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

Writ Petition No. 5029 of 2021

IN THE MATTER OF:

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

-AND-

IN THE MATTER OF:

Md. Belayet Hossain and others

......Petitioners

-Versus-

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Water Resources and others

..... Respondents

Present:
Mr. Justice Sashanka Shekhar Sarkar
And
Justice Urmee Rahman

Mr. Muhammad Ashraf Ali, Advocate

...For the Petitioners

Mr. Md. Mucktadir Rahman, Advocate with
Mr. Md. Mahmudul Hasan, Advocate

…For the Respondent No. 5

Heard on 06.07.2026, 14.07.2026, 21.07.2026 and 28.07.2026
Judgment on 09.08.2026

Urmee Rahman, J:

In the instant writ petition Rule Nisi was issued in the following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why Regulations 1(2)(ga) and 3(1)(ka) of বাংলাদেশ পানি উন্নয়ন বোর্ড কর্মচারী (অবসর ভাতা ও অবসরজনিত সুবিধাদি) প্রবিধানমালা, ২০০০ and office instruction vide memo No. 255(500)-WDB(Sectt.)/FA &A-II/Asu-85/85 dated 18.05.1986 issued by the respondent No. 3 inviting options from the employees of Bangladesh Water Development

> *Board for claiming benefits of pension scheme (Annexure-C to the writ petition) should not be declared to be without lawful authority and of no legal effect and as to why the respondents should not be directed to convert the petitioners from CPF (Contributory Provident Fund) to GPG (General Provident Fund) Pension Scheme in accordance with law after adjustment of amount withdrawn as CPF and/or such other or further order or orders as to this court may seem fit and proper."*

The relevant facts for disposal of this matter, in brief, are that, the Bangladesh Water Development Board (BWDB) was established under Bangladesh Water and Power Development Boards Order, 1972 (P.O No. 59 of 1972). Thereafter in order to develop and efficient management of water resources, the P.O. No. 59 of 1972 has been repealed and বাংলাদেশ পানি উন্নয়ন বোর্ড আইন, ২০০০ was promulgated. The petitioners, 122 (one hundred and twenty) in number, joined BWDB on different dates in different posts during the period of 1975-1984. At the time of their joining in the service, Bangladesh Water Development Board (Employees) Service Rules, 1982 was in operation. The Rules, 1982 provided for only Contributory Provident Fund (CPF) pension scheme for the employees of BWDB. All the petitioners being the employees of the BWDB were automatically enrolled under the CPF scheme as per the Service Rules, 1982. In the year 1985, the BWDB with a view to introduce a new pension scheme for its employees formulated a draft Rule namely BWDB's Employees' Pension and

General Provident Fund Rules of 1985. Before the said draft Rule could accord ascent of the government, on 18.05.1986 BWDB issued an instruction to all its Head Offices to obtain option from the employees regarding the pension scheme within 6(six) months starting from 1st May, 1986. Many employees of BWDB opted for pension scheme within the specified period. However, the petitioners did not take the option and remained in the earlier CPF pension scheme. BWDB issued a circular on 10.01.1999 to the effect that the employees who have joined the service in between 01.06.1985 to 29.10.1986 had no need to give option as because they would automatically be incorporated in the new pension scheme.

The Ministry of Finance by its memo dated 12.03.2000 gave approval to the GPF pension scheme of BWDB and accordingly a pension rule was promulgated in the year 2000 namely, বাংলাদেশ পানি উন্নয়ন বোর্ড কর্মচারী (অবসর ভাতা ও অবসরজনিত সুবিধাদি) প্রবিধানমালা, ২০০০. The Regulation 1(2)(ga) of Regulations, 2000 provides that the provisions of this Regulations would not be applicable to the employees who were in CPF scheme but did not opt for GPF scheme within 29.10.1986. This provision in fact debarred the petitioners from getting any benefits under the said Regulations of 2000. Regulation 3(1)(ka) also provides that the employees who did not express their option to get GPF facilities shall be excluded from getting such facilities. Under such circumstances, the petitioners filed Writ Petition No. 2292 of 2015, Writ Petition No. 1152 of

2016 and Writ Petition No. 11770 of 2017 before the High Court Division for a direction to allow the petitioners to convert from CPF to GPF pension scheme in order to bring uniformity in matters of all attendant benefits by treating them at par with the officers holding GPF pension scheme. In all the writ petitions Rules were made absolute on different dates by different judgments of the High Court Division.

