11 SCOB [2019] HCD 71

High Court Division
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 5336 OF 2015

Tofazzal Hossain Khandker and others
… Petitioners
Vs.
Govt. of Bangladesh represented by the Secretary, Ministry of Post Telecommunications and Information Technology, Bangladesh Secretariat, Dhaka and others
… Respondents

For the Petitioners	Mr. Md. Abdul Matin Khasru with Mr. Pankaj Kumar Kundu, Advocates
For the Respondent no.3	Mr. Md. Mokleshure Rahman, DAG
For the Respondent No.3	Mr. Mainul Hosein, Advocate with Mr. Jahedul Islam, Advocate and Mr. Moniruzzaman Howlader, Advocate
For the Respondent no.5	Mr. Md. Faruk Hossain, Advocate
Date of Judgement	26.02.2018

Present:
Ms. Justice Naima Haider
&
Mr. Justice Zafar Ahmed

If any executive action is taken, which we consider, in light of facts and circumstances, to be unreasonable we take the view that such action was beyond authority because the executives are not authorized to act unreasonably. ... (Para-25)

We are inclined to hold that the amendment made through Clause 3 of the order dated 09.03.2006 was 'whimsical''. This cannot be permitted to remain in force. ... (Para-31)

However, if there is an executive order which results in continuous wrong, as in this case, we take the view that mere delay in filing the writ petition should not affect their relief. No doubt the petitioners filed the petition after a long time but that, in the given circumstances should not defeat their entitlement because the wrong done by the executive is 'continuous'. ... (Para-32)

Executives can employ for temporary period but if they permit the period to extend, either expressly or by conduct, after certain time, the employee can legitimately expect to be absorbed. ... (Para-35)

JUDGMENT

Naima Haider, J:

1. In this application under Article 102 of the Constitution of the People's Republic of Bangladesh, Rule Nisi was issued in the following terms:

> *Let a Rule Nisi be issued calling upon the respondents to show cause as to why the condition no. 3 as inserted in Memo No. সম (বিধি-৩) কন্টি-৬/২০০৩-৬(৫) dated 09.03.2006 (Annexure-D to the writ petition) issued the Ministry of Public Administration bringing the petitioners under work-charged establishment of the Ministry of Post, Telecommunications and Information Technology should not be declared to have without lawful authority and is of no legal effect and why the respondents should not be directed to regularize the appointment of the petitioner in the vacant posts of BTTB placing them in respective grades according to the nature of their jobs under appropriate scales of pay of the Government with continuity of service since 01.07.1997 and/ or such other of further order or orders passed as to this Court may seem fit and proper.*

2. The facts in brief, as set out in the writ petition and the Supplementary Affidavit, are as follows: Approximately 2972 work charged employees, including the petitioners, have been serving under the Bangladesh Telegraph and Telephone Board (BTTB) for approximately 25-30 years as Telecommunication Mechanic, Lineman, wiremen, Clerk, Line Labour, Office Assistant, Peon, Driver etc.

3. Initially they had been serving as casual employees but subsequently they were included in Muster Roll with effect from 01.07.1997 pursuant to the resolution dated 01.09.1997 passed by a high powered Committee Chaired by the Hon'ble Minister, Ministry of Post and Telecommunications.

4. Subsequently, the appointments of the aforesaid 2972 employees, including the petitioners, were brought under work charged establishment by the Ministry of the Post and Telecommunication by order dated 09.03.2006; this was issued further to a letter of Ministry of Establishment (now the Ministry of Public Administration) .

5. By the said order, the salary of the petitioners were fixed at Tk. 2400/- based on 20th grade of the National Pay Scale of 2005. This was irrespective of their posts, qualifications and nature of jobs. The said order dated 09.03.2006 contained provisions which were irrational, arbitrary and were contrary to the orders issued on 28.03.1969 and 21.04.1972 dealing with regularization of employees.

6. In light of the order dated 09.03.2006, the concerned authorities of BTTB brought the petitioners under work charged establishment of the BTTB with effect from 12.03.2006. The petitioners, apprehensive of losing their jobs, were unable to protest. They joined as work charged employees in a compelling situation despite the fact that there were 3432 posts of 3rd Class and 4th Class employees vacant in regular establishment of BTTB up to October, 2007.

