

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**Present:**

Mr. Justice Syed Mahmud Hossain, *Chief Justice*  
Mr. Justice Hasan Foez Siddique  
Mr. Justice Md. Nuruzzaman  
Mr. Justice Obaidul Hassan

**CIVIL APPEAL NO.195 OF 2011**

*(From the judgment and order dated 29.04.2001 passed by the High Court Division in Writ Petition No.338 of 1998)*

Government of Bangladesh, : .....Appellants  
represented by the Secretary,  
Ministry of Commerce,  
Bangladesh Secretariat, Dhaka  
and another.

**Versus**

Md. Nazrul Islam and another : .....Respondents

For the appellants : Mr. A.M. Amin Uddin, Attorney  
General with Mr. Biswajit  
Debnath, Deputy Attorney  
General, instructed by Mr.  
Haridas Paul, Advocate-on-  
Record.

For the respondent No.1 : Mr. M. Amir-ul-Islam, Senior  
advocate, instructed by Mr. Md.  
Zahirul Islam, Advocate-on-  
Record.

For the respondent No.2 : Not represented.

Date of hearing : 20.10.2020, 10.11.2020 & 25.11.2020.

Date of judgment : 08.12.2020.

**JUDGMENT**

**Obaidul Hassan, J.** This Civil Appeal is directed against the judgment and order dated 29.04.2001 passed by the High Court Division in Writ Petition No.338 of 1998 making the Rule absolute directing the writ-respondents to handover the physical possession of the premise at 25, Bangabandhu Avenue, on receipt of the sale price and complete the sale transaction in all respect within a

period of 2(two) months from the date of the receipt of the judgment.

Facts necessary for the disposal of the appeal is that the premises at 25, Bangabandhu Avenue, Dhaka is a property taken over by the writ-respondents, herein the appellants, in the exercise of power conferred by President's Order No.16 of 1972 and the writ-respondents took the decision to disinvest the disputed property and on 11.05.1982 published a public notice in the Bangladesh Times inviting tenders for the sale of a number of abandoned properties including the disputed property. Pursuant to the said public notice the writ-petitioners, herein the respondents, and their brother Md. Aminul Islam, jointly submitted a tender offering Taka 21 lacs and pound sterling 3000 for purchase of the said property and furnished with the offer the requisite earnest money of Tk.1,16,000.00 by pay order. The property has number of shops in different floors and the writ-petitioners and Mr. Aminul Islam have been in occupation of the ground floor and the third floor of the property as monthly tenants by virtue of purchase of the goodwill and possessory interest of the abandoned concern, Razzaks Department Store from the writ-respondents in 1980. The tenders submission were opened on 22.06.1982 and the tender of the writ-petitioners was found to be the highest, but the writ-respondents refrained from taking any

decisions as Title Suit No.188 of 1981 filed by M/S Brothers Limited in the 3<sup>rd</sup> Court of Joint District Judge at Dhaka claiming to be the owner of the property and praying for declaration that the disputed property is not an abandoned property was pending. The said suit was dismissed by a judgment and order dated 27.02.1984. Thereafter, the writ-respondents issued memo dated 09.04.1984 accepting the tender of the writ-petitioners. It was clearly stated in the memo that the writ-petitioners would have to pay pound sterling 3000 and 50% of the price after adjustment of the earnest money within 30(thirty) days from the date of receipt of the memo and to furnish bank guarantee for the balance. And on receipt of the part payment as aforesaid, bank guarantee for the balance and the arrear rent the possession of the disputed property would be handed over to the writ-petitioners. The writ-petitioners in reply to the said memo dated 09.04.1984 wrote a letter on 12.04.1984 stating that the writ-petitioners would pay 50% of Tk.21,61,111.00 as well as 50% of 3000 pound sterling cash as a down payment after adjustment of earnest money and to allow them to pay the balance by 4 half yearly installments against bank guarantee and also requested to allow the writ-petitioners to pay the arrear rent of Tk.20,1070.00 with the second installment. The writ-respondents on receipt of the letter informed the writ-petitioners by memo dated 22.04.1984 to pay 1500 pounds in cash