Being aggrieved thereby the respondent No. 5 preferred Civil Petition for Leave to Appeal before the Appellate Division in which leave was granted and ultimately Civil Appeal No. 490 of 2017 was registered. Civil Petition for Leave to Appeal Nos. 1017 of 2016 and 3348 of 2018 were also filed against the judgments passed in Writ Petitions No. 11770 of 2017 and Writ Petition No. 1152 of 2016 respectively. The Civil Appeal No. 490 of 2017 was heard analogously with the other two Civil Petitions for Leave to Appeal and Hon’ble Appellate Division by its judgment dated 04.02.2020 was pleased to allow the appeal and set aside the impugned judgments and orders of the High Court Division. In the aforesaid judgment the Appellate Division found that the petitioners of earlier writ petition did not challenge the legality and propriety of Regulation 1(2)(ga) of Regulations of 2000, which specifically provided for an embargo in getting the GPF pension scheme.

Since Regulation 1(2)(ga) has been operating as a clog against the petitioners’ right to get pension benefits, the petitioners served a Notice Demanding Justice upon the respondents through their Lawyer on 14.03.2021 requesting them to cancel/withdraw the impugned provision but the respondents did not respond thereto. Being aggrieved thereby and there having no other equally efficacious remedy available, the petitioners filed by the instant writ petition and obtained the present Rule.

Mr. Muhammad Ashraf Ali, learned Advocate appearing for the petitioners submitted that, the Regulations of 2000 was enacted under the provision of Article 34 of P.O. No. 59 of 1972, which provides that all Regulations made under this Article shall be published in the official gazette and shall come into force on such publications. Thus article 34(2) of P.O. No. 59 of 1972 clearly provides for prospective operation of any Regulations made there under but Regulation 1(2)(ga) and 3(1)(ka) of the said Regulations of 2000 disentitled the petitioners from taking its benefit as they had failed to give option before 29.10.1986 while, at that time, Regulations, 2000 was not in existence. As such the said provisions are operating retrospectively affecting the rights of the petitioners which is not permissible under the parent Act. In such view of the matter, Regulation 1(2)(ga) and 3(1)(ka) are liable to be declared ultra vires to the parent law.

In support of this submission learned Advocate placed reliance on the case reported in ***7 BLC (AD) 73*** wherein it has been held that, subordinate legislation cannot give retrospective effect unless authorized by the parent legislation. Same view has been enunciated in the cases reported in ***40 DLR 273*** and ***AIR 1970 SC 385.***

His next submission is that, the BWDB took options from its employees in the year 1986 when the newly introduced pension rule was not in operation and in the absence of any such rule obtaining such options from the employees to opt for pension scheme was without any lawful basis and thus whole option process was illegal and unlawful. Regulation 1(2)(ga) and 3(1)(ka) of Regulations of 2000 have been enacted to validate a previous illegal act of taking option, which cannot sustain in law. In a case reported in ***52 DLR (AD) 140*** it was held that, the impugned order has been made unlawfully and the subsequent approval of the same cannot make it lawful.

He further submitted that, the petitioners in the earlier writ petitions did not challenge the propriety of the Regulations of 2000. Thus, the subject matter and the cause of action of the present writ petition is different from the previous ones. Furthermore, it is now well settled that there can be no waiver or estoppels against the statute. Since the petitioners are now challenging the propriety of law, the writ petition is maintainable. On this point he placed reliance on the decisions reported in ***76 DLR (AD) 85*** *and* ***63 DLR 260***. In the case of Bangladesh Vs. Mahabubul Karim report in ***76 DLR (AD) 85*** it has been held that,

"Doctrine of estoppels, waiver and acquiescence is not applicable against statutory provisions as this Division observed in

the case of Sadique Ahmed vs. Government of Bangladesh reported in 65 DLR (AD) 8 that, "the plea of waiver or acquiescence is not available in respect of violation of law. If it is violated, the Court is bound to say so, no matter when it is raised."