7. BTTB requested the Ministry of Post and Telecommunications by a letter dated 17.10.2007 to issue clearance to fill up said vacant posts by the said work charged employees, including the petitioners. However, no positive steps were taken.

8. In the meantime the Bangladesh Telegraph and Telephone Board Ordinance, 1979 was amendment by the Parliament by enacting the Bangladesh Telegraph and Telephone Board (Amendment) Act, 2009. By the said amendment, two new provisions were inserted in the original Ordinance, namely section 5A and section 5B. According to section 5A of the Ordinance the Government may, in public interest, by agreement, transfer the entire undertaking of the Board to a public limited company registered under the Companies Act,1994 on such terms and conditions as may be specified in the agreement. The word "undertaking of the Board" includes its officers and employees, business, projects, schemes, assets, rights, powers, licence, authorities and privileges, its properties (movable and immovable) reserve funds, investments, deposits, borrowings, liabilities and obligations of whatever natures, but does not include those related to submarine cable as referred to in section 5B. Although a public limited company, being Bangladesh Telecommunications Company Limited (BTCL) was formed, it could not function due to various reasons.

9. In order to resolve the problems that arose in respect of operation of BTCL, 11-member high powered Consultation Committee was formed headed by the then State Minister, Ministry of Labour and Employment. The said committee prepared a comprehensive report on 13.11.2011 with recommendations to create a separate directorate under name " Department of Telecommunications (DoT) keeping provisions to vest employments of all officers and employees including the work charged employees of BTTB (now BTCL) therein without affecting the continuity of their service.

10. In pursuance of the said report, the Secretary, Ministry of Post, Telecommunications and Information Technology made a summary on 20.08.2014 and submitted it before the Secretarial Committee on Administrative Development for approval of the proposal as to formation of the Department of Telecommunications.

11. The concerned Ministry gave approval to form the Departmental Telecommunications (DoT) with consent of the Hon'ble Prime Minister and now the matter of issuance of GO(Government Order) is under process. Though the services of the petitioners have been transferred to the BTCL but BTCL is not functioning and the salaries and allowances of all officers and employees are being borne by the BTTB.

12. The petitioners, having no other alternative and efficacious remedy moved this Division and obtained the instant Rule.

13. The Rule is opposed by the respondent Nos. 3 and 5. Separate Affidavits in Opposition were been filed.

14. The learned Counsel appearing for the respondent No.3, taking us through the Affidavit in Opposition, submits that the petitioners have joined the service in 2006. They cannot now claim to be regularized. At this stage, they cannot also challenge the legality of Clause 3 of the order dated 09.03.2006. The learned Counsel made elaborate submission on laches on the part of the petitioners and submits that the Rule should be discharged.

15. The learned Counsel for the respondent No.5, taking us through the Affidavit in Opposition submits that there are no vacancies and as such it would not be proper for this Division to pass any direction of absorption. He further adopted the submissions of the learned Counsel appearing for respondent No.3 and also made elaborate submission on laches on the part of the writ petitioners. He further submits that the petitioners were involved in

different Trade Union activities and as such, they are not entitled to be absorbed. The learned Counsel also submits that job of the petitioners are temporary and therefore they are not eligible for regularization/absorption. On these counts, the learned Counsel submits that the Rule should be discharged.

16. Mr. Abdul Matin Khasru, learned Counsel for the petitioners refers to the orders dated 28.03.1969 and 21.04.1972, which are still, admittedly in force and submits that the petitioners having served for such a long period, in excess of 15 years, are required to be regularized/absorbed. According to the learned Counsel for the petitioners, the petitioners have legitimate expectation to be regularized. He further submits that some of the petitioners have already retired and/or died and they should be entitled to benefit of our judgment. With regard to Clause 3 of the order dated 09.03.2006, the learned Counsel submits that Clause 3 is manifestly arbitrary and if read in the context of the development of service law, is an affront to common sense. According to him, Clause 3 of the order dated 09.03.2006 ought to be declared illegal and without lawful authority.

17. We have perused the writ petition, the Supplementary Affidavit, the Affidavits in Opposition and the documents annexed therein. We have heard the learned Counsels appearing for the petitioners and the respondents.

