

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

Writ Petition No. 14893 of 2019

In the matter of:

An application under article 102(1)(2)
read with article 44(1) of the Constitution
of the People's Republic of Bangladesh.

AND

In the matter of:

Dr. David Rintu Das and others

..... **Petitioners.**

-Versus-

Bangladesh, represented by the
Secretary, Ministry of Fisheries and
Livestock, Bangladesh Secretariat,
Dhaka and others,

... **Respondents.**

Present:

Mr. Justice Md. Khasruzzaman

&

Mr. Justice Md. Iqbal Kabir

Mr. Bakir Uddin Bhuiyan, Advocate,

...For the **petitioners.**

Mr. Sazzad Ul Islam, Advocate,

.....**For Respondent No.6.**

Judgment on: 29.03.2023

MD. KHASRUZZAMAN, J.:

On an application under article 102(1)(2) read with article
44(1) of the Constitution, *Rule Nisi* under adjudication was issued
on 18.12.2019 in the following terms:

*“Let a Rule Nisi be issued calling upon the respondents to
show cause as to why the Column Nos. 3-5 of Serial No.4 of
Schedule-Ka of the Fisheries Research Institute (Officers and
Employees) Service Regulations, 2013 as amended upto 2016
introduced vide S.R.O. No. 141-Ain/2016 published in the
Bangladesh Gazette on 26.06.2016 to the detriment of the
service rights of the petitioners(Annexure-E) should not be
declared to be ultra vires the Constitution and as to why the*

notice for appointment published in the Daily Samakal on 23.11.2019 by the respondent No.9 so far as it relates to appointment of Principal Scientific Officer(PSO) having Serial No.1 (Annexure-G) should not be declared to have been issued without any lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Facts necessary for disposal of the *Rule Nisi* in short are that the petitioner Nos.1 to 5 joined as Scientific Officer in the Bangladesh Fisheries Research Institute (hereinafter referred to as the BFRI) on different dates i.e. 06.07.1998, 21.01.2001, 21.01.2001, 23.07.2005 and 27.02.2000 respectively as per their respective appointment letters dated 30.06.1998, 06.01.2001, 06.01.2001, 19.07.2005 and 17.02.2000 issued by the authority after being qualified in the competitive examinations and accordingly, they have been serving in their respective post within the satisfaction of the authority; that the respondent No.6, Director General, Bangladesh Fisheries Research Institute(BFRI) by exercising the power under section 18 of the Bangladesh Fisheries Research Institute Ordinance, 1984 formulated Fisheries Research Institute(Officers and Employees) Service Regulations-2013 through publication of the same in the Bangladesh Gazette on 27.02.2013. Thereafter, on 24.05.2016 the petitioners were promoted to the post of Senior Scientific Officer (SSO) vide Memo No. 33.04.0000.130.014.09(Part-1)-173 dated 24.05.2016 and accordingly, they joined to their promoted post on the same day

and thereafter, the authority issued a letter on 16.06-2016 accepting their joining.

It is stated that again in 2016 the respondent No.6, Director General of Bangladesh Fisheries Research Institute brought some amendments in the said Service Regulations- 2013 by introducing new provision to the detriment of the petitioners. In Serial No. 04 of the amended Schedule-Ka, the age limit for the appointment in the post of Principal Scientific Officer by direct recruitment has been shown as up to 40 years changing the age limit of the service Regulations- 2013. In Column No.4 the method of appointment has been provided to the effect that 80% of the post of Principal Scientific Officer would be filled up by promotion and the remaining 20% would be filled up by direct recruitment by changing the earlier provision relating to method of appointment in the Service Regulations-2013 wherein it was provided that the vacant post of Principal Scientific Officer would be filled up by promotion and in case, the eligible candidate is not found for promotion, then the authority would resort to method of filling up by direct recruitment. In column No.5 of the amended Schedule-Ka the eligibility criteria which has been fixed therein is detriment to the right and interest of the petitioners.

