

In the Supreme Court of Bangladesh  
High Court Division  
(Special Original Jurisdiction)

Present:

Mr. Justice A.H.M.Shamsuddin Choudhury  
and  
Mr. Justice Gobinda Chandra Tagore

Writ Petition No.2709 of 2008.

In the matter of:

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

A n d

In the matter of:

Alhaj Advocate Ahmed Ullah Foundation.

----- Petitioner.

- V E R S U S -

Dhaka City Corporation, Represented by the Mayor,  
Nagor Bhaban, Dhaka and others.

----- Respondents.

Mr. Bashir Ahmed, Advocate

..... For the Petitioner.

Mr. A.B.M. Altaf Hossain, D.A.G.

.....For the respondents.

**Heard and Judgment on 21<sup>st</sup> of August, 2011.**

A.H.M.Shamsuddin Choudhury,J:

The Rule under adjudication, issued on 6<sup>th</sup> April, 2008 was in  
following terms:

“Let a Rule Nisi issue calling upon the Respondents to show cause  
as to why the impugned action of the respondents dated 3.4.2008 to  
demolish the construction of the petitioner partially and stopping its  
construction work at the Triple Corner Chatter in front of High Court

Mazar shall not be declared to have been made without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.”

The petitioner’s averment are summarised below;

The petitioner is a non profit social organization registered under Societies Registration Act under the name and style ‘Al-haj Advocate Ahmed Ullah Foundation”, (henceforth the Foundation) with the joint stock companies.

That Foundation was established for providing social service, charitable works and other social developments work, like education, green plantation, orphanage and others things.

The Hon’ble President of Bangladesh was pleased to send his “Bani” on the occasion of distribution of awards of the Foundation to brilliant students and senior lawyers in the year of 2002.

The petitioner introduced green plantanisation theme by planting various valuable trees from Doel Chatter to High Court Mazar and Matshabhaban to the Segunbagicha, commencing the same programme in 2005 and, thereby contributed, to the beautification of part of Dhaka

City. For such social works and contribution, the Hon'ble Prime Minister of the country awarded certificate under the title Annual Beautification Award-06.

The petitioner also constructed, by his own resources, landscape in front of the Supreme Court Bar Bhaban with the symbol of Supreme Court Bar, which is carrying the dignity, image and honour of the Supreme Court Bar and the landscape has been dedicated in the name of two late Freedom Fighters Advocates, named Shahid Advocate AKM Siddique and Shahid Advocate Abdul Ahad.

The petitioner has been running orphanage for 30 boys, located at village Sonapur under the Police Station Sudhram of District Noakhali.

Recognising the petitioner's glorious performance, the respondents accorded permission to the latter, on 14.07.2005, for decorating two important roads namely, "Doel Chattar to High Court Mazar" and "Matshoya Bhaban to Segunbaghicha," with plantation.

The petitioner filed an application to the respondents for making a monument at Triple Corner Chatter in front of the High Court Mazar on 27.11.2007.

After obtaining the said permission, the petitioner took all steps for erecting a monument in the memory of some dedicated souls of 14<sup>th</sup> February, 1983 and 1962.

During the three preceding years, the respondents rendered some advice from time to time to the petitioner through their correspondences dated 30. 10. 05/21. 03. 07/16. 08. 07 /19. 08.07/17.10.07/12.03.08 respectively and the petitioner followed their advice accordingly.

The petitioner directed a letter to the respondent on 24.03.2008 stating that some amendment has been permeated in to the design of the monument. The respondents did not convey any advice to the petitioner ever since.

Having obtained the said permission, the petitioner started construction work of the said monument by engaging expert workers, technicians, precious stones and construction materials, under the supervision, inspection, guidance and monitoring of the respondents. The petitioner completed 95% work by 1<sup>st</sup> April, 2008.

The respondents routinely visited the spot and construction work from time to time and rendered advice to the petitioner for collecting

stones of high qualities and materials for successful completion on the work and the petitioner obliged.

During the continuation of the construction work, the respondents remained satisfied with the work and two of their staff supplied water for the construction work.

When the work was at the final stage, the Member Secretary of the petitioner Foundation received a phone call from the respondents office by which the earlier was requested to travel to the respondents' office to meet the Mayor. The Member Secretary, along with the Executive Director of the petitioner Foundation rushed to the respondents' office. During the intervening period the Mayor had left his office and hence the petitioner's representatives met the Private Secretary of the Mayor, who intimated that the Mayor was personally unhappy with the petitioner's work and had directed the people concerned to demolish the petitioner's monument.

