

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

Writ Petition No. 5671 of 2016

In the matter of :

An application under Article 102 (2) of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of :

Omer Ali

..... Petitioner

-Versus-

Government of Bangladesh, represented by the Secretary, Ministry of Shipping, Bangladesh Secretariat, Dhaka and others.

..... Respondents

Mr. Bahadur Shah, Advocate

.... For the Petitioner

Mr. Saifur Rashid, Advocate

..... For Respondent Nos. 2, 3 and 5

Mr. Sk. Shaifuzzaman, DAG with

Ms. Abantee Nurul, AAG,

Ms. Rokeya Akhter, AAG and

Ms. Afroza Nazneen Akhter, AAG

..... For Respondent No. 1

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Ms. Justice Kazi Zinat Hoque

Date of Hearing : 27.01.2020, 03.02.2020,
25.02.2020 & 23.11.2020

Date of Judgment : 17.12.2020

Zubayer Rahman Chowdhury, J :

The action of Bangladesh Inland Water Transport Corporation (briefly, BIWTC) in issuing the Memo dated 25.04.2016 directing the Bank to encash the Bank Guarantee furnished by the petitioner is being challenged through this application under Article 102(2) of the Constitution. At the time of issuance of the Rule, the operation of the impugned Memo dated 25.04.2016, as evidenced by Annexure H, was stayed for a period of 3 (three) months, which was subsequently extended from time to time by orders of different dates.

The petitioner is the proprietor of Jony Corporation, an Indenting and Export-Import firm. In course of his business, the petitioner participated in a tender, which was published on 21.08.2014 by BIWTC, respondent no. 2 herein, for purchase and installation of fog lights and for supply of other related spares and accessories. The petitioner's bid was accepted and, upon completion of all the formalities, a contract was signed between the petitioner and BIWTC on 06.01.2015. The petitioner furnished a Bank Guarantee as per requirement of the contract.

The petitioner installed the fog lights on board four ferries namely, 1) Bir Shrestha Ruhul Amin, 2) Shah Amanat, 3) Keramot Ali and 4) Shah Paran. However, with the onset of winter, it transpired that the fog lights were not working properly in dense fog, resulting in serious disruption to the ferry service. BIWTC duly informed the petitioner about the matter with a request to take necessary steps to redress the situation. The petitioner replied to the letter sent by BIWTC, but took no further step to rectify the problem. This episode of exchanging letters between

BIWTC and the petitioner continued for some time, presumably from November 2015 upto January, 2016. Thereafter, BIWTC wrote to the concerned Bank namely, National Credit and Commerce Bank Limited, O. R. Nizam Road Branch, Chittagong for encashment of the Bank Guarantee furnished by the petitioner on account of his failure to rectify the matter. It is the issuance of this letter to the Bank by BIWTC that has led to the filing of the instant writ petition by the petitioner.

Mr. Bahadur Shah, the learned Advocate appearing in support of the Rule submits that the petitioner had performed his obligations under the contract by installing the fog lights on board the ferries, which were tested in presence of the officials of BIWTC, who had issued a certificate to the effect that the fog lights were found to be “in working order”. He submits that four officials of BIWTC had earlier travelled to the United States of America (USA) to carry out physical inspection of the fog lights, which were to be installed on board the ferries. He submits that the concerned officials conducted an inspection of the fog lights in New York, USA, expressed their satisfaction and gave their approval. It is only upon receiving such approval that the petitioner proceeded to implement the contract and install the fog lights on board the ferries.

Mr. Shah submits that at a subsequent point of time, when there was some difficulty in operating the fog lights, the respondents wrote to the Bank for encashment of the Bank Guarantee without issuance of any prior show cause notice to the petitioner. Mr. Shah submits that from the report furnished by BIWTC, it is evident that the fog lights were found to be in working order and therefore, as there was no breach in the

performance of the contract by the petitioner, the respondents are not entitled to ask for encashment of the Bank Guarantee. On being asked by the Court as to how the expenses of the trip by four officials of BIWTC to USA was met, Mr. Shah submitted that all the expenses in connection with the trip was borne by the petitioner, as stipulated in the contract itself.