18. The first issue that needs consideration is the legality of Clause 3 of the order dated 09.03.2006 which is impugned in the instant writ petition. To address this issue, first of all, we need to understand the rationale behind the issuance of the orders dated 28.03.1969 and 21.04.1972. The heading of the order dated 28.03.1969 is *"Conversion of temporary posts into regular posts and contingent and workcharged into regular Establishment"* It is clear from the heading that the Government was desirous of regularizing employees subject to condition that the employee must complete certain years of service. We note that the order was issued after consultation with the Ministry of Finance which indicates that the potential fiscal issues associated with the regularization had also been resolved.

19. Now, let us understand why the order dated 21.04.1972 was issued. The relevant part of the order reads as follows:

> *"The Government under Memo No. SGA/RI/IS-33/69/71 (350) dated 28.03.1969 issued orders for conversion of certain temporary posts into permanent ones and contingent and workcharged staff into regular establishment. It appears that these decisions have not been fully implemented as a result of which employees concerned have not yet got the benefit of the said decision. It has, therefore, been decided that the decision referred to above should be implemented immediately.*"

20. The intention of the order is manifestly clear. The Government intends immediate enforcement of the order dated 28.03.1969. We think that such stance was taken because it was unfair to allow works to be carried out by temporary workers for indefinite period of time; those who started as temporary workers expects a place in the Government. They expect to be a part of the Government and the Government acknowledges their expectations.

21. The order dated 21.04.1972 further provides:

> *"... It has been further decided that the conversion, as decided earlier, of the posts which have been in existence for 5/10 years or more should be done with effect from the date the posts were created and the employees should be absorbed against the posts with effect from the date of their appointment"*

22. The said order further provides that the retirement benefits are to be given "retrospectively".

23. The intention of the Government cannot be more clear. The Government intends the temporary employees to understand that the moment they are absorbed/regularized after satisfactory completion of the term specified, they would form part of the Government for all material purpose, from the date of their appointment. Furthermore, we note that the Ministry of Finance was consulted prior to issuance of the order. This means that, once again, the fiscal issues, that may arise from the order was contemplated and dealt with.

24. For ease of reference we now set out below the impugned Clause No. 3 of the order dated 09.03.2006 which purports to make changes to the orders of 1969 and 1972:

> ৩. (ক) Service and General Administration Department, Regulation Branch, Section-1 Gi No. SGA/RI/IS-33/69/71(350), dated Dacca, the 28th March, 1969 স্মারকমূলে ওয়ার্কচার্জড কর্মচারীদের নিয়মিত সংস্থাপনে আনয়নের যে বিধান রয়েছে, বিবেচ্য মাষ্টাররোল শ্রমিকদের ক্ষেত্রে উক্ত বিদান প্রযোজ্য হবে না। অর্থাৎ টিএন্ডটি বোর্ডের মাষ্টার রোল শ্রমিকদের ওয়ার্কচার্জড পদে নিয়োগের পর তাদের নিয়মিত সংস্থাপনে আনয়ন করা হবে না।
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> (খ) সংস্থাপন বিভাগের বিধি উইং-১ এর নং- Estb/RI/S-46/72/55, Dated, Dacca, 21st April, 1972 স্মারকমূলে ওয়ার্কচার্জড কর্মচারীদের অবসর সুবিধা (Retirement benefit দেয়ার যে বিধান রয়েছে বর্ণিত শ্রমিকদের ক্ষেত্রে উক্ত বিধান প্রযোজ্য হবে না। অর্থাৎ, ওয়ার্কচার্জড-এ নিয়োগের পর এসব শ্রমিকগণ অবসর সুবিধা (Retirement benefit) পাবেন না।
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> (গ) সংস্থাপন বিভাগের বিধি-৪ শাখার নং- ED(R-IV)-IM-5/72-96(500), Dated, 28/04/1972 নং স্মারকে বর্ণিত বিধান মোতাবেক বিবেচ্য ওয়ার্কচার্জড কর্মচারীগণ চাকুরীর বয়স ৬০ (ষাট) বৎসর এর সুবিধা পাবেন না। অর্থাৎ তারা বর্তমানে সর্বোচ্চ সয়সসীমা ৫৭ বৎসর পর্যন্ত চাকুরী করতে পারবেন।

25. Before we proceed further with the discussion on the legality of the impugned provision set out aforesaid, we would like to set out our understanding of what we expect of the executives. Executives may from time to time, change its decisions. That is understandable and desirable. Otherwise, the system would come to a halt. However, when the executives do decide the change its previous decisions, the new decision must objectively be understood to be reasonable. The executives must act reasonably. They are not permitted to be unreasonable. They must not do something that, simply put "makes no sense" or for that matter, results in discrimination. If any executive action is taken, which we consider, in light of facts and circumstances, to be unreasonable we take the view that such action was beyond authority because the executives are not authorized to act unreasonably.

