IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,C.J.

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CIVIL PETITION FOR LEAVE TO APPEAL NO.333 OF 2020 WITH CIVIL PETITION FOR LEAVE TO APPEAL NOS.531 and 3451 OF 2019.

(From the judgment and order dated the 25th day of July, 2019 passed by the High Court Division in Writ Petition Nos.7755 of 2017 and 12035 of 2014)

Director General (DG), Directorate General of Health and Service, Mohakhali, Dhaka and another — **…….....Petitioner** (In C.P. No.333 of 2020)

Bangladesh, represented by the Secretary, Ministry of Health and Family Welfare, Dhaka and others — **…….....Petitioner** (In C.P. No.531 of 2019)

Dr. Abu Saeed and others — **…….....Petitioner** (In C.P. No.3451 of 2019)

-Versus-

Dr. Md. Tajul Islam and others — **.....Respondents** (In C.P. Nos.333 of 2020, and 3451 of 2019)

Dr. Abdul Karim and others — **.....Respondents** (In C.P. No.531 of 2019)

For the Petitioners (In C.P. No.333 of 2020) : Mr. Ruhul Quddus, Advocate instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record

For the Petitioners (In C.P. No.531 of 2019) : Mr. A.M. Aminuddin, Attorney General with Mr. Biswajit Debnath, Deputy Attorney General instructed by Mr. Md. Helal Amin, Advocate-on-Record

For the Petitioners (In C.P. No.3451 of 2019) : Mr. Mohammad Ali Azom, Advocate-on-Record

For the Respondent No.1 (In C.P. No.333 of 2020) : Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Ms. Shahanara Begum, Advocate-on-Record

For the Respondent Nos.2-42 (In C.P. No.333 of 2020) : Not represented

For the Respondent Nos.1-2 (In C.P. No.531 of 2019) : Mr. Md. Bodroddoza, Senior Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record

For the Respondent : Mr. Nozrul Islam Chowdhury, Senior Advocate

(In C.P. **No.3451 of 2019**) instructed by Ms. Shahanara Begum, Advocate-on-Record

Date of Judgment : The 03rd day of April, 2022.

Judgment

M. Enayetur Rahim, J: Common questions of law and facts are involved in these Civil Petition for Leave to Appeal and thus, those have been heard together and are being disposed of by this common judgment.

The facts, relevant for disposal of these leave petitions, in short, are that the writ petitioners-respondents are general practitioner for several years after obtaining degree either Bachelor of Unani Medical and Surgery (BUMS) or Bachelor of Ayurvedic Medicine and Surgery (BAMS) under the University of Dhaka. The writ petitioners-respondents according to the publication dated 03.07.2003 under memo No. স্বাস্থ্য অধিঃ/হোঃ দেঃ বিঃচিঃ/ এইচ পি এস পি/নিয়োগ/০২-০৩/১২৪৭১ dated 28.06.2003 and also according to the advertisement for appointment published in the Daily Ittefaq applied for being appointed for the posts of Unani Medical Officer, Ayurvedic Medical Officer and Homeopathic Medical Officers with some other candidates and sat for written and viva voce examinations on 18.07.2003. In total 137 candidates were qualified and succeeded in the written examination and accordingly they appeared in the viva voce examination on 20.07.2003.

But instead of publishing the final result another advertisement for appointment to the same post in the form of advertisement for re-appointment (পুনঃ নিয়োগ বিজ্ঞপ্তি) by memo No. স্বাস্থ্য অধিঃ/হোঃ দেঃ বিঃচিঃ/এইচ পি এস পি/ নি-য়াগ/০২-

০৩/১২৭৩/১ dated 15.10.2003 was published in the daily Ittefaq on 23.10.2003 and in that advertisement it was declared that the previous written and viva voice examination had been cancelled and the candidates who sat for the previous written examination on 18.07.2003 would only be eligible to sit for the upcoming examination; however said examination was also cancelled and vide another notification the advertisement for re-appointment was also suspended and their recruitment process was also suspended although they made several representations before the authority concerned for completing their appointment process but all their efforts went in vein.

Eventually, the Director Homeo and Deshoj Chikitsha, Alternative Medical Care, Directorate General of Health Services (DGHS) vide memo No.8278/1(1) dated 26.02.2012 forwarded a letter to the concerned Ministry for relaxing the age limit of the candidates up to 45 years and also to consider the applications of the candidates who sat for written and viva voce examination initiated in 2003 and the concerned Ministry in response to the above letter issued a letter under Memo No.761 dated 13.11.2012 to consider the age limit of the candidates who sat for written and viva-voce examination in 2003 and in the meantime on 12.11.2012 some qualified candidates also made representation to the Director General of Health & Family Welfare to consider the case of the candidates who sat in the written examination in 2003.

Thereafter, the Director, Homeo and Deshoj Chikitcha and the line Director (AMC) DGHS vide Memo No.91 dated 17.09.2012 sought for approval

for Draft recruitment Rules and Man Power enclosing the structure of operational Plan (OP) mentioning the available post of medical officer in Unani and Ayurvedic and in the said forwarding the authority concerned strongly recommended to consider the application/appointment process for the candidates whose written examination were held and thereafter suspended.

