12 SCOB [2019] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 1852 OF 2014

Dr. A. Y. M. Akramul Hoque
........Petitioner
-Versus-
Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Public Administration, Bangladesh Secretariat, Ramna, Dhaka and others
…..Respondents

Mr. Khair Ezaz Maswood with
Mr. Mohammad Faridur Rahman,
Advocates
.....For the petitioner.

Mr. Md. Ekramul Hoque, DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Purabi Saha, AAG
….For the respondent no. 1.

Heard on 02.07.2017, 29.11.2017, 01.02.2018, 19.07.2018, 10.10.2018, 24.10.2018 and 25.10.2018.

Judgment on 04.11.2018.

Present:
Mr. Justice Moyeenul Islam Chowdhury
-And-
Mr. Justice Md. Ashraful Kamal

Exhaustion of efficacious remedy provided by law: How far it bars the invocation of the writ jurisdiction, Liberal interpretation of Equality before law;

There is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law. ... (Para 24)

If any impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Besides, on the ground of mala fides, the petitioner may come up with a Writ Petition bypassing the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of. ... (Para 29)

Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same. ... (Para 52)

When a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law." ... (Para 65)

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why Rule 4(2) of "সরকারের উপ-সচিব, যুগ্ম-সচিব, অতিরিক্ত সচিব ও সচিব পদে পদোন্নতি বিধিমালা, ২০০২" should not be declared to be ultra vires the Constitution of the People's Republic of Bangladesh and why the Notification No. pj(Ee-1)-01/2009-63 dated 27.01.2009 issued by the respondent no. 1 promoting 72 Joint Secretaries to the post of Additional Secretary (Annexure-'D') and Notification No. pj(Ee-1)-01/2009-852 dated 07.09.2009 issued by the respondent no. 1 promoting 60 Joint Secretaries to the post of Additional Secretary (Annexure-'D-1') and Notification No. 05.130.011.00.00.002.2011-347 dated 10.10.2011 issued by the respondent no. 1 promoting 31 Joint Secretaries to the post of Additional Secretary (Annexure-'D-2') and Notification No. 05.00.0000.130.12.002.2012-52 dated 08.02.2012 issued by the respondent no. 1 promoting 127 Joint Secretaries to the post of Additional Secretary (Annexure-'D-3') and Notification No. 05.00.0000.130.12.002.14-16 dated 13.01.2014 issued by the respondent no. 1 promoting 80 Joint Secretaries to the post of Additional Secretary (Annexure-'D-4'), so far as they relate to the exclusion of the name of the petitioner therefrom, should not be declared to be without lawful authority and of no legal effect and why a direction should not be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011 and to pay him all attending benefits and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner having qualified in the Bangladesh Civil Service (BCS) Examination held in 1982 was recommended by the Public Service Commission (PSC) for appointment in the Administration Cadre and accordingly he joined the Administration Cadre as Assistant Commissioner on 14.12.1983. Thereafter he served in various capacities under the Government and ultimately he was promoted to the post of Joint Secretary on 05.03.2005. As Joint Secretary to the Government of Bangladesh, he served as Director, Bangladesh Jute Mills Corporation from 15.05.2005 to 15.03.2006 and as Director General, Bureau of Statistics from 30.03.2006 to 15.10.2009. However, he was made an Officer on Special Duty (OSD) under the then Ministry of Establishment (now Ministry of Public Administration) on 16.10.2009 and since then he has been an OSD thereunder. A combined gradation list of the officers of the Administration Cadre of various batches of 1982 was updated on 27.01.2014 by the Public Administration Computer Centre (PACC). The name of the petitioner appears at serial no. 79 in that combined gradation list. One Mr. Golam Mostafa Kamal (ID No. 3873) bearing serial no. 80 in the gradation list was next below the petitioner. But Mr. Golam Mostafa Kamal and 27 other officers of the Administration Cadre, who were below the petitioner, were promoted to the post of Additional Secretary superseding him by the Notification No. pj(Ee-1)-01/2009-63 dated 27.01.2009 issued by the Ministry of Public Administration. Again by the Notification No. pj(Ee-1)-01/2009-852 dated 07.09.2009 issued by the Ministry of Public Administration, 46 officers of the Administration Cadre with Mr. Chowdhury Md. Babul Hassan (ID No. 3968) at the top, who were below the petitioner in the

gradation list, were promoted to the post of Additional Secretary superseding the petitioner. Subsequently by the Notification No. 05.130.011.00.00.002.2011-347 dated 10.10.2011 issued by the Ministry of Public Administration, 27 officers (Joint Secretaries) of the Administration Cadre with Mr. Md. Lutfar Rahman (ID No. 1683) at the top were promoted to the post of Additional Secretary superseding the petitioner. By the Notification No. 05.00.0000.130.12.002.2012-52 dated 08.02.2012, 123 Joint Secretaries with Mr. Md. Abdul Quddus (ID No. 2548) at the top were promoted to the post of Additional Secretary superseding the petitioner. Lastly by the Notification No. 05.00.0000.130.12.002.14-16 dated 13.01.2014, the Ministry of Public Administration promoted 78 Joint Secretaries with Mr. Md. Alauddin (ID No. 1359) at the top superseding the petitioner. Thus, a total of 302 Joint Secretaries, who were below the petitioner in the gradation list, were promoted to the higher post of Additional Secretary to the Government bypassing the petitioner without any justifiable reason.