as down payment and to pay the arrear rent of Tk.20,1070.00 within 30(thirty) days along with the 50% cash down payment of the bid money and further informed that all other terms and conditions as communicated by the letter dated 09.04.1984 will remain unchanged. The writ-petitioners having regard to the aforesaid memo dated 22.04.1984 were willing to make payment, but due to filing of First Appeal No.6 of 1984 by M/S Yacoob Brother Limited before the High Court Division against the judgment and decree passed in Title Suit No.188 of 1981 the High Court Division passed an order on 05.04.1984 for maintaining status quo in respect of the property in Civil Rule No.178(f) of 1984. In such situation, the writ-petitioners then wrote a letter on 05.05.1984 to the writ-respondents to inform the writ-petitioners as to whether the writ-petitioners would be required to deposit the amount under the aforesaid circumstances and as to whether the writ-respondents would be able to handover possession pursuant to the tender notification. The writ-respondents replied on 06.06.1984 stating that it would be the discretion of the writ-petitioners as to whether they would make payment or not. The aforesaid First Appeal was heard and dismissed by the High Court Division on 04.03.1991 and coming to know about such dismissal, the writ-petitioners sent letter to the writ-respondents on 10.06.1991 for completion of the sale transaction, but the writ-

respondents did not respond to the said letter. The writ-petitioners again by letter dated 04.07.1991 requested the writ-respondents to arrange transfer of the ownership and the possession on realization of agreed money and this time also the writ-respondents did not give any reply. However, the writ-respondents by memo dated 02.07.1991 requested the writ-petitioners to pay the arrear rents in respect of the portion of the property, which is in their possession as monthly tenants and the writ-petitioners thereafter by letter dated 16.07.1991 requested the writ-respondents to reconsider as to whether in view of agreement of sale, the writ-petitioners would have to pay the monthly rent of the portion of the property. Thereafter, the writ-respondents by memo dated 05.08.1991 intimated the writ petitioners that since the sale price having not been paid the question of waving the rent does not arise. The writ-petitioners paid the arrear rents of the premises in the possession which would be evident from a memo dated 27.05.1992. The writ-petitioners wrote series of letters till 20.12.1996 and requested the writ-respondents to complete the sale transaction in respect of the property, but the writ-respondents issued a memo dated 15.03.1997 asking the writ-petitioners to furnish certain specific papers and the writ-petitioners sent those papers with the forwarding letter dated 24.03.1997. Thereafter, the writ-respondents in spite of repeated personal approach and

phone calls did not give any reply. However, at last the writ-respondents by memo dated 23.12.1997 informed the writ-petitioners that the tender of the writ-petitioners has been cancelled automatically as the writ-petitioners failed to pay the sale price within the time specified in the tender documents. Thereafter, the writ-petitioners sent a notice demanding justice on 18.01.1998 to the writ-respondent No.2, but without any response. In this situation, it cannot be said that the writ-petitioners committed breach of the contract in not making payment within the time stipulated. Particularly, when the writ-petitioners specifically said while seeking advice that they were ready and willing to pay the requisite portion of the bid money. The writ petitioners having not committed any breach of the contract, the agreement is still alive and the writ-respondents are legally bound to complete the sale transaction on receipt of the bid money and the impugned memo has been issued without lawful authority.

Being aggrieved by the impugned memo dated 23.12.1997 issued by the writ respondent No.2, the writ-petitioners preferred Writ Petition No.338 of 1998 before the High Court Division and obtained Rule.

The writ-respondents government contested the Rule by filing affidavit-in-opposition and stated that the commercial premises at 25 Bangabandhu Avenue, Dhaka is an abandoned

property taken over by the Ministry of Commerce in the exercise of the power conferred by President's Order No.16 of 1972. On 11.05.1982 the Ministry of Commerce called and opened tender for the sale of the said property. The bid of the office of the writ-petitioners being the highest bidder was accepted by the tender committee on 20.04.1984, the price was at Tk.21,61,111.00 and 3000 pound sterling. The petitioners were directed to deposit 50% of the money within the 30(thirty) days from the date of receipt of the letter with some conditions and to submit a bank guarantee for the payment of rest 50% by four installments within two years by memo dated 09.04.1984. The bidders did not deposit the money within the stipulated time and hence, the Ministry of Commerce vide memo No.M.C.(AP)-7(17)-Fin/82/134 dated 23.12.1997 informed the writ-petitioners that their accepted offer stood cancelled automatically as they failed to deposit the bid money within the stipulated time as mentioned in the contract made between them and the Ministry of Commerce. The respondents further case was that the writ-petitioners committed breach of contract for which the agreement was not in force and, as such, the order issued vide memo No.M.C.(AP)-7(17)-Fin/82/134 dated 23.12.1997 signed by the Senior Assistant Secretary, Ministry of Commerce was legal and lawful and, therefore, the Rule is liable to be discharged.

The High Court Division by its judgment and order dated 29.04.2001 made the Rule absolute and directed the writ-respondents to hand over the physical possession of the premise at 25, Bangabandhu Avenue, Dhaka on receipt of the sale price and complete the sale transaction in all respect within a period of 2(two) months from the date of the receipt of the judgment.

