

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

WRIT PETITION No. 4110 OF 2024

In the matter of:

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

AND

In the matter of:

Dhali Construction Limited and M/S.
Gazi Construction Limited (JV)
represented by their authorized
representative Gazi Moklesur Rahman.
....Petitioner.

-Versus-

Secretary, Ministry of Housing and
Public Works, Public Works
Department, Bangladesh Secretariat,
Shahbagh, Dhaka and others
.....Respondents.

Mr. Hasan Tareq, Advocate

.....For the Petitioner.

Mr. Bepul Bagmar, D.A.G.

.....For the respondent.

Judgment on: 01.08.2024

Present:

Mr. Justice Md. Khasruzzaman

and

Mr. Justice K M Zahid Sarwar

Md. Khasruzzaman, J:

On an application under article 102 of the Constitution, on
01.04.2024 *Rule Nisi* was issued in the following terms:

*“Let a Rule Nisi be issued calling upon the respondents to show
cause as to why the impugned Memo No.
25.36.0000.220.07.003.23.358/2 dated 08.10.2023 issued by*

the respondent No.4 should not be declared to be have been issued without lawful authority and is of no legal effect and why a direction should not be given upon the respondents to make the due payment to the petitioner pursuant to Memo No. 25.36.0400.140.01.054.(1)-841/8 dated 29.03.2023 and/or pass such other or further order or orders as to this Court may seem fit and proper.”

At the very outset Mr. Hasan Tareq, the learned Advocate for the petitioner submits that he will not press the 2nd part of the *Rule Nisi* so far the payment of his bill is concerned since the authority will pay his bill so far the work has already been done as evident from Annexure-F dated 29.03.2023 and as such, the same may kindly be discharged as being not pressed.

Facts summarized from the writ petition and the papers annexed thereto are that the petitioner is a joint venture contractor firm and engaged in construction with business in Patuakhali and other parts of Bangladesh. Barguna PWD Division, Barguna being a procuring entity invited tender being Tender Invitation Reference No.16.01.0000.037.14.005.18-559 dated 09.01.2019 for construction of 4 storied Zila Model Masjid and Islamic Cultural Center for Islamic Foundation with 4 storied Foundation at Barguna with civil, sanitary, electric and other ancillary works under the project of Establishing 560 model mosques and Islamic Cultural Centers in Zila and Upazila of Bangladesh for the Fiscal Year 2017-2018. The petitioner submitted his bid. Ultimately, he

was found a successful tenderer of the work. As such, Work Order being No.729/10 dated 27.03.2019 was issued in favour of the petitioner (Annexure-B). Thereafter, contract agreement was signed between the parties. After getting work order, the petitioner started and completed necessary initial work of such project i.e. test piling and load test. Since he was not handed over with the design of piling, the petitioner could not start the construction work and as such, his construction materials kept in the site are at threat of being destroyed. Thereafter, the petitioner by a written application dated 18.08.2019 requested the respondent No.6 to handover design of piling/work to complete the work in time. But the design/program of work has not been provided/handed over despite several requests being made by the petitioner. The petitioner ought to have completed the project by 01.10.2020 as per contract agreement. Since the respondents have utterly failed to hand over the site with design of work in time, the duration of the project has already been expired. In the meantime, COVID-19 pandemic was started and thereafter, the market rate of construction materials increased. In that circumstances, the petitioner by an application prayed for reschedule of the work order considering the market price of the construction materials. The respondent authority, without paying any heed to the request of the petitioner, vide Memo No.25.36.0400.140.01.054-(1)-841/8 dated 29.03.2023 cancelled work order being No.729/10 dated 27.03.2019 (Annexure-F). Subsequently, the authority vide Memo

No.25.36.0000.220.07.003.23-358/2 dated 08.10.2023 debarred the petitioner from participating in the tender of the Public Works Department for a period of 01(one) year from 08.10.2023 to 08.10.2024 (Annexure-E). In the meantime, the respondent authority issued retender for construction of the work and the new contractor has already undertaken the retendered work. The petitioner has not been paid his full and final payment despite several requests being made by him.

Hence, challenging the order of debarring from participating in all tender activities of Public Works Department, the petitioner filed this writ petition under article 102 of the Constitution and obtained *Rule Nisi* in the manner as quoted hereinbefore.

No *affidavit-in-opposition* has been filed by either of the respondent.