3. One Mr. Mizanur Rahman (ID No. 1969) bearing serial no. 262 (far below the petitioner) in the combined gradation list of the officers of the Administration Cadre of 1982 batches was promoted to the post of Secretary by the Notification No. 05.130.012.00.00.011.2011-215 dated 28.06.2011. Besides, by the Notification No. 05.130.012.00.00.011.2011-345 dated 10.10.2011, Mr. K. H. Masud Siddiqui (ID No. 3878) and 4 other officers, who were junior to the petitioner as per the gradation list, were promoted as Secretaries to the Government. Moreover, by the Notification No. 05.130.012.001.00.001.2011-452 dated 15.12.2011, Mr. Md. Rafiqul Islam (ID No. 2167), who was below the petitioner in the gradation list, was promoted as Secretary to the Government. Furthermore, one Mr. Syed Manjurul Islam (ID No. 1431) and 10 other officers, who were below the petitioner in the gradation list, were promoted as Secretaries by the Notification No. 05.00.0000.130.12.001.13-54 dated 31.01.2013. Again Mr. Md. Foizur Rahman Chowdhury (ID No. 1027) and 2 other officers, who were below the petitioner in the gradation list, were promoted to the post of Secretary by the Notification No. 05.00.0000.130.12.001.13-467 dated 18.11.2013. Thus a total of 21 officers of the 1982 batches, who were below the petitioner in the combined gradation list, were promoted as Secretaries bypassing the petitioner.

4. The legal instrument for regulation of the appointment of the civil servants by promotion to the ranks of Deputy Secretary, Joint Secretary, Additional Secretary and Secretary is “সরকারের উপ-সচিব, যুগ্ম-সচিব, অতিরিক্ত সচিব ও সচিব পদে পদোন্নতি বিধিমালা, ২০০২” (hereinafter referred to as the Promotion Rules of 2002). Rule 4(1) of the Promotion Rules of 2002 provides merit, efficiency and seniority as the basis of promotion. Rule 4(2) provides that in case of promotion to the rank of Additional Secretary or Secretary, the importance and nature of assignments discharged by a concerned officer in his total service tenure and his personal reputation and other relevant matters will also be considered. Rule 5 prescribes the procedure for promotion. As per Rule 5(4), the respondent no. 2 (Superior Selection Board (SSB)) will make necessary recommendations for promotion which are required to be approved by the Prime Minister. The petitioner had the requisite qualifications as enumerated in the 1st schedule of the Promotion Rules of 2002 for appointment by promotion to the rank of Additional Secretary on 27.01.2009, when a good number of officers of the 1982 batches, who were below the petitioner in the gradation list, were promoted as Additional Secretaries. The 2nd schedule of the Promotion Rules of 2002 sets 100 marks for evaluation of an officer for promotion. On 27.01.2009, when the officers of the 1982 batches were considered for promotion, the petitioner besides being otherwise eligible for promotion had presumably

obtained the qualifying marks; but unfortunately he was not promoted to the next higher post, that is to say, to the post of Additional Secretary to the Government of Bangladesh. The additional considerations as contemplated by Rule 4(2) of the Promotion Rules of 2002 are not only redundant; but also vague, because these are covered by the ACRs of the officers concerned. The provisions of Rule 4(2) have been constantly used by the authority as a pick and choose instrument to condition the higher ranks of the Civil Service of Bangladesh. Hence, Rule 4(2) of the Promotion Rules of 2002 is discriminatory. The repeated supersessions of the petitioner by the junior officers to the post of Additional Secretary and thereafter to the post of Secretary to the Government of Bangladesh are arbitrary and vitiated by malice in law. The repeated supersessions of the petitioner are also violative of Article 29(1) of the Constitution of the People's Republic of Bangladesh. Against this backdrop, the Rule is liable to be made absolute.

5. The respondent no. 1 has contested the Rule by filing an Affidavit-in-Opposition. The case of the respondent no. 1, as set out in the Affidavit-in-Opposition, in brief, runs as follows:

> The promotions to the posts of Deputy Secretary and above are regulated by the Promotion Rules of 2002. According to the Promotion Rules of 2002, the SSB scrutinizes the eligible candidates for promotion and recommends them to the competent authority. The Ministry of Public Administration, after getting approval of the Prime Minister, issues orders of promotion. However, the petitioner was not found eligible for promotion to the post of Additional Secretary to the Government and as such he was not recommended by the SSB. The petitioner had been serving as Joint Secretary and as such his case for promotion to the post of Secretary to the Government was not placed before the SSB. Moreover, the SSB had no option to consider him for promotion to the post of Secretary in accordance with Rule 5(6) of the Promotion Rules of 2002. The Government denies the claim of the petitioner that he had the requisite qualifications for being promoted to the next higher posts. The provisions laid down in Rule 4(2) of the Promotion Rules of 2002 are not vague inasmuch as those provisions require consideration of the nature and importance of the duties performed by the officer concerned throughout his service career. Rule 4(2) is not redundant, but supplementary to Rule 4(1) of the Promotion Rules of 2002. Moreover, there is no chance of adopting any pick and choose policy by misusing Rule 4(2), because it is equally applicable to all incumbents. Therefore Rule 4(2) of the Promotion Rules of 2002 is not discriminatory.