Being aggrieved by and dissatisfied with the judgment and order of the High Court Division dated 29.04.2001, the writ-respondents-appellants have preferred a Civil Petition for Leave to Appeal No.1648 of 2001, which was allowed and leave was granted.

Mr. A.M. Amin Uddin, the learned Attorney General for Bangladesh, appearing for the appellants, has taken us through the judgment and order of the High Court Division, the relevant provisions of law and the connected materials on record and submits that the dispute involves the determination of contractual rights and obligation of the parties, but the High Court Division without considering the vital aspect of the case committed error of law in not holding that the writ petition was not maintainable under Article 102 of the Constitution of the People's Republic of Bangladesh. He also submits that the writ-petitioners-respondents completely failed to perform their part in the contractual obligations in making the payments in accordance with the terms

and conditions as specifically spelt out in the memo dated 09.04.1984 and, as such, the contract came to an end by efflux of time, hence, the High Court Division erred in law in making the Rule absolute. He further submits that the government communicated to the writ-petitioners the decision that the contract in question has come to an end by memo dated 21.12.1997 the High Court Division committed error of law in making the Rule absolute. He next submits that a serious question of disputed facts having been involved in the writ petition, the same being not maintainable and justifiable under the writ jurisdiction, the High Court Division committed error of law in entertaining the writ petition and making the Rule absolute and giving directions to the respondents to handover the possession of the plot in question sitting in special original statutory jurisdiction under Article 102 of the Constitution of the People's Republic of Bangladesh.

In reply, Mr. M. Amir-ul-Islam, learned senior advocate, appearing for the respondent No.1, submits that the grounds for appeal as taken by the appellants are nothing, but full of contradiction and misinterpretation of law, purporting thus ignore the state practices while dealing with a citizen must act fairly and in a just manner. He further submits that the judgment of the High Court Division was passed correctly based on the principle of legitimate expectation as already laid down by this Honourable

Appellate Division in a similar appeal preferred by the *Managing Director of Dhaka WASA Vs. Superior Builders and Engineers Ltd.* 51 DLR (AD) (1999) 56. He also submits that the High Court Division considered the appellants' each and every contention as well as the ground thereof in their true perspective from the view point of law and thereby arrived at a rational, well conceived and legal judgment unanimously. He again submits that the writ petitioners-respondents were ready and willing to pay the contract price, but it is the appellants-writ-respondents, who expressed their inability to complete the transaction of sale even after the disposal of the litigation. He again submits that no show cause notice was given or any reason provided before the contract was cancelled. He finally submits that the findings and observations of the High Court Division are coherent and consistent with the relevant rules and principles and thus the High Court Division has rightly made the Rule absolute and has done justice to all the parties concerned for upholding the rule of law and administration of justice.

We have examined the judgment and order of the High Court Division, the relevant provisions of law and the connected materials on record.

From the evidence on record, it appears that the Civil Petition for Leave to Appeal No. 1648 of 2001 was allowed and leave was granted on the grounds:

- I. That the dispute involves determination of the contractual rights and obligations of the parties the High Court Division erred in law as well as in facts in not holding that the instant writ petition is not maintainable under Article 102 of the Constitution of the People's Republic of Bangladesh.
- II. That the petitioners completely failed to perform their part in the contractual obligations in making the payments in accordance with the terms and conditions as specifically spelt out in the memo dated 09.04.1984, the contract came to an end by efflux of time, which was only communicated to the petitioners by memo dated 21.12.1997, the High Court Division erred in law as well as in facts in not discharging the Rule.

Now, the first question before us is to consider whether the writ petition is maintainable under Article 102 of the Constitution.

Article 102 of the Constitution provides that,.....**(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-**

**(a) on the application of any person aggrieved, make an order.....** The essence of Article 102 of the Constitution is that an aggrieved person can invoke writ jurisdiction if no **efficacious remedy** is available. The High Court Division cannot exercise its power conferred under Article 102 of the Constitution where the contract between the appellants and respondents is a commercial contract in nature. The present contract between the writ-petitioners and the government was a contract of commercial in

nature. Because, the appellants (Government) did not enter into the contract with the respondents in the exercise of sovereign authority which would turn the contract into statutory contract. In case of breach of a contract that is commercial or ordinary in nature, the remedy available for the parties to go to civil court. It is the jurisdiction of the civil court to decide the dispute between the parties in case of breach of commercial or ordinary contract. Without taking evidence this type of dispute cannot be decided by the High Court Division under writ jurisdiction.