Mr. Hasan Tareq, the learned Advocate appearing on behalf of the writ petitioner submits that the authority did not serve any show case notice upon the petitioner before the order of debarring him from participating in all tender activities of Public Works Department and as such, the authority violated the established principle of natural justice and as such, the impugned debarment of the petitioner is illegal and without lawful authority. The learned Advocate further submits that the facts and circumstances of the case indicate that the petitioner has no fault of his own about non-completion of the work in time, rather it is the failure of the authority for whom the work could not be completed in time.

However, the learned Advocate submits that the petitioner has every right to know why he would be debarred from participating in the tender. In the present case, the authority did not issue any show cause notice before the impugned order of debarring was passed. This action of debarment is against the settled principle of natural justice and as such, the same is liable to be declared to have been issued without lawful authority and is of no legal effect.

Mr. Bepul Barmar, the learned Deputy Attorney General appearing on behalf of the respondents submits that since the petitioner could not complete the project work within time, the work order was cancelled and the petitioner was debarred by the impugned order from participating in all tender of Public Works Department in accordance with law. Hence, he has prayed for discharging the *Rule Nisi*.

We have considered the submissions of the learned Advocates appearing on behalf of their respective party and perused the writ petition and all papers annexed thereto. It appears that the *Rule Nisi* has two parts. In first part of the *Rule Nisi*, the impugned debarment was challenged. In the second part, the petitioner prayed for a direction to pay his bills for the work already done by him. Referring Annexure-F to the writ petition, the learned Advocate at the very outset submits that he will not press the second part of the *Rule Nisi* since the authority will pay of his bill. So, we will confine within the first part of the *Rule Nisi* which

relates to debarment of the petitioner from participating in all tender activities of Public Works Department.

Admittedly, on the allegation of non completion of work within time, the work order was cancelled by Memo dated 29.03.2023 (Annexure-F). Again on the self same allegation (যথা সময়ে কাজ সম্পাদনের ব্যর্থতার জন্য), the authority vide Memo dated 08.10.2023 debarred the petitioner from participating in all tender process of Public Works Department (Annexure-E). So, what we found is that the petitioner was punished twice for the self same allegation which raises question over the action of the respondents. The authority cannot punish the petitioner twice for the same offence as per law. So far the debarment of the petitioner is concerned the petitioner submits that no show cause notice was served upon him before debarring him from participating in all tender processes of Public Works Department has been passed. No affidavit-in-opposition has been filed to controvert the statements made in the writ petition. General principle of law is that the writ petition is a summary proceeding which is to be disposed of on affidavit. Statements made in the writ petition are required to be controverted by filing affidavit-in-opposition. If any statement is not controverted by filing affidavit-in-opposition, the Court is to proceed as if such statement made in the writ petition has been admitted by the respondents. And as such we are of the view that the statements made in the writ petition and allegations made against the respondent-authorities in respect of non service of any show cause notice are deemed to have

been admitted by the said respondent authority. This view finds support in the case of **Naseem Bano Vs. U.P. reported in AIR 1993 SC 2592.**

The basic principle of fair procedure is that before taking any action against a man the authority should give him notice of the case and afford him fair opportunity to answer the case against him and to put his own case. This view finds support in the case of **RAJUK Vs. Dhaka WASA, 14 BLC(AD)129**; Notice has to given if any person is sought to be affected in his right, interest, property or character. This view also finds support in the case of **Abul Ala Moudoodi Vs. West Pakistan, 17 DLR(SC)209**. Here in this case, the petitioner has a valid licence as a contractor. Previously he was awarded with the work order and very successfully completed those works which are evident from Annexures-A series to the writ petition. The allegation which has been brought against the petitioner is that he did not complete the work in time. The authority has already cancelled his work order and the work was re-tendered and the new contractor has already started the work. Surprisingly, by another order the petitioner has been debarred from participating in all tender processes of Public Works Department. The authority could issue show cause notice before taking such action of debarment against the petitioner. This is violation of principle of natural justice as held by the Appellate Division in the cited case. So, the impugned order of debarring is

without lawful authority and is of no legal effect and as such the *Rule Nisi* is liable to be made absolute.

In the result, the first part of the *Rule Nisi* is so far concerned, made absolute.

Thus impugned Memo No. 25.36.0000.220.07.003.23.358/2 dated 08.10.2023 issued by the respondent No.4 is hereby declared to have been issued without any lawful authority and is of no legal effect and set aside.

There will be no order as to costs.

Communicate the order.

K M Zahid Sarwar, J:

I agree.