6. The officers junior to the petitioner were found eligible and accordingly they were recommended for promotion by the SSB. Seniority is not the only basis of promotion. Merit, efficiency and seniority are the basis of promotion. The supersessions of the petitioner in the matter of promotion to the post of Additional Secretary are not vitiated by malice in law. No right of the petitioner was curtailed or infringed by the Government nor was he deprived of his legal entitlement. The petitioner is now retired and as such the Government has no scope to give him promotion to any higher post. Promotion can not be claimed as a matter of right. It is not a fundamental right; rather it is a statutory right. The Writ Petition is not maintainable because the petitioner being a public servant is not amenable to the judicial review under Article 102 of the Constitution. As such the Rule is liable to be discharged with costs.

7. By filing a Supplementary Affidavit-in-Opposition dated 03.07.2018, the respondent no. 1 has annexed the copies of the ACRs of the petitioner, minutes of the meeting held by

the SSB for promotion and summary for the Prime Minister and other documents for perusal by the Court.

8. At the outset, Mr. Khair Ezaz Maswood, learned Advocate appearing on behalf of the petitioner, submits that the Writ Petition is maintainable in the High Court Division under Article 102 of the Constitution inasmuch as he has challenged the vires of Rule 4(2) of the Promotion Rules of 2002 and secondly he has come up before the High Court Division for enforcement of his fundamental rights as guaranteed by the Constitution and in that view of the matter, the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1 is not a bar to the maintainability of the Writ Petition under Article 102 of the Constitution.

9. Mr. Khair Ezaz Maswood also submits that Rule 4(2) of the Promotion Rules of 2002 provides for additional considerations such as nature and importance of the duties performed during the entire service period, personal reputation and other relevant matters of an officer in case of promotion to the rank of Additional Secretary or Secretary and the additional considerations are not only redundant; but also vague and the provisions of Rule 4(2) have been constantly used by the concerned authority as a pick and choose instrument to condition the higher ranks of the Civil Service of Bangladesh and as such Rule 4(2) of the Promotion Rules of 2002 is discriminatory and hence the same is liable to be struck down as being unconstitutional.

10. Mr. Khair Ezaz Maswood further submits that indisputably a total of 302 Joint Secretaries, who were junior to the petitioner in the combined gradation list, were promoted to the post of Additional Secretary by various notifications as evidenced by Annexure-‘D’ series to the Writ Petition and the reasons for repeated supersessions of the petitioner to the post of Additional Secretary appeared to be vague and no specific reason was spelt out by the SSB in this regard and in this perspective, the repeated supersessions of the petitioner to the post of Additional Secretary to the Government are not tenable in law.

11. Mr. Khair Ezaz Maswood next submits that a total of 21 officers, who were originally junior to the petitioner, were promoted to the post of Secretary from the post of Additional Secretary as evidenced by Annexure-‘E’ series to the Writ Petition and had the petitioner been promoted to the post of Additional Secretary in due course, he would have been promoted to the post of Secretary from the post of Additional Secretary in the normal course of things; but as ill luck would have it, he was subjected to discrimination in the matter of promotion to the posts of Additional Secretary and Secretary to the Government through no fault of his own.

12. Mr. Khair Ezaz Maswood also submits that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the then Ministry of Establishment for reconsideration of his case for promotion to the post of Additional Secretary; but ironically enough, that was answered by making him an OSD on 16.10.2009 and this posting of the petitioner as an OSD in the Ministry of Public Administration in the above background is a classic case of malice in law and given this scenario, the repeated supersessions of the petitioner to the next higher post of Additional Secretary are vitiated by bad faith, arbitrariness and unreasonableness.

13. Mr. Khair Ezaz Maswood further submits that the evaluation report of the petitioner’s Annual Confidential Reports (ACRs) from 1982 to 2013 (Annexure-‘2’ to the Supplementary Affidavit-in-Opposition) is a testament to the fact that his service career is spotless and

unblemished and from 2000 to 2009, on an average, he scored about 95% marks and subsequently being an OSD in the Ministry of Public Administration, his ACRs were not written by the concerned authority.

14. Mr. Khair Ezaz Maswood next submits that as the total service record of the petitioner is unblemished and untainted, it does not stand to reason and logic as to why he was superseded time and again in the matter of promotion to the post of Additional Secretary and resultantly to the post of Secretary to the Government and considering the entire scenario from this standpoint, a man of ordinary prudence will definitely come to the conclusion that the petitioner was victimized out of oblique motives.

