

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaqul Islam

CIVIL APPEAL NO.14 OF 2014

(Arising out of C. P. No.1290 of 2009)

(From the judgment and order dated the 13th May, 2009 passed by a Division of the High Court Division in Writ Petition No.8228 of 2008)

The Government of the People's : . . . Appellants
Republic of Bangladesh,
represented by the Secretary,
Ministry of Labour and
Employment and others

-Versus-

Mohammad Amirul Islam and : . . . Respondents
others

For the Appellants : Mr. A.M. Aminuddin, Attorney General
instructed by Mrs. Sufia Khatun,
Advocate-on-Record

For Respondent No.1 : Mr. Shah Monjurul Hoque, Advocate
instructed by Mrs. Shahanara Begum,
Advocate-on-Record

For Respondent Nos.2-3 : Not represented

Date of Hearing and Judgment : **The 22nd day of August, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 13.05.2009 passed by a Division of the High Court Division in Writ Petition No.8228 of 2008 making the Rule absolute.

Respondent No.1, herein, as petitioner (hereinafter referred to as the writ-petitioner) filed the writ-petition No. 8228 of 2008 challenging the Memo No.শক/প্রশা-

১/৩০/২০০৮/১৬৫ dated 28.10.2008 (annexure 'D' to the writ petition) discharging him from his service.

In the writ petition, it was contended, *inter alia*, that the writ-petitioner was appointed as Principal of Sheikh Fazilatun Nessa Mujib Women Technical Training Center, Mirpur, Dhaka vide Memo No. শকম/প্রশা-১/২২/২০০৮/১২৮ dated 31.07.2006 and he joined the post on 02.08.2006. With a view to appoint Senior Instructors of other Technical Training Centers, a written examination was held on 12.07.2008 at the aforesaid Center and the petitioner as the Principal of the same was entrusted with the functions of a Supervising Officer. As per direction of respondent No.4, the Project Director, the writ-petitioner appeared at the office of the Chairman and the Joint Secretary (Admin and Development) of the Ministry of Labour and Employment on 13.08.2008 at 2:30 pm. The Project Director also directed two other persons, namely: Mrs. Mahmuda Akter and Salma Akter who performed the functions as the Investigators in the examination and they were also present. The Chairman asked the writ-petitioner as to whether any discrepant and untoward situation occurred in the examination and he thoroughly discussed with them regarding the examination held on 12.07.2008. Then, all on a sudden, the writ-petitioner received the impugned Memo dated 28.10.2008 by which his contractual appointment as the Principal of the Centre had been cancelled and he was discharged from the post. The writ petitioner did not allegedly receive any prior

show cause notice and the impugned letter did not also assign any reason for such discharge and cancellation of the contract. The impugned Memo was issued in clear breach of the principle of natural justice.

The Rule was contested by writ-respondent No.4, the Project Director, Bureau of Manpower, Employment and Training by filing affidavit-in-opposition and supplementary affidavit, contending, *inter alia*, that the written examination for the post of Chief Instructor (Garments) was held on 11.07.2008 and written examination for the post of Senior Instructor (Garments) was held on 12.07.2008 in Sheikh Fazilatunnesa Mujib Women Technical Training Centre. The writ-petitioner and two others were entrusted with the responsibility of holding the said examination on 12.07.2008. Members of the recruitment Committee received allegations to the effect that corruption was resorted to in the examination held on 12.07.2008 and upon such allegations, an enquiry was held by the Chairman and the Members of the recruitment Committee and after preliminary enquiry, they found that Most. Razia Khatun, sister of the writ-petitioner appeared at the examination for the post of Chief Instructor held on 11.07.2008 and she failed in that examination. She thereafter also appeared in the examination for the post of Senior Instructor on 12.08.2008 and it was found that during examination the writ-petitioner took out the question and answer scripts from the examination hall with the help of his

subordinate and submitted it by writing the answers to the questions by another Instructor and thereby managed to get his sister successful in the said examination. 7(seven) persons were asked to appear before the enquiry Committee and after enquiry into the same the persons involved with the aforesaid illegal act were punished taking lenient view, but the writ-petitioner being the main person responsible for committing the aforesaid offence was discharged from service. In the appointment letter of the writ respondent-petitioner, it was stated that the appointment could be terminated or cancelled by giving one month notice by either without mentioning any reasons or by giving one month pay. The writ-respondent-petitioner committed number of other illegalities for which his service contract was rightly cancelled and the same calls for no interference by the High Court Division.