On being so told, this, the petitioner made several abortive attempts to establish contract with the Mayor.

On 2.4.2008, the Member Secretary of the Foundation and Mr. Mahbub Uddin Khokon, an Advocate of the Supreme Court, spoke to the Mayor over telephone to be told that he would discuss the matter the following day. But on 3.04.2008, staff of the respondents started demolishing the construction work of the monument and took away all materials, including marble stones and other costly items.

By a letter, dated 3.2.2008, the respondent accorded permission to the petitioner for erecting a monument and plantation at Triple Corner of the Chatter in front of High Court Mazar and on that basis, the petitioner started the construction work within the full knowledge, inspection, guidance and supervision of the respondents and completed 95% construction work of the monument and its basement, and as such, the respondents' purport to demolish the same partially and stopping its construction work, is wholly illegal, unwarranted in law, malafide, without lawful authority and is of no legal effect.

The petitioner obtained permission by submitting an application to the respondents on 04.12.2007, along with a design of the monument, which was duly accepted. Permission was transmitted to the petitioner

by a letter dated 03.02.2008, and as such, the respondents are under an obligation not to disturb the petitioner in its peaceful pursuit to complete the monument.

The petitioner has not violated any terms as laid down in letter dated 03.02.2008 and there was no allegation against the petitioner of violation of the terms.

Before demolishing, no notice was served upon the petitioner and as such there has been gross violation of the principles of natural justice.

By spending huge sums of money and completing 95% work of the Monument, including its foundation and basement, the petitioner has acquired legally enforceable right to complete the monument.

By a supplementary affidavit the petitioner, has prayed that the respondent No.8 and 9 be directed to appoint 3 workers (guard) by rotation, and the Chairman, Water and Sewerage Authority (WASA) be directed to install water connection for watering green plantation in the monument area at the cost of the government; and to direct the respondents to take steps to maintain the sanctity, dignity and honor of

the **‘JATIO SHIKKHA ODHIKAR CHOTTOR’** as well as the monument thereon.

Although the Rule was issued quite some times back, no affidavit to rebut the petitioners assertion emanated from any of the respondents.

As the Rule matured, Mr. Bashir Ahmed structured his submission on a two prone theory. His first leg of submission was based on the doctrine of legitimate expectation, while his next limb of was erected on the notion of equitable estoppel.

Unfortunately, again, none was available to refute the submission the petitioner’s learned advocate proffered.

The questions, we are to resolve, are (1) whether the respondents’ actions went hand in gloves with lawful authority and (2) whether the petitioner has earned a right to procure the relief it craves.

Absence of affidavit-in-opposition requires us to deem as accepted the factual assertions the petitioner figured, which are to the effect that it is the respondent no.1 which accorded generous permission to the petitioner to accomplish a noble duty. Yet, the allegation, not thwarted,



is that they are now trying to demolish the monument and are not geared allow the work, undertaken by the petitioner, to proceed.

The legal regimes that are apposite, are, in our retrospection, twofold. The first of such is obviously the doctrine of equitable estoppel as, Justice Dinning, as he then was, propounded in the celebrated case of Central London Properties Trust-V—High Trees House Ltd (1947 K B 130). The second legal theory that is attracted is that of legitimate expectation, again progenitored by none other than Lord Denning, as he then became.

Equitable or promisory estoppel would have been the most appropriate theory in a case where, in reliance on a promise by a promisor, the promises suffers some detriment, as has happened in the instant case. But, the problems are twofold. Firstly, the debate as to its applicability in public law, as opposed to private law domain, is yet to be resolved and, secondly, it was unequivocally emphasised in a subsequent case, i.e that of Combe-V-Combe (1951 2 K B 215), that promisory estoppel can only be used as a shield, not as a sword. So on

this count the petitioner can not avail it as he would then be allowed to use it as a sword, a cause of action, rather than using it in defence.

Can the doctrine of legitimate expectation be drawn in the petitioners aid?

This relatively recent doctrine, which emerged from the debris of the abortive case of Schmidt-v-the Home Secretary (1969 2 Ch. 149), has flared like wild fire in the old commonwealth, including it's natal home, Britain, during the decades of 80 s and onward, so much so that more than half of the judicial review cases fall dependant on this dogma. In gist, this doctrine would apply where, a representation; whether verbal or written, whether express or implied, influences the mind of the recipient of the representation in such a way that a reasonable expectation grows in his thought that the representation would be acted upon.

So, in ex-parte Baker, below, Simon Brown L J stated "The authority is bound by it's assurance, whether expressly given or by way of established practice".