15. Mr. Khair Ezaz Maswood also submits that it is clear from the minutes of the meeting of the SSB held on 27.01.2009 (Annexure-'3' to the Supplementary Affidavit-in-Opposition) that no objective assessment was made with regard to the efficiency, skill and suitability of the petitioner for promotion in view of the cryptic finding- "f-c¡æ¢a ¢h¢dj¡m¡l 4(2) ¢hd¡ej-a ¢h-hQe¡ L-l f-c¡æ¢al ®k¡NÉ fËa£uj¡e e¡ qJu¡u" and as no objective assessment was made thereabout, he did not have a fair deal before the SSB.

16. Mr. Khair Ezaz Maswood further submits that the evaluations of the efficiency, conduct, discipline, quickness of understanding, initiative, zeal to work, honesty, personality and various other requirements of service were recorded each year in the ACR of the petitioner and those evaluations ought to be the most dominant and persuasive factors for the purpose of determining his eligibility for the promotion post. In support of this submission, Mr. Khair Ezaz Maswood draws our attention to paragraph 66 of the decision in the case of Bangladesh represented by the Secretary, Ministry of Establishment…Vs…Shafiuddin Ahmed and 2 others, 50 DLR (AD) 27.

17. Mr. Khair Ezaz Maswood lastly submits that in the event of the petitioner's success in this Writ Petition, his financial benefits to the promoted posts of Additional Secretary and Secretary may not be given; but his pension may be fixed, as he is now retired, regard being had to the pay scale of a Secretary to the Government of Bangladesh under S¡a£u ®hae ®úm, 2009 (as was in force at the relevant time) treating the petitioner as deemed to have been promoted to the post of Secretary on 28.06.2011. In this respect, Mr. Khair Ezaz Maswood relies upon the decision in the case of Md. Nurul Hoque Miah…Vs…Government of Bangladesh represented by the Secretary, Ministry of Establishment and others, 17 BLT (AD) 211.

18. Per contra, Mr. Md. Ekramul Hoque, learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that as the petitioner is admittedly a public servant, his remedy lies not in the writ jurisdiction of the High Court Division under Article 102 of the Constitution; but in the concerned Administrative Tribunal as constituted under Article 117 of the Constitution. In this regard, he adverts to the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1.

19. Mr. Md. Ekramul Hoque also submits that it is manifestly clear from the minutes of the meeting of the SSB held on 27.01.2009 (Annexure-'3' to the Supplementary Affidavit-in-Opposition) that having not been found eligible for promotion under Rule 4(2) of the Promotion Rules of 2002, the petitioner was not promoted to the post of Additional Secretary

to the Government and on this count, the impugned supersessions of the petitioner can not be found fault with.

20. Mr. Md. Ekramul Hoque further submits that undoubtedly a reason was assigned for supersessions of the petitioner to the post of Additional Secretary as evidenced by Annexure-'3' to the Supplementary Affidavit-in-Opposition and as his juniors were found eligible for promotion in view of Rule 4(2) of the Promotion Rules of 2002, they were promoted to the post of Additional Secretary and subsequently some of them were promoted to the post of Secretary to the Government of Bangladesh and the impugned supersessions of the petitioner are quite valid and justified in the facts and circumstances of the case.

21. Mr. Md. Ekramul Hoque next submits that at the fag-end of his service career, the petitioner was made an OSD and as such his ACRs for the period from 2010 to 2013 as an OSD were not written by the concerned authority in view of the Memo No. pj(¢pBl/¢p¢f-3)-41/93-27(225) dated 01.04.1993 and the non-writing of the ACRs of the petitioner during that period (2010 to 2013) as evidenced by Annexure-'2' to the Supplementary Affidavit-in-Opposition is very much in accord with the Memo dated 01.04.1993 issued by the then Ministry of Establishment and as such no exception can be taken thereto.

22. Mr. Md. Ekramul Hoque also submits that both in law and equity, the petitioner can not get the reliefs sought for in the Writ Petition and that is why, the Rule should be discharged.

23. We have perused the Writ Petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto and heard the submissions of the learned Advocate for the petitioner Mr. Khair Ezaz Maswood and the counter-submissions of the learned Deputy Attorney-General for the respondent no. 1 Mr. Md. Ekramul Hoque.

24. To begin with, the issue of maintainability of the Writ Petition must be decided first. In Article 226 of the Indian Constitution, we do not come across the expression "if satisfied that no other equally efficacious remedy is provided by law"; but in our constitution, this expression is very much there in Article 102(2)(a). So there is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law.

25. In England, prerogative writs particularly writs of mandamus were not issued by the Court when alternative remedy under the statute was available. This was a self-imposed rule of the Court on the ground of public policy. Issuance of writs when alternative remedies were not availed of would undermine the Subordinate Courts and Tribunals. Under the Pakistan Constitution of 1956, the Supreme Court and the High Courts in issuing prerogative writs used to follow the rule of the English Court. It was, however, pointed out that this rule of exhaustion of alternative remedies was the rule of the Court and did not affect the jurisdiction of the Court to entertain writ petitions. But the Pakistan Constitution of 1962 provided that the High Courts would interfere only when there was no other adequate remedy available to the petitioner. The same position has been maintained in our Constitution which stipulates non-availability of efficacious remedy as a pre-condition for interference by the High Court Division.