However, after making such amendments in the Service Regulations-2013, respondent No. 9 vide Memo No. 33.04.0000.105.03.006.2019-483 dated 19.11.2019 published notice for appointment in the *Daily Samakal* on 23.11.2019

regarding some officers and employees in the BFRI including the post of Principal Scientific Officer(PSO) in Serial No.1 thereof along with some terms and conditions for appointment in the said post of Principal Scientific Officer to be followed to the detriment of the attached service rights and benefits of the petitioners (Annexure-G to the writ petition).

Under the circumstances, on 01.12.2019 the petitioners submitted an application to the respondent No.6 stating the above facts arising out of such amendments in the Service Regulations-2013 with a prayer to cancel the notice for appointment dated 23.11.2019 and thereby to appoint them in the post of Principal Scientific Officer by promotion which has been received on putting official seal and signature on the same day (Annexure-H to the writ petition) but till date they did not pay any heed to it.

Under such circumstances, the petitioners have challenged *Column Nos. 3-5 of Serial No.4 of Schedule-Ka of the Fisheries Research Institute (Officers and Employees) Service Regulations, 2013 as amended upto 2016 introduced vide S.R.O. No. 141-Ain/2016 published in the Bangladesh Gazette on 26.06.2016 (Annexure-E) and also challenged the notice for appointment published in the Daily Samakal on 23.11.2019 by the respondent No.9 so far as it relates to appointment of Principal Scientific Officer (PSO) having Serial No.1 (Annexure-G) and obtained Rule Nisi along with order of stay by order dated 18.12.2019.*

During the pendency of the Rule Nisi and order of stay, the respondent No.9 issued notice under Memo No. 33.04.0000.015.05.003.20-1667 dated 23.08.2021 asking the aspirants/candidates for submitting their scientist's profile to give promotion to the post of Principal Scientific Officer in the BFRI within 02.09.2021 under the amended Service Regulations which being the subject matter of the *Rule Nisi*, the petitioners through their learned Advocate sent representation dated 18.12.2019 requesting the authority to comply with the order of stay passed in the writ petition affirmed in C.M.P. No. 1059 of 2019 and thereafter, on 29.08.2021 the petitioners served notice for filing contempt petition but without paying any heed to the same, the respondent issued notice as contained in Memo No. 33.04.0000.015.05.003.20-1667 dated 23.08.2021 asking the aspirants for submitting their scientist's profile for giving promotion to the post of Principal Scientific Officer in the BFRI in violating of the order of stay dated 18.12.2019 passed in the instant writ petition and as such, the petitioners filed an application for issuance of the supplementary *Rule Nisi*.

On the contrary, the respondents have filed an affidavit-in-reply to the application for issuance of supplementary *Rule Nisi* stating *inter-alia* that since as per the said memo dated 23.08.2021 the petitioners have already submitted their scientist's profile for consideration of their promotion, they have no right to challenge the same in the present application and as such, they have prayed for rejecting the same.

However, upon hearing the parties and on perusal of the application as well as the affidavit-in reply, this Court by order dated 19.09.2021 allowed the application and thereby issued supplementary Rule in the following terms:

“Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why order as contained in Memo No. 33.04.0000.105.05.003.20-1667 dated 23.08.2021 (Annexure-O to the application) issued under the signature of the respondent No.9 giving instruction to the apt aspirants for submitting their scientist’s profile for giving promotion to the post of Principal Scientific Officer in Bangladesh Fisheries Research Institute(BFRI) in violating of the order dated 18.12.2019 (Annexure-J) passed by this Court in the instant Writ Petition No. 14893 of 2019 which has been upheld by the Appellate Division by order dated 05.01.2020(Annexure-M) passed in Civil Miscellaneous Petition No. 1095 of 2019 shall not be declared to have been issued without any lawful authority and is of no legal effect and as to why a declaration should not be made that the services of the petitioners and other similar post holders shall not be governed by the previous Fisheries Research Institute(Officers and Employees) Service Regulations-2013 published in the Bangladesh Gazette on 27.02.2013(Annexure-C) and /or pass such other or further order or orders as to this Court may seem fit and proper.”