The Rule is being opposed by the respondent nos. 2, 3 and 5 by filing an affidavit-in-opposition. Mr. Saifur Rashid, the learned Advocate appearing on behalf of the contesting respondents submits that the action of the respondents is in accordance with the terms of the contract. He submits that as the fog lights were found to be ineffective during the winter season, the petitioner was asked to rectify the defects, but no action was taken by him. He submits that it is because of the failure of the petitioner to comply with the directive of BIWTC that has necessitated the issuance of the letter to the Bank seeking encashment of the Bank Guarantee.

The matter before this Court appears to be very innocuous at first sight. Nevertheless, it raises certain issues which are of considerable public importance and concern as it brings to light the manner in which official matters are being conducted by a statutory Corporation.

It is on record that four Government officials had travelled to the USA for the purpose of inspecting the fog lights prior to their supply and installation on board the ferries. The purpose of the trip was to carry out pre-shipment inspection regarding “performance of the goods, complying with their technical specification”. Out of the four officials, two officials

were from the Ministry of Shipping, who were on deputation to BIWTC. Apart from The General Manager (Technical), BIWTC, one other official of the Ministry was a Civil Engineer. However, for all practical purposes, it can be said that only one out of the four member team had the educational qualification and the technical know-how to carry out the inspection in question. We fail to understand as to how non-technical persons could “examine and evaluate the suitability and function of the fog lights”.

Let us now examine the role function that was carried out by the Inspection Team during the trip to USA. In the report dated 17.12.2020, which was signed by the General Manager (Marine), BIWTC and the Assistant General Manager (Marine), BIWTC, Dhaka, it has been stated as follows:

“PSI কমিটি গত ২৮/০৩/২০১৫ খ্রিঃ আমেরিকার New York বিমানবন্দর হতে New jersey তে পৌঁছেন এবং ০৩/০৪/২০১৫ খ্রিঃ New York ত্যাগ করেন। এ সময় সরবরাহকারী মেসার্স জনি কর্পোরেশনের প্রোপ্রাইটর Mr. Lt. Cdr. Omar Ali (Retd.) BN এবং M/S ANCI/ARTICULIGHT COMPANY এর প্রতিনিধি ও Sales and Marketing President Mr. ANTONIO এর তত্ত্বাবধানে ও বাবস্থাপনায় হোটেল এর পার্শ্ববর্তী এলাকায় Portable Generator স্থাপন করে ১ (এক)টি সার্চ এন্ড ফগ লাইট এ Power সংযোগ করে প্রজ্জ্বলিত করা হয়।

এছাড়া এ সময় লাইটটির remote control, intensity, power, focus, Country of Origin এবং অন্যান্য technical specification পরীক্ষা করা হয়। তাছাড়া, উপরোক্ত ২ (দুই) জন প্রতিনিধির সহযোগিতা ও তত্ত্বাবধানে ARTICULIGHT, USA Company’র ফ্যাক্টরীতে নির্মিত সার্চ এন্ড ফগ লাইটের বিভিন্ন যন্ত্রাংশ পর্যবেক্ষণ ও পরিদর্শন করা হয়।

অতঃপর সরবরাহকারী প্রতিষ্ঠানের প্রতিনিধি ভ্রমণকারী দলকে ভ্রমণের অংশ হিসেবে New York এর Statue of Liberty, Liberty Island, Ellis Island এ Memorial museum পরিদর্শনে নিয়ে যান। Liberty Island এবং Ellis Island এ যাবার পক্ষে কর্মকর্তাগণ Hudson River এ পরিচালিত Tourist জাহাজগুলোর design এবং outlook গভীরভাবে পর্যবেক্ষণ করেন।”