Referring to a decision reported in ***AIR 1971 SC 1409*** learned Advocate for the petitioners submitted that, in this case the Indian Supreme Court has held that pension is not a bounty payable on the sweet will and pleasure of the Government and that on the other hand the right to pension is a valuable right vesting in the Government servant. It has been held that the right to pension is a property. In the instant case, when the Regulations of 2000 was promulgated all the petitioners were in service and all of them should have been automatically benefited from it but by inserting Regulation 1(2)(ga) and 3(1)(ka) and by giving retrospective effect this valuable rights of the petitioners had been curtailed.

Therefore, he prayed that, the Rule is liable to be made absolute.

Conversely learned Advocate Mr. Md. Mucktadir Rahman with learned Advocate Mr. Md. Mahmudul Hasan, entered appearance on behalf of the respondent No. 5 i.e. the Director General of BWDB and strongly contested the Rule by filing an affidavit in opposition.

It is the contention of the learned Advocate for respondent no. 5 that, the petitioners filed the writ petition after about 35 years (now it is 40 years) from the date of offering such option and after 21 years (now it is 26 years) of the promulgation of the Regulations of 2000 praying for a direction to convert their CPF pension scheme to the GPF pension scheme although they consciously expressed their option to keep themselves with the former Contributory Provident Fund (CPF) and preclude from General Provident Fund (GPF) scheme when they were asked to give option. Hence, there is no scope to make such prayer at this stage. Furthermore, all the petitioners went on retirement long ago and had withdrawn their pension benefits calculated under the CPF pension scheme. Thus the Rule having no merit is liable to be discharged.

Learned Advocate next submitted that, it is an established provision that a successive writ petition on the same facts by the same person on the same grounds or on grounds which could have been taken in the earlier petition, will be barred by *res judicata.* He placed reliance on some reported decisions in order to substantiate this argument, which are ***42 DLR (AD) 126, AIR 1964 Patna 174 (FB), 50 DLR 249.*** In all these cases the principle of 'constructive *res judicata'* was considered. In the case reported in ***AIR 1964 Patna 174 (FB)*** it was held that:

> *"If a party has knowledge of a proceeding and having had an opportunity when it might and ought to have raised objection, it does not do so, it cannot be allowed to raise that objection subsequently. If the court passes an order which it could not have passed*

> *in case that objection had succeeded on the ground that it must be deemed to have been raised by the party and decided against it. In other words, when an order is passed by a competent court, which is inconsistent with the existence of fact or law on which the party could have based its objection, it must be deemed that the court has decided those facts or law against it."*

In this case it was further observed that:

> *"...where party has filed a writ application in the High Court, but has omitted to raise certain points, including the vires of certain Act, its subsequent suit for a declaration about the vires of that Act is barred by constructive res judicata."*

Learned advocate further submitted that, the writ petitioners, who admittedly are employees of BWDB, had been given ample opportunities to opt for the pension scheme within a period of six months. However, they intentionally opted out and decided to continue with earlier existing CPF Scheme. If the employees' belated exercise of option is accepted, the effect would be to permit them to secure the double benefit of Provident Fund Scheme as well as Pension Scheme, which is unjust and not permissible in law. The validity period of the option to switch over to newly introduced pension scheme had expired on 29.10.1986 and there was no recurring cause of action. Hence, this writ petition is not maintainable in the present form and the Rule is liable to be discharged.