On 25.08.2022 and on 09.11.2022 the learned Advocate for the petitioner Nos. 2, 5 and 1 filed two applications for discharging the *Rule Nisi* on the ground that they will not proceed with the same. Accordingly, the *Rule Nisi* was discharged so far it relates to the petitioner Nos. 2, 5 and 1. In such circumstances, the *Rule Nisi* remains pending so far it relates to the petitioner Nos. 3 and 4 only.

Respondent No.6 filed an *affidavit-in-opposition* denying all material allegations made in the writ petition stating *inter-alia* that except petitioner No.04, none of the petitioners joined in the direct service of the BFRI rather they joined in different projects of BFRI and lastly, the service of petitioner Nos. 1 to 3 was absorbed under the Revenue Set-up on 01.07.2002. It is stated that the original Law of BFRI namely “Fisheries Research Institute Ordinance, 1984 has been repealed by Bangladesh Fisheries Research Act, 2018. However, in pursuance to section 10 of the said Ordinance, 1984 the Board of Governors of BFRI formulated Fisheries Research Institute (Officer and Employees) Service Regulations-1989 which was in force till the Fisheries Research Institute (Officer and Employees) Service Regulations-2013 came into force on 27.02.2013 and lastly the said Service Regulations of 2013 was amended through publication in the Bangladesh Gazette on 26.06.2016 and as such, the amendments are not detriment to the petitioners rather, these are necessary to make the institute more resourceful. It is also stated that BFRI is a scheduled Institute of Bangladesh Agricultural Research Council,

(shortly, BARC) and as such, BARC is the mother council of BFRI and the said BARC is regulated by the Bangladesh Agricultural Research Council Act, 2012 and the terms and conditions of the service of BARC is governed by Bangladesh Agricultural Research Council Employees Service Regulations, 2019 (as amended in 2021) wherein 10% of the posts of Principal Scientific Officer is filled up by promotion and the remaining 90% by direct recruitment and the other terms and conditions are similar with the BFRI Service Regulations as amended upto 2016. However it is stated that there are vacancies in 31 out of 38 posts of the Principal Scientific Officer but due to pendency of the instant writ petition, the concerned authority is not able to fill up those vacancies in the said post; and as such the *Rule Nisi* is liable to be discharged.

By filing supplementary affidavit-in-opposition the respondent No.6 stated that there are 20 Senior Scientific Officers including the petitioners in the service who have fulfilled their preliminary requirement of serving 05(five) years in the feeder post to be promoted in the post of Principal Scientific Officer. But due to pendency of the writ petition the authority has kept the matter of promotion stopped and as such necessary order may be passed.

Mr. Mohammad Bakir Uddin Bhuiyan, the learned Advocate appearing on behalf of the petitioner Nos. 3 and 4 submits that there are long lines of the judicial decisions of the Apex Court that new Rules cannot be imposed upon the employees if it is

detriment and disadvantage to the employees who were appointed earlier under the previous Rules. He next submits that the impugned provision of the amended Regulations has been made with a view to give special benefits to a particular person or a group of persons who are the most juniors to the petitioners and as such, the same being detriment to the attached rights and benefits of the petitioners is liable to be declared *ultra vires* the Constitution. He also submits that the provision of the Fisheries Research Institute (Officers and Employees) Service Regulations-2013 is applicable to the petitioners and therefore, the impugned provision of the Service Regulation is against the fundamental rights of the petitioners as guaranteed under articles 26, 27 and 31 of the Constitution and hence he has prayed for making the Rule Nisi absolute.

In support of the submissions, the learned Advocate for the petitioners has relied on the decisions in the case of **Giasuddin Bhuiyan(Md) and others Vs. Secretary, Security Services Division, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others, 74 DLR(AD)231; Bakrabad Gas System Limited Vs. Al Masud-ar-Noor and others, 66 DLR(AD)187; Bangladesh Bank Vs. Sukamal Sinha, 21 BLC(AD)212; and Paschimanchol Gas Company Limited Vs. Md. Nuruzzaman and others, 24 BLT(AD)171.**