(emphasis added)

Undoubtedly this makes a very interesting reading, to say the least. The four member delegation had travelled to New York, USA and spent six days between 28.03.2015 and 03.04.2015 for the purpose of “inspecting the fog lights and evaluating their performance”. From the aforesaid report, it transpires that the physical inspection of the fog lights was carried out at a place “adjacent to the hotel” (হোটেলের পার্শ্ববর্তী এলাকা) with the help of a portable generator. It further appears from the Report that the team also visited the Statue of Liberty, Liberty Island, Ellis Island and the Memorial Museum, crossing the Hudson River on a tourist vessel. It is, therefore, apparent that out of the six days spent in USA, only a few hours, not even half a day, was spent for the purpose for which the officials had travelled to USA, while the remaining period was spent in visiting places of interest, which had absolutely no nexus or relevance with the purpose of the visit.

Although Mr. Bahadur Shah has submitted that as per terms of the contract, the expenses incurred in relation to the visit was borne by the petitioner, that is not factually correct. The tender document, annexed as Annexure B to the writ petition, contains a stipulation in clause GCC 31.2, which reads as under :

“Supplier will arrange pre-shipment Inspection (PSI) abroad of the proposed search and fog lights for 4 (four) persons at supplier’s own cost before shipping the goods, duration will be 7 (seven) days excluding travel time.”

However, from Annexure 5 of the affidavit-in-opposition dated 01.03.2017, it appears that Clause 31.5 of the General Conditions of Contract contains the following stipulation :

“The Purchaser may require the Supplier to carry out any test and/or inspection not required by the Contract but deemed necessary to verify that the characteristics and performance of the Goods comply with the technical specifications, codes and standards under the Contract, provided that the supplier’s reasonable costs and expenses incurred in the carrying out such test and/or inspection shall be added to the Contract Price.”

Placed in juxtaposition, it is apparent that although on one hand, the tender document provides that the expenses relating to pre-shipment inspection shall be borne by the supplier, in reality, it is the tax payers of the country who are being made to pay for the visit by the officials.

There is yet another interesting episode of the case. It is on record that the fog lights were tested in the month of June. It is inconceivable as to how the fog lights could be tested during summer when there is absolutely no fog or even mist in the weather. It not only defies common sense and logic, but also demonstrates the utter reckless conduct of the officials of BIWTC. Nevertheless, after carrying out the inspection, the officials duly certified that the fog lights were “in working order.” However, as is evident from the subsequent course of events, with the onset of winter, the fog lights were found to be absolutely unworkable, thereby seriously disrupting the ferry service, not to mention the suffering caused to hundreds of passengers. It may not be out of context to take note of the fact that an amount of Taka Six Crore was spent for procurement of the fog lights in question.

The General Clauses of Contract, drafted and prepared by respondent, requires to be examined from the view point of its justifiability. Clause 31.2 of the Contract, executed by BIWTC with the

petitioner, quoted earlier in the judgment, requires the supplier (the petitioner herein) to arrange Pre-Shipment Inspection (PSI) of the fog lights for four persons “abroad” at the supplier’s own cost before shipment of the goods. The clause also stipulates that the duration of the visit will be 7 (seven) days, excluding travel time.

Let us examine this particular clause in the context of the case in hand. The contract in question was for purchase of fog lights, which were to be installed on board the Ferries that ply in the Aricha and Mawa routes. Although the clause provided that four persons could go abroad, interestingly, there was no mention as to the qualification or expertise of such persons, presumably for facilitating the trip to be undertaken by non-technical officials, which, in fact, has happened in the instant case. Last, but not least, the duration for such Inspection was stipulated as 7 (seven) days. However, as is evident from the Report filed by BIWTC in their affidavit-in-opposition, the “actual” or “real time” that was spent by the officials for the purpose of “Inspection of the fog lights” was only a few hours. It is on record that the officials visited several other places of interest in and around New York for the remaining period of their “official visit”.