Scores of other cases, like *Re Liverpool Taxi Owners Association* (1972 2 ALL E R 589), *AG of Hongkong-v-Ng Yuen Shin* (1983 2 AC 629), provide prolific examples of express promise based legitimate expectation, while the decision in the oft quoted House of Lords decision in the case of *Council of Civil Service Unions-v-Minister for the Civil Service*, popularly known as *GCHQ case* (1985 AC 374), stands as a stout authority to support the proposition that legitimate expectation, can trigger from previous practice.

In *Ex-parte Coughan* (2001, Q B 13) the Court of Appeal confirmed that substantive legitimate expectations are protected under the English law. In that case, a promise to some disabled people that they could stay in a shelter home for as long as they chose, was held to have had ignited a legitimate expectation that the shelter home concerned could not be closed down. The Court of Appeal relied on the test which is whether to frustrate a substantive legitimate expectation would be so unfair as to amount to an abuse of power. The House of Lords endorsed the *ex-parte Coughan* principle in a number of cases, inclusive of the

case of R-v-Secretary of State for Home Department, ex parte Zegiri (2002 U K H L 3).

Lord Diplock in GCHQ case, supra, had this to say;

“ For a legitimate expectation to engender, the decision must affect other person.....by depriving him of some benefit or advantage which (1) either he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue until there has been communicated to him some rational grounds for withdrawing it, on which he has been given an opportunity to comment; or (11) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.”

Lord Fraser in the same case said that a legitimate expectation can be created in one of the two ways, either from an express promise given on behalf of a public authority or from the existence of a regular practice.

In *R-v-Secretary of State for Home Department, ex-parte Khan* (1985 I ALL ER 40) a promise made as to the policy to be followed on a particular aspect of immigration control, made generally, was held to be binding on the doctrine of legitimate expectation.

The doctrine of substantive legitimate expectation is akin to estoppel.

In *R-v-Secretary of State for the Home Department* (2003 1 WLR 2724, it was held that a promise that a prisoner would be placed in a protected witness unit, would create a legitimate expectation, though in that case the claim failed because the promises were made by the police, whose promise could not bind the prison service.

In *R-v-Secretary of State for Home Department, ex-parte Oloniluyi* (1989 Imm. A.R 135) it was held that an express representation made to an alien that she would have no trouble returning to the UK”, stimulated a legitimated expectation that she would be allowed to return to the UK.

In describing the purpose of the criterion of legitimacy, Lord Scarman indicated that legitimate expectation is not concerned with what

the claimant actually expected, but rather with what he was entitled to expect in all the circumstances (*Re Finally* 1985 AC 318).

Similarly, Lord Fraser expressed in *Attorney General of Hong Kong-v- Ng Yean Shiv*, *supra*, that the doctrine is an objective legal construct because the claimant's expectation must be reasonable in order to be legitimate. Indeed, Lord Denning in the *Patriarch* case of *Schmidt-v-Secretary of State for Home Department*, *supra*, also used the phrases "reasonable expectation."

In Britain, the debate as to whether an objectively reasonable expectation will *ipso facto* be clothed with legitimacy, without further ado has, till date, remained unresolved. The view expressed by the Privy Council in *Attorney General of Hong Kong-v- NG Yuen Shiv*, *supra*, favoured the earlier view, while Lord Scarman in *Re Findlay*, *supra*, came up with the view that even if the expectation is objectively reasonable, it can, nonetheless be dependent on the policy of the authorities concerned.

Although the normative view, as Lord Scarman has propounded, has been subjected to wide range of criticism, and notwithstanding the

critics' claim that "normative view" conflates the issue of whether an expectation is prima facie worthy of protection and whether on the particular facts of the case, it is lawful to frustrate the expectation, it remains beyond qualm that the expectation must be objective, rather than subjective, which connotes that the expectation shall not be legitimate, if no reasonable person will consider the representation to be binding or to carry the meaning which the claimant attributes to it (R-v-Gaming Board of Great Britain ex parte Kingsley 1996 COD 241). The question ought, usually, to be what would a reasonable person in the claimant's position have expected? It is , however, not clear though, precisely how much knowledge the reasonable person be imbued with. Generally the reasonable person should be assumed to have a basic understanding of the way in which the country is governed.

To be legitimate, an expectation must be consistent with the terms of the statute under which the public body is empowered to act. So, as Sedley L.J expressed in R-V-Commissioners of Customs and Excise exparte F & 1 services Ltd EWCA Civ 762)

“The law recognises no legitimate expectation that the public authority will act unlawfully.”