Mr. Sazzad-ul-Islam, the learned Advocate appearing on behalf of the respondent No.6 submits that there is no

inconsistency in between the earlier Service Regulations and the amended Service Regulations and rather in the impugned Service Regulations, the interests of the departmental candidates have been kept widely other than the direct candidates and as such, the same is not detriment to the rights and interest of the petitioners. He next submits that to fill up the vacancies in 31 posts of the Principal Scientific Officer, the concerned authority published advertisement asking suitable candidates to submit their scientific profile and in pursuance to which the petitioners along with other 15 candidates already submitted their respective scientist's profiles to the respondent no.6 seeking promotion as per the amended Service Regulations of 2016 and as such, the petitioners have no right to contest the instant *Rule Nisi* which is liable to be discharged.

We have heard the learned Advocates for both the parties, perused the writ petition, all other connected papers annexed thereto, the Service Regulations of 2013 and the amendments made in the Service Regulation in 2016 and the decisions cited above and relied upon by the petitioners.

It appears that by the Rule Nisi, the petitioners have asked for declaring the column Nos. 3 to 5 of Serial No.4 of Schedule-Ka of the Fisheries Research Institute (Officers & Employees) Service Regulations-2013 as amended up to 2016 to be *ultra vires* the Constitution and thereby also asked for declaring the notices for appointment dated 23.11.2019 and 23.08.2021 so far it relates to

the appointment of Principal Scientific Officer to have been issued without any lawful authority and is of no legal effect.

Having gone through the records, it appears that the petitioner Nos. 1, 2 and 5 got the Rule Nisi has been discharged for non prosecution and as such, we are concerned with the petitioner Nos. 3 and 4 only. From the writ petition it appears that petitioner Nos.3 and 4 joined as Scientific Officer in the Bangladesh Fisheries Research Institute (BFRI) on 21.01.2001 and 23.07.2005 under the Fisheries Research Institute (Employees) Service Regulations-1999. The said Service Regulations-1999 has been repealed by promulgating Bangladesh Fisheries Research Institute (Officers and Employees) Service Regulations-2013 and thereafter, the petitioner Nos. 3 and 4 were promoted to the post of Senior Scientific Officer on 24.05.2016 under the Service Regulations-2013. It appears that in getting promotion the petitioners had to serve in their initial post for more than 20 years and 16 years respectively. From the supplementary affidavit-in-opposition filed by respondent No. 6, it appears that the petitioners have fulfilled the preliminary requirement of serving 05 (five) years in the Senior Scientific Officer i.e. the feeder post for promotion in the next higher post i.e. Principal Scientific Officer.

The petitioners by filing affidavit-in reply has stated that the Board of Governors of Fisheries Research Institute in its 36th meeting held on 13.03.2016 took a decision to condone the

required length of service in the feeder post of Principal Officer and accordingly, promoted some officers considering their performance in the service. The Board of Governors also in its 40th meeting held on 18.01.2021 took a decision to condone the required length of service in the feeder post and promoted some Principal Scientific Officer to the post of Chief Scientific Officer. This statement has not been controverted or denied by respondent through filing affidavit in opposition and as such, the same appears to have been admitted by them.

So, this being the position of the case, we are of the view that the writ petitioner Nos. 3 and 4 have acquired vested right of getting promotion under the previous Service Regulations of 2013. Right created under the Regulations of 2013 cannot be curtailed or taken away by subsequent amendment of the Service Regulations 2016. It is well settled that any rule made under the proviso to article 133 of the Constitution can be both prospective and retrospective but it cannot be used to take away the vested rights of a person in the service of the Republic or it cannot violate fundamental rights of a person guaranteed in the Constitution. Moreover, as per provision of section 6(c) of the General Clauses Act, 1897 the vested right acquired by the writ petitioners under the previous Service Regulations of 1983 is not affected on the ground of repeal of the same by the subsequent promulgation of Service Regulations of 2008.