Although Mr. Shah has attempted to justify that the expenses were borne by the petitioner, in reality, it is absolutely incorrect and misleading. As we have observed hereinbefore, by virtue of Clause 31.5, the total expense incurred in connection with the visit of the four officials was borne by the tax-payers of the country.

We are mindful of the fact that it may indeed be necessary for Government officials to travel abroad for various purposes in connection with official work. However, such trips should not be undertaken, unless it is absolutely necessary. As Guardian of the Constitution, this Court has a duty and obligation to ensure that the tax-payers' money is not wasted. The case in hand is a classic example where Government officials have not only abused their official position and authority to undertake the trip to USA, but they also failed to perform their duty. Needless to observe that because of the total incompetence and inefficiency of the concerned officials, the quality and performance of the fog lights could not be verified properly. Last, but not least, in utter defiance to logic and common sense, the fog lights were tested in the month of June.

If positions of responsibility are manned by officials who do not possess basic common sense, not to mention the necessary expertise, it is bound to cause financial loss to the State Exchequer. We are constrained to observe that the concerned officials have not only abused their official position, but they have also demonstrated extreme arbitrariness, not to mention utter incompetence, in discharging their duties. Apart from the issue of wastage of the tax-payers money, we cannot ignore the consequential effect that arose from the failure of the fog lights to function during winter – the sufferings of hundreds ordinary passengers. Not surprisingly, the contesting respondent has remained totally silent on this issue.

Although the Zamindars of the British era had to give up a substantial portion of land along with the authority to collect revenue with

the abolition of the Zamindari system way back in 1952, the conduct of Government officials appear to suggest the advent of “neo-Zamindars”. Recent press reports, published in the national dailies, disclose that the Ministry of Primary and Mass Education has proposed to send five hundred Government officials abroad over a period of five years, involving an expenditure of Taka Five Crore, to observe the management and implementation of mid-days meals in schools. Thankfully, the Government is yet to grant approval to the said proposal. If such “high handed”, not to mention “atrocious”, conduct on the part of Government officials are not checked, but allowed to continue unabated, we may very soon see reports of Government officials travelling to the United Kingdom to learn “the proper way to wear a formal suit”. Although it may sound quite absurd, that may soon become a reality.

The Government officials are reminded, in no uncertain terms, that they have been appointed in Government service to serve the people, and not to be served and that too, at the tax-payers’ expense. Each and every Government official has a solemn duty and obligation to “serve the people”. This is not only their duty and obligation, as required under the various Acts that govern and regulate their service, but it is also a constitutional mandate. This view of ours is fortified by the language used in Article 21 of the Constitution, which stipulates as under:

“21. (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.

(2) Every person in the service of the Republic has a duty to strive at all times to serve the people.”

(emphasis added)

It has to be borne in mind that Government officials are not rendering free voluntary service; rather, they are holding positions of responsibility and enjoying benefits and privileges, which is being paid for by the taxpayers of the country. They have no right, for less any authority, to discharge their official duties in such reckless and arbitrary manner, causing financial loss to the ordinary tax taxpayers of the country. The Acts, Rules and Ordinance, which regulate the appointment and service conditions of the Government Officials are entitled “The Government Servants (Special Provisions) Ordinance, 1979,” “The Public Servant (Retirement) Act, 1975,” “The Public Servant (Retirement) Rules, 1975,” “The Government Servants (Discipline and Appeal) Rules, 1985,” to name a few. The title of the above mentioned Acts, Ordinance and Rules are self-explanatory and do not require any further elaboration. As has been stated so aptly by Professor A.W. Bradley and Professor K. D. Ewing :

“Within a democracy, those who govern must be accountable, or responsible, to those whom they govern”.
(Constitutional And Administrative Law, 14th Edition, at page 107).