26. In the case of Shafiqur Rahman…Vs…Certificate Officer, Dhaka and another reported in 29 DLR SC 232, the Supreme Court of Pakistan noted the change and observed in paragraph 28:

> "... if the alternative remedy is adequate and equally efficacious, in that case, such an alternative remedy is a positive bar to the exercise of the writ jurisdiction, even though the writ concerned is in the nature of certiorari."

27. Article 102(2)(a) having incorporated the rule of exhaustion of statutory remedies, the existence of efficacious remedy will preclude reliefs thereunder. The bar of efficacious remedy is not attracted when an infringement of any fundamental right is alleged.

28. In the case of Dhaka Warehouse Ltd. and another...Vs... Assistant Collector of Customs and others reported in 1991 BLD (AD) 327, it was held in paragraph 12:

> "12. In principle, where an alternative statutory remedy is available, an application under Article 102 may not be entertained to circumvent a statutory procedure. There are, however, exceptions to the rule. Without attempting an exhaustive enumeration of all possible extraordinary situations, we may note a few of them. In spite of an alternative statutory remedy, an aggrieved person may take recourse to Article 102 of the Constitution where the vires of a statute or a statutory provision is challenged; where the alternative remedy is not efficacious or adequate; and, where the wrong complained of is so inextricably mixed up that the High Court Division may, for the prevention of public injury and the vindication of public justice, examine that complaint. It is needless to add that the High Court Division is to see that the aggrieved person must have good reason for bypassing an alternative remedy."

29. If any impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Besides, on the ground of mala fides, the petitioner may come up with a Writ Petition bypassing the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of.

30. Another exception has been made in the case of M. A. Hai and others...Vs...Trading Corporation of Bangladesh, 40 DLR (AD) 206 where the Appellate Division has held in paragraph 10 that availability of alternative remedy by way of appeal or revision will not stand in the way of invoking the writ jurisdiction of the High Court Division raising purely a question of law or interpretation of any statute.

31. In Sontosh Kumar Shaha's Case (6 SCOB (2016) AD 1), it has been clearly, categorically and unambiguously held that any person in the service of Republic or any statutory authority can not seek judicial review in respect of terms and conditions of his service or actions taken relating to him as a person in such service including transfer, promotion, and pension rights, except in matters relating to challenging the vires of the law and infringement of fundamental rights as guaranteed Part III of the Constitution.

32. Reverting to the case in hand, we find that the petitioner has challenged the vires of Rule 4(2) of the Promotion Rules of 2002. Over and above, he has come up with the Writ Petition for enforcement of his fundamental rights as guaranteed by Articles 27 and 31 of the

Constitution. On top of that, it has been alleged by the petitioner that his repeated supersessions are mala fide.

33. Considered from the above angle, the decision in the case of the Government of Bangladesh and others…Vs…Sontosh Kumar Shaha and others, 6 SCOB (2016) AD 1, according to us, is not a bar to the maintainability of the Writ Petition before this Court under Article 102 of the Constitution. What we are driving at boils down to this: this Writ Petition is maintainable under Article 102 of the Constitution.

34. It is admitted that the petitioner is an officer of the Administration Cadre. He served in various capacities under the Government till he was promoted to the post of Joint Secretary on 05.03.2005. It is also admitted that he was made an OSD on 16.10.2009 and remained so till he went on post-retirement leave (PRL) on 28.02.2014. However, indisputably a total of 302 Joint Secretaries junior to the petitioner as per the gradation list were promoted to the post of Additional Secretary by various notifications as evidenced by Annexure-'D' series to the Writ Petition. As the petitioner was not promoted to the post of Additional Secretary, the question of his promotion to the post of Secretary being an Additional Secretary did not arise at all in view of Rule 6(5) of the Promotion Rules of 2002. Anyway, there is no gainsaying the fact that a total of 21 officers of the 1982 batches, who were junior to the petitioner in the gradation list, were promoted to the post of Secretary to the Government by various notifications as evidenced by Annexure-'E' series to the Writ Petition.

35. Now let us deal with the reason for supersession of the petitioner to the next higher post of Additional Secretary to the Government as provided by Annexure-'3' to the Supplementary Affidavit-in-Opposition. It is in Annexure-'3' that the petitioner did not seem to be eligible for promotion in the light of Rule 4(2) of the Promotion Rules of 2002. But stunningly enough, no specific reason was assigned for the supersession of the petitioner in Annexure-'3'. It is strikingly noticeable that the SSB did not objectively assess the worth, efficiency, drive, zeal to work and integrity of the petitioner as to suitability of his promotion particularly when the evaluation report of his ACRs from 1984 to 2013 speak volumes about his spotless, untainted and unblemished service record. What is signally important is that admittedly on an average, the petitioner scored about 95% marks from 2000 to 2009 as evidenced by Annexure- '2' to the Supplementary Affidavit-in-Opposition. Since he had been undeniably an OSD in the Ministry of Public Administration from 2010 to 2013, we can not impute any blame to him for non-writing of his ACRs for that period (2010 to 2013), regard being had to the Memo No. pj(¢pBl/¢p¢f-3)-41/93-27(225) dated 01.04.1993. As the ACRs of the petitioner during his entire service career are excellent and as no specific reason was assigned for his repeated supersessions, he can not be a victim of the whims and caprices of the respondents. Such being the state of affairs, we feel constrained to hold that the SSB did not act fairly in evaluating the suitability of the petitioner for promotion to the post of Additional Secretary to the Government.