Similarly in *R-V- Department of Education and Employment , ex-parte Begbic* (2000 1 WLR 1115), the Court of Appeal held that the claimant’s expectation could not be legitimate as the same would be contrary to a provision inserted in an Act of Parliament. The same view was also echoed by the Court of Appeal in *R(Bloggs 61) v-Secretary of State for Home Department* (2003 1 WLR 2724), where the Court of Appeal came out against granting legitimacy to an expectation as that would have required the authority concerned to act in breach of a statutory duty.

#### Ultra Vires Expectation

The question whether ultra vires expectation can have any footing in English law, is hotly contested.

The English Law does not recognise as legitimate, an expectation based on an ultra vires promise or practice. A public body will also be absolved from giving effect to a legitimate expectation if it is required to act contrary to the expectation by statute (*R(x)v-Head Teacher and*



Governor of T school (2008 1 ALL E R 249). Threefold justification have been propounded in favour of the negativity. Firstly, holding a public body to an unlawful representation would destroy the ultra vires principle by permitting public bodies to extend their own power at will (R-v-Ministry of Agriculture Fisheries and Food, ex-parte Hombale Fisheries Ltd (1995 2 ALL ER 714). Secondly, estoppel or legitimate expectation should not apply to a public body so as to prevent it from exercising its statutory powers or duties (Attorney General of HongKong-v-Ng Yuen Shiv, supra). Thirdly, to allow ultra vires expectations to bind a public body may prejudice third parties. In this respect, Peter Gibson LJ in Rawland-v- Environment Agency (2005 Ch,1). expressed. “.....Orthodox English domestic law does not allow the individual to retain the benefit, if creating or maintaining that benefit is beyond the power of the public body.”

Simon Brown L.J. in R-v-Devon CC ex-parte Baker (1995 1 ALL E R 73), supra comprehensively put legitimate expectation into four classes: (1) substantive legitimate expectation (2) Procedural legitimate Expectation: where the claimants' interest is referable to some ultimate

benefit, which he hopes to retain : here it is the interest itself rather than the benefit that is the substance of the expectation: here his interest is protected by procedural fairness. The case of Schmidt-v-Secretary of State for Home Department is a glowing example of procedural legitimate Expectation, where Lord Denning expressed, obiter, that no alien had a legitimate expectation to be allowed to stay for the permitted time and if that is revoked before the time limit expires, the alien ought to be given an opportunity to make a representation.

In this category, the claimant's right and the authority's duty to treat him fairly are two sides of the same coin.

It is often argued that this category should be best left under the principles of natural justice, rather than legitimate expectation.

Simon Brown L J's third category, embraces procedural fairness: the claimant's expectation that the authority would act fairly towards him.

About the fourth category, Simon Brown L.J said, "The final category of Legitimate Expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the

protection of interest, must be followed, consequent upon some specific promise or practice.

Now, facts that have remained unimpeached, assimilated and conflated with the doctrine of legitimate expectation, particularly of the substantive class, according to Lord Diplock and Simon Brown L J's classification, would pose no difficulty for us to visualise that there was an express promise from the Dhaka City Corporation that the petitioner would be allowed to undertake the work and then to retain it's harvest.

The promise was clear, unambiguous and devoid of relevant qualifications, as it ought to be as per the Court of Appeal's mandate in R-v-Newhan LBC (2002 1 WLR 237) to the effect that it is important to identify precisely what the public body has committed itself to.

There is nothing before us to be swayed to the equation that the petitioner's expectation can not be honoured without breaking any statutory dictate or that the same would offend the ultra vires rule.

The petitioners case, does therefore, fulfill all the criteria that are centrifugal to legitimate expectation, and hence, the Rule deserved to be steered to a successful destiny and the same should hence made absolute,

in part, i.e. to the extent of allowing the petitioner to erect and maintain the monument and the greeneries, without, however, any order on cost.

That leaves us to consider the claim that the respondent no.1 be directed to deploy a couple of guards and the respondent no.10 be directed to shower water on the greenery around the monument.

In this context, however, we have been unable to detect any promise or practice to the effect that the designated respondents would shower water on the greenery around the monument or deploy any personnel to protect the same. So, the petitioner can not lay any claim on these. Its prayer to that effect, is hence, bound to founder.

For the reasons stated as above, the Rule is made absolute in part, as stated above. The respondents are directed not to demolish the monument and the garden the petitioner has erected and set up, and to allow the petitioner to maintain the same, unhindered.

Gobinda Chandra Tagore, J.

I agree.