Since the breach of commercial contract is civil in nature, it is the exclusive jurisdiction of the civil court to decide the dispute. It was held in the case of *Shamsunnahar Salam and others vs. Mahammad Wahidur Rahman and others* [51 DLR(AD) 232] that, "A writ court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement." The similar observation was given by this Division in the case of *Md. Nuruddin vs. Manager, Sales (C&B), Zone-4 of Titas Gas transmission and Distribution Company Ltd and ors* reported in 18 BLD(AD) 273 that, "For any alleged breach of contract the remedy lies in the Civil Court because it involves determination of questions of fact and as such the view taken by the High Court Division is perfectly in accordance with the principles governing the writ jurisdiction."

If any contract is statutory in nature or if it is entered into by the government in exercise of sovereign authority, then in case of

breach of that contract, the person aggrieved can invoke the writ jurisdiction before the High Court Division to enforce the contract. It was decided in the case of *Bangladesh Power Development Board and others vs. Md. Asaduzzaman Sikder* [9 BLC(AD) 1] that, “A person can invoke the writ jurisdiction in case of breach of contract when: (a) the contract is entered into by the government in 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 the instant case, the contract does not fulfill the requirements as decided by us. It is neither a statutory contract nor entered into by the government in the capacity of sovereign power and the relief sought is not against breach of statutory obligation rather the relief is sought by the respondents allegedly for the breach of commercial obligation between appellants and respondents. In view of discussions made above, we hold that the writ petition is not maintainable.

A similar view was taken by this Division in *Managing Director, WASA vs. Md. Ali and others* [27 BLD(AD) 298] that, “The contract being not entered into by the appellant with the respondent in terms of any statutory provision or in exercise of statutory power of the appellant but the contract being an ordinary commercial contract or contract of general nature or a pure and simple contract, the relief sought

*for and granted by the High Court Division in the writ petition is not legally available.” In the case of **Superintendent Engineer, RHD Sylhet & others vs. Md. Eunos and Brothers (Pvt.) Ltd. and Md. Eunos and Brothers (Pvt.) Ltd. Vs. Md. Asmat Uddowla Sobhan and others [31 BLD (AD) 1]** it was also held that, “In the instant case, the contract does not fulfill any of the requirements to make the same a statutory contract or contract entered into by the Government in the capacity as sovereign. The contract was an ordinary commercial contract or contract of a general nature or a pure and simple contract. As the alleged contract does not fulfill any of the requirements to make the same a statutory contract or contract entered into by the Government in the capacity as a sovereign, the relief claimed by way of writ jurisdiction is not entertainable.”*

In consideration of the matters discussed above, it is crystal clear that the contract entered into by the writ-petitioners and writ-respondents is an ordinary commercial contract and the remedy in case of breach of this contract, if any, is available before the civil court and the High Court Division had no jurisdiction to entertain the writ petition. In the instant case, the requirements required to get the remedy in the form of writ petition under Article 102 of the Constitution before the High Court Division are not available. So we are of the view the writ petition is not maintainable under Article 102 of the Constitution.

Mr. M. Amir-ul-Islam, learned senior advocate, appearing for the respondent No.1, has referred the decision held in the case of *Managing Director, Dhaka, WASA vs. Superior Builders and Engineers Ltd.* [51 DLR(AD) 56], which is as under:

*“A writ petition cannot be founded merely on contract, but when a contract is concluded the contractor has a legitimate expectation that he will be dealt with fairly.”*

It is true that when a contract is concluded both the parties of the contract have legitimate expectation that they would be treated fairly. But the facts and circumstances of each case is different. The facts and circumstances of the case referred on behalf of the respondent No.1 does not attract the facts and circumstances of the case at hand. So, in the instant case, the question of legitimate expectation does not arise at all.

The question whether the writ-petitioners completely failed to perform their part in the contractual obligations in making the payments in accordance with the terms and conditions as specifically spelt out in the memo dated 09.04.1984 can be decided by a civil court after taking evidence. As the instant case is not maintainable under Article 102 of the Constitution, so the question of the obligations, duties of the parties are not to be dealt with in this forum. We have already discussed in the preceding paragraphs that the issue involves the question of the

determination of facts which cannot be decided without taking evidence or examining the parties.

On consideration of the matters discussed above, we are of the view that the High Court Division made a serious error of law making the Rule absolute. The writ petition was not at all maintainable under Article 102 of the Constitution. So, we are constraint to interfere.

Thus, the appeal is **allowed** without any order as to costs. In the result, the judgment and order of the High Court Division is set aside.

C. J.

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