Learned Advocate referred to the case of ***Union of India and others Vs. M.K. Sarkar*** reported in ***(2010) 2 Supreme Court Cases 59*** regarding similar facts and circumstances. In that case the respondent joined the railway service on 10.02.1947 and was a subscriber to the Contributory Provident Fund Scheme. The Railways introduced the pension scheme on 16.11.1957. Under the said scheme, those who entered railway service on or after 16.11.1957, were automatically governed by the pension scheme. Those employees who were in service as on 01.04.1957 and those who joined between 01.04.1957 and 16.11.1957 were given an option to switch over to pension scheme instead of continuing under the Contributory Provident Fund Scheme. The respondent though aware of the introduction of the pension scheme did not opt for such scheme and continued with CPF. More than 22 years after his retirement and after receiving his dues under the CPF scheme, requested to switch the pension scheme, which was rejected. Ultimately the Indian Supreme Court held that, *"Having enjoyed the benefits and income from the provident fund amount for more than 22 years, the respondent could not seek switch over to pension scheme which would result in the respondent getting in addition to the PF amount already received, a large amount as arrears of pension for 22 years (which will be much more than the provident fund amount that will have to be refunded in the event of switch over) and also monthly pension for the rest of his life. If his request for such belated exercise of option is accepted, the effect would be* *to permit the respondent to secure the double benefit of both provident fund scheme as also pension scheme, which is unjust and impermissible. The validity period of option to switch over to pension scheme expired on 31.12.1978 and there was no recurring or continuing cause of action. The respondent's representation dated 08.10.1998 seeking an option to shift to pension scheme with effect from 1976 ought to have been straightaway rejected as barred by limitation/delay and laches*."

Learned Advocate for the respondent No. 5 also submitted that, the impugned regulations of the Regulations of 2000 are neither arbitrary nor illegal. Those are not discriminatory in nature and the substantial issue of the present case is covered by the judgment of the Appellate Division in Civil Appeal No. 490 of 2017. To challenge the legality of the law under Article 102 one has to show that the law violates fundamental rights, that it exceeds legislative competence or is unconstitutional. The petitioners could not spell out how the Regulations particularly 1(2)(ga) and 3(1)(ka) and the office instruction dated 18.05.1986 violated fundamental rights of the petitioner or how those exceeded legislative competence and in what way is unconstitutional. Therefore, neither the Regulations nor the memo dated 18.05.1986 are without lawful authority and hence the Rule issued in the writ petition is liable to be discharged for ends of justice.

We have heard the learned advocates for both the parties and perused the writ petition, supplementary affidavit, the affidavit in opposition and all the documents annexed as annexures therewith.

It is admitted that all the petitioners are retired employees of Bangladesh Water Development Board (BWDB), who kept themselves out of the option which was given to them on 18.05.1986 in order to avail the newly introduced General Provident Fund (GPF) pension scheme. It is also admitted that, earlier they filed a number of writ petitions praying for a direction upon the respondents to allow the petitioners to convert from CPF to GPF pension scheme pursuant to the memo dated 19.11.1995 issued by the Finance Division and the Rules were made absolute by this Division with the following direction:

> *"the respondents are directed to allow the petitioners to convert from CPF to GPF Pension scheme and to bring uniformity in the matters of all attendant benefits by treating them at par with the officers holding GPF Pension scheme within a period of 60(sixty) days from the date of receipt of the judgment in accordance with law."*

Appellate Division was pleased to set aside the aforesaid judgment in Civil Appeal No. 490 of 2017 rejecting the prayer of the petitioners to convert their CPF pension scheme to GPF pension scheme. In that judgment dated 04.02.2020 the Appellate Division held that:

"In the instant writ petitions, the writ petitioners have prayed for getting GPF facilities though they failed to make such option before 28.09.1986. In view of the provision of প্রবিধান 1 (2)(Ga) of প্রবিধানমালা, the writ petitioners are not entitled to get the benefit of the প্রবিধানমালা since they did not take opportunity of the circular issued by the BWDB.

It further appears from the writ petitions that none of the writ petitioners challenged the legality and propriety of the aforesaid provision of law. Until that provision is declared void or amended the same is binding upon the writ petitioners. The Court of law is not authorized to give any relief bypassing the statute. The writ petitioners neither challenged the said statutory provision nor the circular by which option was given. Since the CPF holders have failed to exercise the option within time, they are not entitled to be included in the GPF scheme on the ground of parity.

