an error on the face of the record in that the Appellate

Division failed to enter into any discussion on any of the review petitioners (Review Petition Nos.338, 339, 340, 341 and 342 of 2016).” [Sic]

Consequently, these civil appeals arose.

Mr. M. Qumrul Haque Siddique, learned Advocate appearing for the appellants summaries his argument in line with the leave granting order.

Mr. Probir Neogi, learned Senior Advocate appearing for the respondents in support of the impugned judgment and order dated 08.02.2016 submits that the grounds of review are addressed by this Division in the impugned judgment and order and as such the appeals are liable to be dismissed.

Article 105 of the Constitution confers jurisdiction on the Appellate Division to exercise power of review. It reads as follows:

“105: The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any Rules made by that Division to review any judgment pronounced or order made by it.”

Rules have been made known as the Supreme Court of Bangladesh (Appellate Division) Rules, 1988. Order XXVI of the said Rules, deals with review and it reads as follows:

PART IV

ORDER XXVI

REVIEW

1. Subject to the law and the practice of the Court, the Court may, either of its own motion or on the application of a party to a proceeding, review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Code of Civil Procedure and in a Criminal proceeding on the ground of an error apparent on the face of the record.

Rule 2-9 of this order contains procedure regarding filing of an application for review.

Thus, a perusal of the same would show that the jurisdiction of this Court, to entertain a review petition in a civil matter, is patterned on the power of the Court under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC, for short). Order XLVII Rule 1 of the Code of Civil Procedure, reads as follows:

REVIEW

1.(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed,

or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

It is settled law that the power of review cannot be confused with appellate power which enables a superior Court to correct all errors committed by a subordinate Court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudication. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

Let us see the grounds of the leave granting order dated 06.06.2013 which are decided by the impugned judgment and order.

Leave granted on the following points:

- I. *Whether the judgment and order of the High Court Division is erroneous inasmuch as the said judgment failed to specify grounds as to how Rule 5 relating to regularization and determination of seniorities of the posts from the development projects to Revenue Budget Rules, 2005 is inconsistent with fundamental rights enshrined in Articles 27 and 29 of the Constitution.*
- II. *Whether the High Court Division erred in failing to appreciate the facts that the employees directly recruited in the revenue budget through PSC and the employees recruited in the development project do not*

belong to the same class for the purpose of Article 27 of the Constitution and as such, the impugned judgment is liable to be set-aside.

III. Whether the High Court Division erred in law by declaring that the seniority of project employees would be the seniority of project actual joining the development project and the High Court Division misconceived Articles 27 and 29 of the Constitution by considering two unequal classes as equals.

Inconsistency of Rule 5 of the Rules of 2005 with fundamental rights enshrined in Articles 27 and 29 of the Constitution was agitated in the earlier appeals which are discussed in the impugned judgment and order, and addressing the point of law, this Division in the impugned judgment and order observed:

"So, it is to be looked into whether Rule 5 of the Rules of 2005 is inconsistent with Articles 27 and 29, it has not assigned any reason why this Rule 5 is inconsistent with Articles 27 and 29(1) of the Constitution. True, the Constitution expressly conferred upon the High Court Division the power of judicial review and if it finds that any statute is inconsistent with the Constitution, it can declare the said statute ultra vires the Constitution to the extent it is found inconsistency.

A law may be declare ultra vires the Constitution if it is in contravention of the fundamental rights guaranteed in part III of the Constitution. He must show that his right or interest has been affected by reason of the statute. But a particular provision or section of a statute is found inconsistent with another provision of the same statute, how the Court can declare a provision/section ultra-vires Articles 27 or 29(1) of the Constitution?

As observed above, there is presumption infavour of the constitutionality of an enactment and the person who claims the statute unconstitutional must show that there has been a clear transgression of the constitutional principles. The High Court Division did not even declare Rule 5 ultra vires to Articles 27 or 29(1). It simply set-aside Rule 5. Assuming that it has declared Rule 5 ultra vires the Constitution, how the officers/employees will get seniority over others who are already in the revenue set up. It will create anomaly. It is the only a provision which gives a guideline to count the seniority of an officer or employee working in the development project whose service has been regularized in the revenue budget and he can claim the seniority from the date of regularization. If this Rule 5 is struck down the writ petitioners cannot claim any right of seniority but Rule 6 does not relate to determine the seniority." (Sic)

From the leave granting order based on which present appeals arose it is clear that the appellants in other way round challenged Constitutionality of Rule 5 of the Rules of 2005 which had been sought earlier and had been negatived by the impugned judgment and order.

In the case of *Sow Chandra Kante and another vs. Sheikh Habib*, reported in (1975) 1 SCC 674, the Indian Supreme Court held:

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

It is well settled that a party is not entitled to seek a review of a judgment delivered by this Division merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by this Division is final, and departure from that principle is justified only when circumstances of a substantial and compelling character

make it necessary to do so. Reference to the case of *Sajjan Singh vs. State of Rajasthan*, reported in AIR 1965 SC 845.

However, we have noticed that though the appellants are absorbed but their right of regularization has been recognized long after, in the year 2006.

From Clause 3 of Rule 4 and Clause 1 of Rule 5 of the Rules of 2005 it is evident that the seniority of the employees absorbed in the revenue set up from development project is to be counted from the date of regularization of their service in the revenue set up and this regularization depends on the recommendation of Public Service Commission or departmental promotion or selection committee, as the case may be. This recommendation of Public Service Commission, undisputedly, is not given within any timeframe. In many cases, it takes a long time, sometimes several years, to give its recommendation/opinion for regularization of the employees absorbed in the revenue set up from development project and the delay affects seniority of the employees who were absorbed in the revenue set up from development

project to the employees who were directly appointed in the Government service long after absorption in the revenue set up.

Thus, this aspect should be addressed by the respondents in order to create equal opportunity for all.

All the civil appeals are dismissed with the observation made above.

No order as to costs.

CJ.

J.

J.

J.

J.