A Division Bench of the High Court Division on hearing the writ petition by the impugned judgment and order made the Rule absolute.

Being aggrieved by the said judgment and order the Government has preferred Civil Petition for Leave to Appeal No. 1290 of 2009 before this Division and eventually, leave was granted. Hence the present appeal.

Mr. A.M. Aminuddin, learned Attorney General, appearing for the appellant submits that the High Court Division erred in law in failing to consider that the writ petition was not maintainable as the very

appointment of the writ petitioner is a pure and simple contract and, in this connection, he referred to the case of Superintendent Engineer, Road and Highways Department, Sylhet and others Vs. Md. Eunos and Brothers (PVT) Ltd. 31 BLD(AD) page-1, para-61.

He further submits that the High Court Division while making the Rule absolute having erred in not considering the facts that the writ petitioner had been found guilty of gross misconduct as he had taken out the examination script of another examinee who was his sister and after getting it completed submitted it to the authority and thereby illegally ensured her success in the examination.

Learned Attorney General further submits that the High Court Division having not appreciated that the writ petitioner is guilty of a number of illegalities and is holding of post of Principal of the Centre is unbecoming and according to Clause 5 of the writ petitioner's appointment letter, Annexure-A to the writ petition which says that the service of the writ petitioner's contractual appointment can be terminated at any time without any show cause notice by giving him one month salary or one month notice in lieu thereof.

Per contra, Mr. Shah Monjurul Hoque, learned Advocate appearing for the respondent No. 1 having supported the impugned judgment and order submits that the writ petitioner appointed as Principal of Sheikh Fozilatun Nessa Memorial Women Technical Training Centre,

Mirpur, Dhaka and joined there on 02.08.2006 and the said training centre is a government project, the writ petitioner at the time of his joining made a contract with the authority that his service will run till existence of project and to cancel the contract it will require minimum one month notice and all over laws and by laws are existing relating to service, are also applicable in case of the service of the writ petitioner but the authorities did not follow any of the provisions. The authority with an ulterior motive discharged the writ petitioner as such the judgment and order passed by the Hon'ble High Court Division dated 13.05.2009 may not be interfered

We have heard the learned Advocates for the respective parties, perused the impugned judgment as well as the other relevant documents as placed before us.

It transpires from the impugned judgment and order that the High Court Division had made the Rule absolute holding that before termination no show cause notice was issued to the writ-petitioner and thereby principal of natural justice has been violated seriously and that the impugned order was passed in violation of clause 5 the terms of appointment letter enabling the respondent to terminate the petitioner's service by giving 1(one) month notice or 1(one) month salary will be no existence to him.

It is undeniable fact that the writ-petitioner was appointed as the Principal of Karigori Prosikhon Kandro,

a Project under the Ministry of Labour and Manpower Affairs, Government of Bangladesh under a contract and admittedly there was no service Rule and thus terms and condition of service of the writ-petitioner will be governed as per the terms and condition stipulated in the letter of appointment.

In clause 5 of the letter of appointment it has been stipulated to the effect:

“কোন কারণ দর্শানো ব্যতিরেকে যে কোন পক্ষ এক মাসের নোটিশে অথবা এক মাসের বেতন প্রদান সাপেক্ষে এ চুক্তিপত্র বাতিল করতে পারবে। তবে চুক্তিপত্র বাতিলের পূর্বে সরকারী পাওনা পরিশোধ করতে হবে।”

In view of the above provision, stipulated in the letter of appointment it is not at all necessary to issue any show cause notice to the writ-petitioner and the writ-respondents have got every authority to terminate the service of the writ petitioner giving 1(one) month notice or to pay 1(one) month salary. In the instant case, it transpires from the impugned order of termination that without giving an opportunity to the writ-petitioner 1(one) month time or without paying 1(one) month salary the writ-petitioner was terminated from the service; but this irregularity in not paying 1(one) month salary or one month notice *if so facto* does not make the impugned order without lawful authority and is of no legal effect or illegal.