In this context, it may be pertinent to mention that in the United Kingdom, the ‘Civil Service Code’ was enacted in 1996 to deal with the issue of ethical standards that are required to be maintained by civil servants, wherein it was stipulated that civil servants are required, amongst other things, “to endeavour to deal with the affairs of the public sympathetically, effectively, promptly and without bias or mal-

administration”. The Code further stipulates that civil servants “should endeavour to ensure proper, effective and efficient use of public money”.

As Guardian of the Constitution, this Court is concerned about the manner in which official matters are being conducted. Such conduct on the part of irresponsible, not to mention incompetent, Government officials cannot be allowed to continue unabated. This guardianship, according to Lord Bridge, as stated in *R. vs Lord Saville of Newdigate, ex parte A*, reported in (1999) 4 All ER 860, “is exercised through the principle of reasonableness”.

Accordingly, we propose to lay down certain guidelines for guidance of all the officials undertaking overseas trips. However, we hasten to add that the guidelines should be made applicable for “official visits”, and not to any private overseas visit by the Government officials.

For all official trips outside Bangladesh, undertaken by Government officials holding the rank of Additional Secretary and below, prior permission must be obtained not only from the concerned Ministry, but also from the Ministry of Finance and the Cabinet Division. Upon their return, they should furnish a report to the Ministry of Finance and the Cabinet Division giving details of their visit and the purpose for which it was undertaken together with an account of the expenses incurred in connection with such visit. No Government official shall be allowed to go on any official visit unless prior permission is obtained from each of the Ministries indicated above. In our considered view, this is necessary to prevent “fanciful and purposeless” foreign trips by Government officials and more importantly, to prevent wastage of the taxpayers’ money.

The concerned Ministry is directed to take positive steps and amend the relevant Clauses in the “General Clauses of Contract” to ensure that henceforth, no such provision is incorporated in any Contract, executed by or on behalf of the Government, whereby the supplier is allowed to recover the expenses, incurred in connection with any overseas visit undertaken by Government officials, directly or indirectly, from the Government. Furthermore, necessary amendments should be made in the General Conditions of Contract, which is executed by or on behalf of the Government, so as to ensure that incidental expenses, which are to be borne by the contractor or supplier, is not included in the contract price. In other words, all such expenses are to be borne exclusively by the Supplier/Contractor and they shall not be included in the contract price itself.

Reverting to the issue before us, Annexure F-1, being the Bank Guarantee furnished by the petitioner, stipulates as under :

“The Guarantee is valid until 30.03.2016 consequently; we must receive at the above mentioned office any demand for payment under this guarantee on or before that date.”

This aforesaid guarantee was subsequently extended upto 17.05.2016. As the petitioner did not take any step to make the fog lights workable, BIWTC wrote to the Bank on 25.04.2016 with a direction to encash the Bank Guarantee and credit the amount in its account. It is on record that the contending respondents have filed an application before the Bank seeking extension of the validity of the Bank Guarantee. However, the extension of the Bank Guarantee is a matter which rests

purely on the discretion of the concerned Bank. It is the duty of the beneficiary (in this case, BIWTC), to ask for the extension of the validity, before the expiry of the period mentioned in the Bank Guarantee. Usually a Bank Guarantee has to be extended at the request of the beneficiary or the person providing the Bank Guarantee, but such extension can only be granted by the issuing Bank. This Court has no jurisdiction or authority to pass a direction upon the concerned Bank for extension of the Bank Guarantee. In our view, the application that was filed before this Court seeking a direction upon the concerned Bank to extend the validity of the Bank Guarantee was totally misconceived.

In the result, the Rule is discharged.

The order of stay, granted earlier by this Court, is hereby recalled and vacated.

Respondent no. 2, i.e., BIWTC shall be at liberty to take steps to encash the Bank Guarantee.

There will be no order as to cost.

Kazi Zinat Hoque, J :

I agree.