36. In Re Infant H(K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. In this connection, we feel tempted to say that the duty to act fairly is required of a purely administrative act (Council of Civil Service Union…Vs…Minister for the Civil Service [1984] 3 All E.R. 935).

37. The Indian Supreme Court has adopted this principle holding:

> "…this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…Vs... India, AIR 1981 SC 818).

38. It is often said that mala fides or bad faith vitiates everything and a mala fide act is a nullity. Now a pertinent question arises: what is mala fides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held:

> "It is commonplace to state that mala fides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs…Secretary to the Government of W. B, AIR 1964 Cal 265).

39. To render an action mala fide, there must be existing definite evidence of bias and action which can not be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act (Punjab…Vs… Khanna, AIR 2001 SC 343).

40. The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs… Wednesbury Corporation [1948] 1 KB 223).

41. It goes without saying that bad faith is interchangeable with unreasonableness and extraneous consideration. The distinction between malice in law and malice in fact has been vividly and graphically made by Viscount Haldane, L.C:

> "Between malice in fact and malice in law, there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question whether a valid cause of action can be stated. (Shearer…Vs…Shield, [1914] AC 808).

42.Thus there is malice in law where it is an act done wrongfully and wilfully without reasonable or probable cause and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard of the rights of others. (State of A.P. and others…Vs…Goverdhanlal Pitti, (2003) 4 SCC 739).

43. f an authority acts on what are, justly and logically viewed, extraneous grounds or if an authority acts on a legally extraneous or obviously misconceived ground of action, it would be a case of malice in law. (Regional Manager…Vs…Pawan Kumar Dubey, AIR 1976 SC 1766).

44. Malice in law is a malice which is implied by law in certain circumstances, even in the absence of malicious intention or improper motive. (Shearer…Vs…Shield, [1914] AC 808).

45. Colourable exercise of power is equated with malice in law and in such a case, it is not necessary to establish that the respondent was actuated by a bad motive. (Venkataraman…Vs…India, AIR 1979 SC 49).

46. No employee has any right to claim promotion. Generally speaking, a person can not claim promotion on the basis of seniority alone; but a senior employee has a right to be considered for promotion. If the relevant law provides that promotion will be given only on the basis of seniority, promotion given to a junior bypassing the senior who has also the qualification required for the promotion post will be violative of Articles 27 and 29(1) of the Constitution. Where the promotion post is to be filled up on seniority-cum-suitability basis, the guarantee of Articles 27 and 29(1) requires that an employee fulfilling the qualification of the promotion post should be considered for promotion. Thus if the junior employee is promoted without considering the case of the senior employee who fulfills the qualification of the promotion post, the guarantee of equality of opportunity is violated. The appointing authority is the judge of the suitability of a candidate for the promotion post. Once the senior employee's case is considered and the junior is promoted, the promotion can not be challenged as unconstitutional unless it can be shown that the action of the authority is ex-facie arbitrary or mala fide or unreasonable in the Wednesbury sense.

47. Article 27 of our Constitution provides that all citizens are equal before law and are entitled to equal protection of law. Sir Ivor Jennings in his "The Law and the Constitution" stated:

> "Equality before the law means that among equals, the law should be equal and should be equally administered, that like should be treated alike".

48. A.V. Dicey in his "Law of the Constitution" mentioned:

> "Equality before the law does not mean absolute equality of men which is a physical impossibility, but the denial of any special privileges by reason of birth, creed or the like, in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law Courts."

49. In the "Limitations of Government Power" by Rotundy and others, the phrase "equal protection of the law" was described in the following manner:

> "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the Government. It does not reject the Government's ability to classify persons or draw lines in creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or be arbitrarily used to burden a group of individuals. Such a classification does not violate the guarantee when it distinguishes persons as 'dissimilar' upon some permissible basis in order to advance the legitimate interest of society."

50. In the case of Southern Rly Co. V. Greane, 216 U. S. 400, Day-J observed:

> "Equal protection of the law means subjection to equal laws, applying alike to all in the same situation."

51. Chandrachud-J, in the case of Smt. Indira Gandhi V. Raj Narayan, AIR 1975 SC 2279, described his idea of equality in the following words:

> "All who are equal are equal in the eye of law, meaning thereby that it will not accord favoured treatment to persons within the same class."

52. On consideration of the views expressed by these distinguished Judges and Authors as to the meaning of the phrase "equality before law and equal protection of law", we do not think that we will be able to define this term in a better way. "Equality before law" is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others. The term "equal protection of law" is used to mean that all persons or things are not equal in all cases and that persons similarly situated should be treated alike. Equal protection is the guarantee that similar people will be dealt with in a similar way and that people of different circumstances will not be treated as if they were the same.