The inquiry committee found misconduct of the writ-petitioner and the authority had taken the impugned action on the basis of the inquiry report and thus, for

non-payment of 1(one) months' salary or notice cannot be a ground to maintain the writ-petition maintainable. As the impugned action had been taken on subjective satisfaction of the authority concerned, there is no room for importing fact of natural justice in such a case. In this particular case the authority before taking the impugned action made an inquiry by forming a committee wherein the writ-petitioner was given a chance to defend himself. Thus, it cannot be said that no opportunity was given to the writ-petitioner to defend himself and the principle of natural justice had been violated.

In the case of **Union of India V. J.N. Sinha;** MANU/SC/0500/1970: (1970)IILLJ284SC it has been observed that:

“It was also held that rules of natural justice are not attracted in such a case. If the appropriate authority forms the requisite opinion bonafide, it was held, its opinion cannot be challenged before the courts though it is open to an aggrieved party to contend that the requisite opinion has not been formed or that it is based on collateral grounds or that it is an arbitrary decision.”

The findings of the High Court Division that the termination of the writ-petitioner without observing the principal of natural justice is void and is not based on sound principle of law.

It is now well settled principles that *the principles of Natural Justice cannot be prettified or felted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. The Natural Justice has an expanding content and is not stagnant. In applying these principles, there is a need to*

balance the competing interests of Administrative justice and the exigencies of efficient administration.

In the instant case the contract between the parties is neither a constitutional contract nor a statutory or commercial contract and thus, there is no scope to enforce any terms of the contract invoking writ jurisdiction and as such the writ-petition was not maintainable.

In the case of **Kerala State Electricity Board and others Vs. Kurien E. Kalathil and others, MANU/SC/0435/2000** the Supreme Court of India has held that:

“A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a

matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.” (underlines supplied)

Our Appellate Division in the case of **Superintendent Engineer, RHD Sylhet & others Vs. Md. Eunos and Brothers (Pvt.) Ltd & others along with other cases reported in 31 BLD (AD) page-1** has elaborately discussed and settled in regard to the status of a contract.

In the said case it has been held that;

“Our Appellate Division of the Supreme Court in the case of Bangladesh Power Development Board and others Vs. Asaduzzaman Sikder reported in 9BLC(AD)(2000) I wherein it has been held that “A person can invoke writ jurisdiction in breach of contract when (a) the contract is entered into by the Government in the capacity as sovereign, (b) contractual obligation arises out of statutory duty or sovereign obligation or public function of a public authority, (c) a statutory contract, (d) the contract was entered into by the public authority. Invested with a statutory power, (e) the relief sought is against breach of statutory obligation.”

“In such circumstances the disputed question of fact cannot be decided in the writ jurisdiction. In the case of Shamsunnahar Salam and other Vs. Mahammad Wahidur Rahman and others reported in 51 DLR(AD) 232 wherein it has been held that “A writ Court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement.” Similar view has been taken in the case of Nuruddin (Md) Vs. Titas Gas Transmission and Distribution Company Ltd. and others reported in 3 BLD(AD)231.”

In this particular case the impugned action of termination does not involve '**public law element**' and no '**public law rights**' had accrued in favour of the writ-petitioner which has been infringed.

In view of the above, we are of the opinion that the writ petition was not maintainable. The High Court Division has committed serious error in entertaining the writ petition and making the Rule absolute declaring the impugned order without lawful authority and is of no legal effect.

Having discussed and considered as above, we find merit in the appeal.

Accordingly, the appeal is allowed.

The impugned judgment and order dated 13.05.2009 passed by the High Court Division is hereby set aside.

However, the appellant is directed to pay 1(one) month salary to the writ-petitioner.

C.J.

J.

J.