However, without considering the recommendation, the authority concerned made an advertisement for appointing some persons afresh to the aforesaid posts in the Daily Prothom Alo on 12.03.2013 in which the pending recruitment process was not at all considered.

Challenging the said advertisement, some of the candidates who passed in the written examination and participate in viva voce moved before the High Court Division preferring 02(two) separate writ petitions, writ petition No.3474 of 2013 and writ petition No.12035 of 2014 and the different Division Benches of the High Court Division after hearing the said writ petitions made the Rule absolute directing the authority concerned to fill up the posts advertised in the Operation Plan (OP) of Alternative Medical Care (AMC), January-2017 to June-2022 as per Rule, if the writ petitioners are selected in earlier appointment process and if they are not otherwise disqualified as per the present circular in any manner.

Being aggrieved by and dissatisfied with the impugned judgments the Respondents as petitioners have preferred C.P. No.333 of 2020 and C.P. No.531 of 2019. The leave petitioners in C.P. No.3451 of 2019 were not party in the

writ petitioners; however, being aggrieved by the impugned judgment passed in writ petition No.7755 of 2017 they have preferred the same.

Mr. A.M. Amin Uddin, learned Attorney General, appearing for the leave petitioners in C.P. No.531 of 2019 submits that the judgment and order passed by the High Court Division in making the Rule absolute clearly shows non-application of judicial mind having failed to appreciate that the writ petitioners-respondents have any locus-standi to file the writ petition as they were not finally selected in appointment process.

He further submits that the High Court Division while passing the judgment and order failed to appreciate that the writ petitioners-respondents were the candidates of appointment process for the year 2003 which appointment process was postponed by the authority concerned and eventually the tenure of the stipulated project was expired and subsequently while a new project is beginning then some post have been created for which an advertisement for fresh recruitment was published in the year 2013 and the writ petitioners-respondents did not challenge that advertisement feeling aggrieved the same. The advertisement dated 28.06.2003 was published for appointment in Alternative Medical Care (AMC) operational plan under 4th Health Population and Nutrition Sector Program (HPSP) and the written examination was held on 18.07.2003 but in the meantime duration of the said HPSP project has been expired and as a result there is no existence of the project at all and eventually a new project has been started for the year January 2017-June 2022 for which the

writ petitioners- respondents have sought for appointment without participating in the recruitment process and the High Court Division failed to consider this factual and legal aspects and as such committed serious error in making the Rules absolute.

Mr. Ruhul Quddus, learned Advocates, appearing for the petitioners in C.P No.333 of 2020 adopted the submissions made by the learned Attorney General.

However, Mr. Md. Nozrul Islam Chowdhury, learned Senior Advocate, appearing for the respondents in C.P. No.333 of 2020 and C.P. No.3451 of 2019 and Mr. Bodroddoza, learned Senior Advocate, appearing for the respondents in C.P. No.531 of 2019 have made identical submissions that the writ petitioners-respondents have got legitimate expectation to be appointed in the posts in question, and that some of candidates who appeared in the examination held in the year 2003 have already appointed by the concerned authority in the respective posts pursuant to the judgment of the High Court Division passed in writ petition No.3474 of 2013 and writ petition No.12035 of 2014,

Learned Advocates for the writ petitioners-respondents further submits that the writ petitioners-respondents were not parties in the writ petition Nos.3474 of 2013 and 12035 of 2014 but still they have their right to be appointed in vacant posts as their examination earlier held by the concerned authority for those posts and as in the judgment passed in the above two writ petitions there is a direction for appointing the writ petitioners in those posts if

they are not disqualified otherwise and also regarding the number of the vacant posts and as they have the qualification as required, and as they also appeared in the same written and viva voce examination like as the writ petitioners-respondents, regarding all aspects, they may be considered with the writ petitioners in appointing to those posts if any are not disqualified otherwise which has been affirmed by the Appellate Division and it would be more appropriate to uphold the order of the High Court Division.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgments and other materials as available on record.

In the instant case writ petitioners-respondents in response to the advertisement made on 28.06.2003 by the concerned authority for appointment of Unani Medical Officer, Ayurvedic Medical Officer and Homeopathic Medical Officers applied for the said posts and sat for written and viva voce examination on 18.07.2003 and 20.07.2003 respectively. However, the said appointment process was eventually stopped and postponed. Thereafter, the writ petitioners-respondents made several representations to various authorities to complete the appointment process and to give them appointment in their respective posts.

It appears that the advertisement dated 28.06.2003 was published for appointment in 4th Health, Population and Nutrition Sector Program (HPSP) project and at present there is no existence of said project and now the writ

petitioners-respondents have sought for appointment in Alternative Medical Care (AMC) Operational Plan (OP) for year January-2021-June 2022 under 4th Health, Population and Nutrition Sector Program (HPNSP) project which has been started after a long period of earlier HPSP project. The HPSP project has already been ended and closed.