53. The Indian Supreme Court gave a new dimension to the equality clause when it delivered the judgment in E.P. Royappa Vs. T. N. (AIR 1974 SC 555). In that judgment, Bhagwati J observed:

> "The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is the founding faith, to use the words of Bose J, 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We can not countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it can not be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to the political logic and constitutional law and is therefore violative of Article 14..."

54. The principle of equating discrimination with arbitrariness was affirmed by the Indian Supreme Court in a number of subsequent decisions such as Maneka Gandhi…Vs...India, AIR 1978 SC 597; Romana Shetly…Vs…International Airport Authority, AIR 1979 SC 1628, Ajay Hashia…Vs…Khalid Mujib, AIR 1981 SC 487; D.S. Nakara…Vs…India, AIR 1983 SC 130; A.L. Kalra…Vs…P and E Corporation of India, AIR 1984 SC 1361 et al.

55. The expression 'intelligible differentia' or 'permissible criteria' has been interpreted in the landmark decision in the case of Sheikh Abdus Sabur ….Vs… Returning Officer, District Education Officer-in-Charge, Gopalganj & others reported in 41 DLR (AD) 30.

56. Article 31 of the Constitution stands couched in the following language:

> "31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

57. Coming back to the present case before us, the petitioner and others who are in the combined gradation list of the officers of 1982 batches are a class by themselves. There is no 'intelligible differentia' or 'permissible criteria' between them as spelt out in 41 DLR (AD) 30 (supra). In the absence of any 'intelligible differentia' or 'permissible criteria' between the petitioner and others in the combined gradation list, the petitioner should not have been discriminated against as regards his promotion. More so, when admittedly the ACRs of the petitioner all through his service career are uniformly above board containing no adverse comments therein and there has been no departmental proceeding initiated against him for misconduct or any other like cause. So in all fairness, the petitioner should have been promoted to the post of Additional Secretary to the Government as was done in the case of his juniors as evidenced by Annexure-'D' series to the Writ Petition.

58. The reason for supersession of the petitioner as mentioned in Annexure-'3' to the Supplementary Affidavit-in-Opposition is "পদোন্নতি বিধিমালার ৪(২) বিধানমতে বিবেচনা করে পদোন্নতির যোগ্য প্রতীয়মান না হওয়ায়". This reason, on the face of it, is cryptic, vague, unspecific and nebulous. In this perspective, we are led to hold that the impugned supersessions of the petitioner as evidenced by Annexure- 'D' series are arbitrary and unreasonable in the Wednesbury sense.

59. As a sequel to our earlier discussion, we find that mala fides is enough if the aggrieved party establishes that the authority making the impugned supersessions did not apply its mind at all to the matters in question. It is simply incomprehensible and unfathomable as to why the SSB brushed aside the spotless, untainted and unblemished service record of the petitioner throughout his career without any plausible reason whatsoever. On this point, the learned Deputy Attorney-General Mr. Md. Ekramul Hoque has failed to furnish any acceptable explanation. It may be reiterated that on an average, the petitioner scored about 95% marks from 2000-2009 as per Annexure-'2' to the Supplementary Affidavit-in-Opposition. It is quite astounding that the SSB singularly failed to assess the performance of the petitioner as per his ACRs during his service career in an objective manner. It is a case of total non-application of mind. Some extraneous factors were definitely taken into account by the SSB out of ulterior motive while superseding him to the promotion post repeatedly. The bad motive or intent of the SSB is quite discernible in this regard. From the facts and circumstances of the case, it is crystal clear that the repeated supersessions of the petitioner are classic cases of bad faith or mala fides. The doctrine of acting fairly mandates that the SSB ought to have examined the matter of promotion of the petitioner with a fine tooth-comb and arrived at an appropriate and just decision. But unfortunately the SSB did not do so and consequentially he became a victim of its ex-facie arbitrariness, unreasonableness and bad faith. As such we are impelled to hold that the petitioner was superseded several times in colourable exercise of power and for collateral purpose.

60. It is on record that the petitioner submitted a representation dated 13.09.2009 to the Secretary of the Ministry of Public Administration for reconsideration of his case for promotion; but without responding thereto, he was made an OSD in the Ministry of Public Administration on 16.10.2009. This is, no doubt, malice in law, pure and simple.

61. We find substance in the submission of Mr. Khair Ezaz Maswood that the evaluations of the efficiency, conduct, discipline, quickness of understanding, initiative, zeal to work, honesty, personality and various other requirements of service were recorded each year in the

ACR of the petitioner and those evaluations ought to be the most dominant and persuasive factors for the purpose of determining his eligibility for the promotion post. But shockingly enough, those evaluations were completely disregarded by the SSB for reasons best known to itself.

62. In the case of the Director-General, NSI…Vs…Md. Sultan Ahmed reported in 1 BLC (AD) 71, the Appellate Division has deprecated double-standard on the part of the executive Government giving a benefit to a particular person and denying the same to another, although they are otherwise equal. As the petitioner and his junior colleagues in the combined gradation list stand on the same footing, they should have been treated alike. In the absence of any disqualification criteria vis-à-vis the promotion of the petitioner, the respondents should not have superseded him. Needless to say, the junior officers in the gradation list were promoted superseding him repeatedly without any legally justifiable reason. In this way, the SSB resorted to double-standard as held by the Appellate Division in 1 BLC (AD) 71. We deprecate this sort of double-standard in unequivocal terms.