From close reading of Regulation No. 3(1) (Ka) of প্রবিধানমালা, ২০০০ it appears to us that the employees, who did not express their option to get GPF facilities, has been excluded from getting such facilities. Consequently, no such fund has been created under প্রবিধানমালা, ২০০০ for them. Rather their Contributory Provident Funds have been created. Now after about 29 years from the date of offering such option and 15 years of the promulgation of প্রবিধানমালা, ২০০০ the writ petitioners have filed these writ petitions to include their names to get GPF facilities where provisions of regulation Nos. 1(2)(ga) read with 3(1)(ka) made specific embargo on the way to get such facilities. It appears that in each of the case of option the specified *date bore a definite nexus to the objects sought to be achieved by giving of the option. Option once exercised was told to have been final.*

In view of the aforesaid facts and circumstances, we find merit in the appeal. Accordingly, the Civil Appeal No. 490 of 2017 is allowed without any order as to cost. The impugned judgment and order of the High Court Division is set aside."

Admittedly the petitioners went on retirement and availed their pension benefits calculated under the previous CPF pension scheme. Now the instant writ petition has been filed challenging the Regulation No. 1(2)(ga) and 3(1)(ka) of the Regulations of 2000 as well as challenging the notice inviting options from the employees in 1986 and also for a direction to convert their pension scheme. In such backdrop of the matter the issues before us that fall for determination are:

(1) Whether the present writ petition is barred by doctrine of 'constructive *res judicata', and*

(2) Whether Regulation 1(2)(ga) and 3(1)(ka) of *বাংলাদেশ পানি উন্নয়ন বোর্ড কর্মচারী (অবসর ভাতা ও অবসরজনিত সুবিধাদি) প্রবিধানমালা, ২০০০* has been enacted lawfully; and

(3) Whether the petitioners are entitled to convert their earlier pension scheme CPF to the newly introduced GPF at this stage.

<u>Question of Maintainability on the ground of constructive res judicata:</u>

Regarding the principle of *res judicata* section 11 of the Code of Civil Procedure, 1908 provides that:

> "*11. Res Judicata- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*"

In Explanation IV to this Section it has been further provided that:

> *"Explanation IV-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."*

Regarding the concept of 'constructive *res judicata'* and the Explanation IV to Section 11 of the Code of Civil Procedure it has been stated by late Mr. Mahmudul Islam, Senior Advocate, Supreme Court of Bangladesh, in his book, namely, 'The Law Of Civil Procedure' that:

> *"As a general rule, every ground of attack or defence with reference to title sued*

must be pleaded, if necessary in the alternative, for the plaintiff will not be allowed to make out a fresh case afterwards. Explanation IV by a deeming provision lays down that such a matter which might and ought to have been made a ground of attack or defence in the former suit will be a matter directly and substantially in issue in such suit. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided."

The question whether this principle of constructive *res judicata* can be made applicable in writ jurisdiction has been answered in the case of **Dr. Syed Matiur Rob Vs Bangladesh** reported in **42 DLR (AD) 129**. It was held in that case that,

"The bar of res judicata is applicable in Writ proceedings on the general principle that the public interest requires that there should be an end to litigation and that a person should not be vexed twice in respect of the same subject matter. It will, however, depend on the facts of each case whether issues in the present proceeding were raised or could have been raised in the previous proceeding and whether the issued raised were earlier decided on merits."

The question of res judicata is thus not confined to ordinary civil suits only, it can apply to writ proceedings as well. The principle is based on finality of litigation.

The question that now arises for consideration is whether an issue which could and ought to have been raised in an earlier writ petition, but was not so raised, would operate as constructive res judicata in the subsequent writ petition.