The writ petitioners-respondents did not have acquired any legal right to be appointed in HPSP project and now they cannot claim to be appointed in new project i.e. Alternative Medical Care (AMC) Operational Plan (OP) as of right without participating in recruitment process. The writ petitioners-respondents participated in the examination for appointment under HPSP project in the year 2003 and having regard to the fact that the said appointment process was postponed and cancelled and on the plea of their participation in the earlier written and viva examination, no legal and vested right has been created in favour of the writ petitioners-respondents to be appointed to the posts as allegedly vacant in the new project. Mere participation in the written and viva voce examination, *ifso facto*, does not create any vested right in favour of the writ petitioners-respondents to be appointed automatically in the newly created posts in subsequent project.

Learned Advocates for the writ petitioners-respondents have tried to convince us that since the writ petitioners had participated in the written and viva voce examination earlier and in the new project there are vacant posts, the

writ petitioners have a legitimate expectation to be appointed directly in the said post.

With regard to the application of '**legitimate expectation principle**' this Division in the case of **Secretary, Ministry of Fisheries and Livestock and others Vs. Abdul Razzak and others** reported in 71 DLR (AD), Page-395 has observed as follows:

> "Before applying the principle, the Courts have to be cautious. It depends on the facts and recognized general principles of administrative law applicable to such facts. A person, who bases his claim, on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation, that is, he has *locus standi* to make such claim. Such claim has to be determined not according to the claimant's perception but in the public interest.
>
> The doctrine of legitimate expectation can neither preclude legislation nor invalidate a statute enacted by the competent legislature. The theory of legitimate expectation cannot defeat or invalidate a legislation which is otherwise valid and constitutional. Legitimate expectations must be consistent with statutory provisions. The doctrine can be invoked only if it is founded on the sanction of law. (Hear statutory words override any expectation, however well-founded.
>
> It is open to the Government to frame, reframe, change or re-change its policy. If the policy is changed by the Government and the Court do not find the action malafide or otherwise

> unreasonable, the doctrine of legitimate expectation does not make the decision vulnerable. The choice of policy is for the decision maker and not for the Court."
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> (underlines supplied to give emphasis)

The above view has also been reiterated in the case of **The Director General, represented by Bangladesh Rural Development Board (BRDB), Dhaka Vs. Asma Sharif , Shariatpur and others**, reported in 72 DLR (AD), Page-188.

In the above case this Division has held that any appointment by passing the relevant Rules of the concerned authority should be treated as back door appointment and such appointment should be stopped.

It further held that:

> "Opportunity shall be given to eligible persons by inviting applications through public notification and appointment should be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law."

In view of the above observations of this Division we have no hesitation to hold that the writ petitioners-respondents have no legal and vested right to be appointed as of right in the posts as has been sought by them on the plea that they had earlier participated in the written examination and viva voice for the similar posts. The claim of the writ petitioner-respondents appears to be very fanciful having no legal basis.

Learned Advocates for the respondents-writ petitioners having referred to the judgment passed in writ petition No.3475 of 2013 and writ petition

No.12035 of 2014 have tried to convince us that pursuant to judgment of the said cases by the concerned authority has filled up the post by appointing the said writ petitioners in the respective posts and thus, these the writ petitioners-respondents may be treated equally.

We have gone through the findings of the judgment of the said writ petitions as quoted in the impugned judgments.

Having perused the said judgments we have no hesitation to hold that the observations/directions made in the said writ petitions are not based on sound principle of law and the law settled by this Division. Since, the judgments passed by the High Court Division in the above two writ petitions are not in accordance with law, thus those have no binding effect and persuasive value on any authority; rather said judgments are void *ab initio*. May be, by virtue of the above two judgments some persons have got appointment by the concerned authority but it is our considered view that this act is to be treated as passed and closed transaction.

It is pertinent to mention here that in 2003 advertisement was made for appointment of 07(seven) Uninani Medical Officer, 06(six) Ayurvedic Medical Officer and 07(seven) Homeopathic Medial Officer i.e., in total for 20 posts. But now 35+06=41 persons by filing two separate writ petitions are seeking jobs in the newly created posts on the plea that they had participated in the selection process pursuant to the above advertisement though they were not finally

selected and the High Court Division allowed the prayer of them. This kind of relief is beyond the scope of law and also ridiculous.

It has to be borne in mind that the function or duty of a Court is not to do charity; rather it has to act in accordance with law to ensure justice. If an aspirant candidate or a participant of a particular selection process is provided job later on without participation in later selection process as decided by the concerned authority then this will create havoc in regular selection process and eligible and meritorious candidates will be deprived from getting job.

Having considered and discussed as above, we find merit in the leave petitions and thus, the impugned judgments and orders passed by the High Court Division are set aside.

Accordingly, all the leave petitions are disposed of.

Judgments and orders passed by the High Court Division are hereby set aside.

C.J.

J.

J.

B/O.Imam Sarwar/
Wards:2788.