63. Now let us address the vires of Rule 4(2) of the Promotion Rules of 2002. It is well-settled that there is a presumption of constitutionality in favour of the impugned provisions of Rule 4(2) of the Promotion Rules of 2002. Of course, that presumption is a rebuttable presumption.

64. Anyway, Rule 4(2) of the Promotion Rules of 2002 is quoted below verbatim:

"৪।(২) অতিরিক্ত সচিব কিংবা সচিব পদে পদোন্নতি প্রদানের ক্ষেত্রে সংশ্লিষ্ট কর্মকর্তার সমগ্র চাকুরীকালীন সময়ের মধ্যে পালনকৃত দায়িত্বের গুরুত্ব ও প্রকৃতি এবং তাহার ব্যক্তিগত সুনামসহ প্রাসঙ্গিক অন্যান্য বিষয় বিবেচনা করা হইবে।"

65. In the case of Bangladesh Agricultural Development Corporation represented by the Chairman, Krishi Bhaban, 49-50 Dilkusha Commercial Area, Dhaka and others…Vs…Md. Shamsul Haque Mazumder & others reported in 14 MLR (AD) 197, it was held in paragraph 33:

> "33. In the instant case, the vires of Regulation 55(2) though challenged, the High Court Division declined to declare the Regulation as ultra vires as the High Court Division thought it prudent to dispose of the case otherwise than by striking down the Regulation. The approach of the High Court Division is appreciated because when a case can be decided without striking down the law but giving the relief to the petitioners, that course is always better than striking down the law."

66. In the instant case, we find that the impugned supersessions of the petitioner are violative of Articles 27 and 31 of the Constitution. In the first place, the SSB failed to apply the equality clause to the petitioner in the matter of promotion to the next higher post. Secondly, he was not dealt with in accordance with law as per Article 31 of the Constitution. In this context, it is to be borne in mind that the due process of law is incorporated in Article 31 of the Constitution. As we have found that the respondents contravened Articles 27 and 31 of the Constitution with respect to the promotion of the petitioner, we opine that there is no need for striking down Rule 4(2) of the Promotion Rules of 2002. Precisely speaking, the relief sought for in the Writ Petition can well be given to the petitioner without knocking down Rule 4(2) of the Promotion Rules of 2002. Considered from this standpoint, Rule 4(2) of the Promotion Rules of 2002 is left as it is.

67. In the case of Md. Nurul Hoque Miah…Vs…Government of Bangladesh represented by the Secretary, Ministry of Establishment and others, 17 BLT (AD) 211 relied upon by Mr. Khair Ezaz Maswood, it was held in paragraph 19:

> "19. Since the appellant did not serve in the post of Commissioner of Taxes with effect from 07.09.1995 until he went on L.P.R on 30.12.1996 and considering the financial complication as has been submitted by the learned Additional Attorney-General, we direct to treat him promoted as the Commissioner of Taxes with effect from 07.09.1995 but will not be entitled to any financial benefit for the said period until going on L.P.R as a Commissioner of Taxes and consequential retirement with effect from 30.12.1997 but would get his pension calculated at the rate of basic pay for the scale at Tk.7800-200X6-9000/- as amended by the new scale at 11,700-300X6-13500/- w.e.f. 01.07.1997 per month treating the appellant as deemed to have been promoted to the said post of Commissioner of Taxes."

68. From the foregoing discussions and in the facts and circumstances of the present case, a direction may be given upon the respondents to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. Admittedly the petitioner went on PRL on 28.02.2014. Now he is a retired public servant. At the time of his going on PRL on 28.02.2014, the National Pay Scale of 2009 was in force. According to that National Pay Scale of 2009, a Secretary to the Government of Bangladesh got basic salary at the rate of Tk. 40,000/- (fixed) per mensem. In view of any possible complication that may arise out of the financial benefits for the entire period from 27.01.2009 to 28.02.2014 in the future, we refrain from awarding the financial benefits of that period to the petitioner; but he shall be deemed to have gone on PRL on 28.02.2014 as a Secretary to the Government of Bangladesh in the scale of Tk. 40,000/-(fixed) as per the National Pay Scale of 2009 and he will be entitled to all pensionary benefits of that scale of Tk. 40,000/-.

69. Having regard to the discussions made above and the facts and circumstances of the case, the Rule is made absolute in part. The respondents are directed to treat the petitioner as deemed to have been promoted to the post of Additional Secretary with effect from 27.01.2009 and to the post of Secretary to the Government with effect from 28.06.2011. He will be deemed to have gone on PRL as a Secretary to the Government of Bangladesh on 28.02.2014. Consequentially he will be entitled to all pensionary benefits of a Secretary to the Government of Bangladesh in view of the then prevalent National Pay Scale of 2009 as discussed in the body of this judgment.

70. The respondents are further directed to implement this judgment within 90(ninety) days from the date of receipt of its copy.

71. However, there will be no order as to costs.

72. Let a copy of this judgment be immediately transmitted to each of the respondents for information and necessary action.