In the case of ***Nur Hossain vs. Bangladesh*** reported in ***27 DLR 541*** this Division held that:

> *"Where in the previous writ petition legality of the requisition order was not challenged and it was contended that the requisition was bad as the land sought to be requisitioned was not specified, the illegality of the requisition order cannot be agitated in the subsequent writ petition."*

Similarly in the case of ***Bangladesh vs. Laxmi Jauadan Jew Bigraha*** reported in ***10 BLT (AD) 16*** it has further held that:

> *"Where in a previous writ petition, among other things, a sale deed was challenged, but no rule was issued as regards the sale deed, subsequent writ petition challenging the sale deed was held to be barred by constructive res judicata."*

Furthermore, in the case of ***Devilal vs. STO*** reported in ***AIR 1965 SC 1150*** it was held that:

> *"The public policy consideration requires that a suitor must take all the pleas available and known to him at the time of the formal litigation to sustain a claim or defence as otherwise the doctrine of finality of judgment pronounced by the courts would be materially affected."*

In the abovementioned case reported in ***27 DLR 541*** Justice D. C. Bhattacharya categorically decided that:

> *"The Judicial Committee of the Privy Council has laid down that the Rule of res judicata is applicable not merely on the basis of positive Law but also on the basis of public policy. The general principle is that there should be a finality in a litigation so that much of the uncertainty as to the rights and liabilities of this citizens are set at rest at the earliest point of time. …Therefore we do not think that any question of hardship or injustice is involved if finality is attributed to a decision in such a proceeding."*

On meticulous examination of all the above mentioned decisions and considering the facts and circumstances of the present case, we find that the petitioners have earlier approached this Court seeking a direction upon the respondents to permit them to switch over to the pension scheme in question. In that writ petition the petitioners had all the opportunity to challenge the vires of the law, which they did not challenge although it was essential for proper adjudication of the matter. Learned Advocate for the petitioners contended that there is no estoppel against law and it can well be challenged at a belated stage. This contention would have been appropriate if the instant writ petition was filed for the first time, which is not the case here. The earlier writ petitions were allowed by the High Court Division but the decision was subsequently reversed by the Appellate Division. The petitioners' claim for being permitted to switch over to the said pension scheme has already been considered in the earlier proceedings and has failed before the apex court. Appellate Division upon comparing the difference between the two pension schemes arrived at the finding that, there are some distinguishable features between two different schemes. Those two schemes are created by two different laws. The system and method for calculation of the gratuity and pension are also different. It was categorically observed by their Lordships that, the difference of amount between the two facilities indicates the reason behind non acceptance of GPF facilitates by the writ petitioners at the relevant time. Appellate Division also found that,

> *"It appears from the materials on record that Bangladesh Water Development Board issued a circular on 18.05.1986 providing option to its employees allowing 6(six) months time for offering option to switch over from CPF to GPF scheme which was remained valid for period of 6 months. In response to the said circular, 18004 officers and staffs expressed their offers of availing GPF facilities and on the other hand 3537 officers and staffs including the writ petitioners willfully did not take any opportunity to switch over from CPF to GPF facilities and remained under CPF scheme, perhaps, with an impression that*

they would get more facilities in CPF scheme. That is, ample opportunity was given to CPF holders to exercise the option for switch over to GPF scheme."

In the present writ petition, although the petitioners have sought to assail the vires of the impugned provision, the ultimate relief sought for by them remains substantially the same, namely to secure an opportunity to avail the GPF pension scheme which they had earlier declined to opt for at their sweet will and had been thoroughly discussed by the Appellate Division. The change in the form of the challenge in the present writ petition, therefore, cannot by itself alter the substance of the relief sought for.

Therefore, we are of the view that, substantial issue that has already been decided in the earlier writ petition by the Appellate Division is the same as that has been sought for in the present writ petition, hence, we find that the writ petition is barred by the doctrine of 'constructive *res judicata'*.

Since we have decided that the suit is not maintainable, we do not consider it necessary to examine the other issues raised by the parties.

Accordingly, the Rule is discharged.

However, there will be no order as to costs.

Communicate the judgment and order at once.

Justice Sashanka Shekhar Sarkar, J:

I agree.

Helal/ABO