In this juncture reliance may be made in the case of **Government of Bangladesh and another Vs. Md. Ruhul Amin Munshi and another, 21 BLC (AD) 85** wherein it has been held in paragraph No.19 as under:

“..... there is no power to make a rule under the proviso to Article 133 of the Constitution which affects the vested rights of a person or contravenes independent constitutional provisions or violates fundamental rights as enshrined in Articles 26, 27 and 29 of the Constitution. Moreover, retrospectivity will be arbitrary and unconstitutional if the date from which retrospective effect is given has no reasonable nexus with the provisions contained in the amending rules. In other words, rights or benefits (e.g. as to pay, seniority or right to be considered for promotion) which have been already accrued or earned under the existing Rules cannot be taken away by changing the Rules with retrospective effect or by making new Rules with retrospective effect.”

In the case of **Giasuddin Bhuiyan(Md) and others Vs. Secretary, Security Services Division, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others, 74 DLR(AD)231**, it has been held as under:

“It is settled that though the appointing authority has right to amend/alter the Service Rules to suit the need of time but not to the detriment to the rights or privileges that existed at the

relevant time when an employee of such appointing authority entered into its service.”

In the case of **Bakrabad Gas System Limited Vs. Al Masud-Noor and others, 66 DLR(AD)187**, it has been held as under:

“The appointing authority enjoys the power and the authority to frame new rules to regulate the service of its employees, but in no way, can take away the accrued/vested rights of its employees.”

In the case of **Bangladesh Bank Vs. Sukamal Sinha, 21 BLC(AD)212** it has been held as under:

“The authority has every right to amend/alter the service Rules to suit the need of the time and, as such, there is no illegality in preparing the circular with new terms and conditions but such new terms and conditions prepared by the authority shall not be applicable to the detriment or disadvantage to the privilege that existed at the relevant time when an employee of such appointing authority entered into its service.”

In the case of **Paschimanchol Gas Company Limited Vs. Md. Nuruzzaman and others, 24 BLT(AD)171** it has been held as under:

“There is no dispute that the petitioner got appointment in 1997, that is, long before the promulgation of the Service Rules of 2005. So he is entitled to get benefit of the Service

Rules under which he got his appointment, that is, he is entitled to get the benefits as provided in Service Rules of 1988 and his service would be regulated under the said provision of law. The High Court Division rightly held that the provisions of Service Rules of 2005 are to be effective in respect of the appointment of the employees who have been appointed on 21.01.2005 or onward.”

In view of the aforesaid decisions, it is clear that the writ petitioner Nos. 3 and 4 are entitled to get benefits of the promotion to the next higher posts as claimed under the previous Service Regulations of 2013, even after the subsequent amendments in the Service Regulations.

Further there is long lines of the decision of our apex Court that without declaring the aforesaid provision of the law to be *ultra vires* the Constitution, this Court has power to give the substantive relief as prayed for, the Appellate Division in the case of **Dr. Nurul Islam Vs. Bangladesh, 33 DLR (AD) 201** has held that where the substantive relief claimed in the writ petition can be granted without striking down any legal provision, that course is to be followed. In the said case, the then Hon’ble Chief Justice Mr. Justice Kemaluddin Hossain observed as follows:

“I like to adhere to the well established self-set rule which says, the Court will not declare a law unconstitutional, if the case in which the question is raised can be properly disposed of in some other way.”

So, it is clear that the Court has ample power to give the substantive relief as claimed in the writ petition without striking down the legal provision challenged in the writ petition to be *ultra vires* the Constitution.

As we have already found that there are vacancies in as many as 31 posts of the Principal Scientific Officer and to fill up such vacancies, the authority published advertisement asking the suitable candidates to submit their scientists' profiles and since the petitioners have submitted their profiles, the authority is directed to consider the matter of promotion of the petitioners and all eligible candidates to the post of Principal Scientific Officer under the previous Service Regulations-2013 (amended 2016).

In view of the discussions made hereinabove and the decisions as referred to above, the Rule Nisi is liable to be disposed of.

With the aforesaid observations and directions, the *Rule Nisi* issued in the instant writ petition is disposed of. The ad-interim order of stay granted at the time of issuance of the Rule and subsequent order of status quo is hereby recalled and vacated.

Communicate the order

MD. Iqbal Kabir,J.

I agree.