26. If the executives exercise their discretion, we assume that the authority would act bona fide and there cannot be any presumption of the power being "misused or improperly used". Lord Mac Naughten in the case of Williams Vs Giddy [1911] AC 381 very succinctly held:

> *"Nobody, ofcourse, can dispute that the Government and the Board has a discretion in the matter. But it was not an arbitrary discretion as Pring J seems to think. It was a discretion to be exercised reasonably, fairly and justly"*

27. In our view, the actions of the executives must take account of the relevant facts. The executives are expected to demonstrate wisdom and take such decisions which show that "they thought about it before taking it". In case of changing and/or amending a decision already taken, the executives must show that they actually understood the necessity for the

change and the change(s) made "makes sense". There must be cogent justification for the change and the change(s) made must have a purpose and do not result in discrimination or arbitrariness.

28. We are not sure of the justification for the following in Clause 3 of the order dated 09.03.2006: অর্থাৎ টিএন্ডটি বোর্ডের মাষ্টার রোল শ্রমিকদের ওয়ার্কচার্জড পদে নিয়োগের পর তাদের নিয়মিত সংস্থাপনে আনয়ন করা হবে না। Why should this be? Why should this apply for টিএন্ডটি বোর্ডের মাষ্টার রোল শ্রমিক. Why should certain class of employees be treated differently from the rest, and that too without any reason. The executives are not at liberty to do what they please. What differentiates these employees from the others? We asked the learned Counsels for the respondents but no satisfactory response was provided. There is also nothing in the Affidavit in Opposition. This goes to show that the executives "just decided". They are not permitted to flout with the rights of others just because they have discretion and powers. What surprises us that the order relates to টিএন্ডটি বোর্ডের মাষ্টার রোল শ্রমিক By Clause 5 of the order dated 09.03.2006, the executives excluded the operation of Clause 3 for other Ministries, Divisions, Departments. This in our view is manifestly discriminatory. Not only that, we say again, this is grossly arbitrary, more so because there is no "justification".

29. Clause 3 further provides ওয়ার্কচার্জড-এ নিয়োগের পর এসব শ্রমিকগণ অবসর সুবিধা (Retirement benefit) পাবেন না। We have really tried our best to understand this. We simply failed. If the impugned provision stands, an employee will work for many years and after retirement, he/she will not obtain any benefit. This is absurd. Nothing can justify this.

30. We also do not understand why টিএন্ডটি বোর্ডের মাষ্টার রোল শ্রমিক would not obtain the benefit of retirement at the age of 60 while others similarly situated would.

31. In our view, Clause 3 of the order dated 09.03.2006 "makes no sense" and is an affront to common sense. Clause 3 is manifestly arbitrary and has resulted in gross discrimination. The said provision also has no justification. We are inclined to hold that the amendment made through Clause 3 of the order dated 09.03.2006 was "whimsical". This cannot be permitted to remain in force.

32. We are also inclined to address the issues raised by the learned Counsels for the respondents. Their main contention is laches on the part of the petitioners. The order was issued in 2006. There is no doubt. It is true that delay defeats equity. However, in refusing relief on the ground of laches, we must understand the nature of the order which was challenged. Whether a party is guilty of laches depends on the facts of the case, the nature of the order etc. The principle on which this Division should proceed in refusing relief on the ground of delay or laches is that the rights have accrued to others by reason of the delay or laches and such rights should not be interfered with. That is not the case here. The petitioners were deprived. No one has anything to gain from this. There are two different types of scenarios. First, the executives pass an order which affects someone for a limited time or the order affects the person "one of". For instance, the executives pass and order denying certain permission. This is what we are inclined to term as "on of" situation. For instance the executives pass an order denying a litigant certain right for a specified period. This is not uncommon in tender cases where applicants are blacklisted for certain period. If in those circumstances the person who is aggrieved comes before this Division after a long time, we would be slow to entertain. Not because he is not aggrieved but because our perception would be that he was "not bothered". However, if there is an executive order which results in continuous wrong, as in this case, we take the view that mere delay in filing the writ petition

should not affect their relief. To hold otherwise would be to permit the executives to "continue the commission of wrong". We are not prepared to do this. No doubt the petitioners filed the petition after a long time but that, in the given circumstances should not defeat their entitlement because the wrong done by the executive is "continuous". We are therefore unable to agree with the learned Counsels that the Rule should be discharged for laches.

33. We also do not understand why the participation of the petitioners, if at all, with trade union matters be a bar to the relief sought. If the executives were aggrieved by their alleged participation, they should have taken steps then. We find the submission of the learned Counsel in this regard completely irrelevant.

34. In light of the above we are inclined to hold that Clause 3 of the order dated 09.03.2006 is arbitrary, discriminatory and illegal.

35. This now brings us to the second issue. The petitioners joined the service on different dates before 2000. In 2006 they were joined under compelling circumstances with BTTB. Even if we take 2006 as the starting point of their entry, they have served more than 10 years. They have, in fact served the Government far more. The orders dated 28.03.1969 and 21.04.1972 (which remains in force as on date) clearly contemplates that persons serving in excess of 5 years ought to be regularized. These orders confer expectation to be regularized/ absorbed. Even assuming these orders were not in force, we find it unreasonable to permit an executive to allow someone to work "temporarily" for such a long time. Executives can employ for temporary period but if they permit the period to extend, either expressly or by conduct, after certain time, the employee can legitimately expect to be absorbed.

36. We find it very unreasonable to permit the executives to treat the petitioners as temporary even after more than 15 years particularly in light of recommendation for regularization. Given that we have held that Clause 3 of the order dated 09.03.2006 as illegal, the orders dated 28.03.1969 and 21.04.1972 (which remains in force as on date) are binding. The petitioners are clearly entitled to be regularized/ absorbed in light of the orders passed in 1969 and 1972.

37. On the issue of regularization/absorption this Division already passed several judgments and these were not interfered with by the Hon'ble Appellate Division. Our judgments were based on, among others, the orders dated 28.03.1969 and 21.04.1972. Our judgments were also based on legitimate expectation of the petitioners in those writ petitions. This petition is no different. We thus should not treat this differently. That being the position, we are inclined to hold that the petitioners must be regularized/ absorbed. The petitioners might have joined BTTB in 2006 but this organization is controlled and managed by the respondents. This organization, as we understand, is non functional. This cannot be a ground for non absorption. They started from the respondents and they should be absorbed with the respondents.

38. BTTB is now restructured into Department of Telecommunication which has been abolished with 11,255 posts which includes the posts of the petitioners. That being the case, the petitioners are to be absorbed with the Department of Telecommunication (DoT) (Formally BTTB).

39. In light of the above, we are inclined to hold that there is merit in the Rule. The Rule is made absolute. Clause 3 of the order dated 09.03.2006 is declared to be without lawful

authority and of no legal effect. We further hold that the petitioners are entitled to be absorbed/ regularized, for the reasons set out aforesaid. Accordingly we are inclined to pass the following directions:

> "*The respondents are directed to regularize the appointments of the petitioners in the Department of Telecommunications (DoT) (formally BTTB) placing them in respective grades according to nature of their jobs under appropriate scale of pay of the Government with continuity of service from their initial date of joining within 60(sixty) days from the date of receipt of a copy of this Judgment and Order, on being satisfied that they are otherwise not disqualified.*
> *The respondents are further directed to ensure that the petitioners who have retired are entitled to benefits of our judgment.*
> *The respondents are also directed to ensure that the successors of the petitioners who have died are also entitled to the benefit of this Judgment and Order"*

40. The Rule is made absolute with the aforesaid direction. There shall be no order as to costs.

41. Before parting with the judgment, would like to remind the respondents to ensure that our judgment is complied without fail.

42. Communicate the Judgment and Order at once.