

18 SCOB [2023] AD 36**APPELLATE DIVISION****PRESENT:****Mr. Justice Hasan Foez Siddique, CJ****Mr. Justice Obaidul Hassan****Mr. Justice M. Enayetur Rahim****CIVIL PETITION FOR LEAVE TO APPEAL NO.860 OF 2022**

(From the judgment and order dated 05th day of April, 2018 passed by the High Court Division in Writ Petition No.7545 of 2015)

Government of Bangladesh :
represented by the Senior Secretary,
Ministry of Land and others

...Petitioners**-Versus-****Md. Selim Khan and others**

:

...Respondents

For the Petitioners

: Mr. Kazi Mynul Hassan, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record

For the Respondent No.1

: Mr. Ajmalul Hossain, Senior Advocate with Ms. Tania Amir, Senior Advocate and Mr. Moniruzzaman Asad, Advocate instructed by Ms. Madhumalti Chowdhury Barua, Advocate-on-Record

For the Respondent Nos.2-3

: Not represented

Date of Hearing and Judgment

: The 29th day of May, 2022**Editors' Note:**

High Court Division disposing of a writ petition directed concerned authority to co-operate substantively with the writ petitioner-respondent for dredging/extracting of 86.30 lac cubic meter of sand/earth at writ petitioner's own cost from the dubochar of Meghna River bed situated under different Mouzas by country made dredger for the proper navigability of the river. Against the order of the High Court Division the Government preferred this leave petition. The Appellate Division analyzing sections 2 (7), 3, 9, 10, 11 and 13 of বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০ found that the High Court Division in contravention of the above Act most illegally and arbitrarily leased out the Mouzas in questions to the writ petitioner for extracting sand which it cannot do. Consequently, Appellate Division set aside the judgment and order of the High Court Division with a direction to the Deputy Commissioner, Chandpur to take necessary steps to realize the royalty for the already extracted sand (বালু) from the writ petitioner.

Key Words:

Article 102 of the Constitution; Sections 2 (7), 3, 9, 10, 11 and 13 of বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০; Balumahal; *mandamus*; Ports Act, 1908 and Ports Rules, 1966

Article 102 of the Constitution and Section 9 of বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০:

The High Court Division cannot assume the power and jurisdiction of a particular authority conferred by a specific law/statute in exercising power under Article 102 of the Constitution of the People's Republic of Bangladesh and thus, the High Court cannot declare a particular area as '*Balumahal*' making a particular law i.e. Ain 2010 nugatory or redundant. Thus, in this particular case the High Court Division has traveled beyond its jurisdiction declaring the mouzas in question as '*Balumahal*'.

(Para 20)

Section 10 of বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০:

A '*Balumahal*' shall be leased out through open tender, and after acceptance of lease proposal, concerned Deputy Commissioner would execute lease agreement in specific manner and procedure and after receiving the lease money the possession of leased '*Balumahal*' will be handed over to the lessor. But the High Court Division making the Ain, 2010 nugatory most illegally and arbitrarily leased out the mouzas in questions to the writ petitioner for extracting sand. The High Court Division, in fact, had played the role of the lessor, which it cannot do.

(Para 22 & 23)

Mandamus may not be issued where there is no violation of a legal right:

It is now well settled that *mandamus* may not be issued where there is no violation of a legal right or statutory duty by the authority concerned and that a person can avail writ jurisdiction by way of *mandamus* only for enforcement of his legal right or for redress violation of such right.

(Para 28)

Court cannot give any direction contrary to the relevant Act and Rules:

In the instant case no legal right or statutory right has been created in favour of the writ petitioner to get lease of the '*Balumahal*' in question and the concerned authority refrains to perform its legal or statutory duty. Mere deposition of the cost for hydrographic survey by the petitioner with the approval of court *ipso facto* does not create any legal or vested right in his favour. The writ petitioner did not come before the court to establish any public right but only to serve his selfish ends. A writ of *mandamus* cannot be indulged for such a purpose. Further, Court cannot give any direction which is contrary to the relevant Act and Rules.

(Para 30 & 31)

Section 3 of বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০:

For the excavation of any kind of bed of navigable waterways or removal of sand (বালু) outside the port area, the provision of 'বালুমহাল ও মাটি ব্যবস্থাপনা আইন, ২০১০' will be applicable, even for the purpose of proper and smooth navigation. In this regard Bangladesh Inland Water Transport Authority (BIWTA) has got no authority to deal with the matter under the Port Rules, 1966.

(Para 34)

JUDGMENT**M. Enayetur Rahim, J:**

1. Delay of 1440 days in filling the civil petition for leave to appeal is hereby condoned.
2. This leave petition, at the instance of writ-respondents are directed against the judgment and order dated 05.04.2018 passed by a Division Bench of the High Court Division

in writ petition No.7545 of 2015 disposing the Rule with a direction to co-operate substantively with the writ petitioner-respondent for dredging/extracting of 86.30 lac cubic meter (i.e. 30 crore and 48.10 lac cubic feet) sand/earth from the dubochar of Meghna River bed situated under charsholadi Mouza, Paschim Charkrishnapur Mouza, Charjahiruddin Mouza, Nilkomol Mouza, Monipur/ Kutubpur Mouza, Bajapti Mouza, Gazipur Mouza, Charbhoirabi Mouza and Miarchar Charfakhordia Mouza under Haimchar Upozilla, Chandpur and Razrajeswar Mouza, Nilarchar Mouza, Ibrahimpur Mouza, Zafrabad Mouza, Safarmali Mouza, Shakhua Mouza, Ichuli Mouza, Chaltatli Mouza, Gunanandi Mouza, Gorapia Mouza and Induli Mouza under Chandur Sadar Upozilla, Chandpur (as per annexure-L) (**hereinafter referred to as Mouzas in question**) by country made dredger.

3. The relevant facts for disposal of the leave petition are as follows:

4. The present respondent No.1 as writ petitioner filed writ petition No.7545 of 2015 before the High Court Division and a Rule was issued on the following terms:

“Let a rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to do a hydrographic survey chart from the Meghna river bed situated at Charsholadi Mouza, Paschim Charkrishnapur Mouza, Charjahiruddin Mouza, Nilkomol Mouza, Monipur/Kutubpur Mouza, Bajapti Mouza, Gazipur Mouza, Charbhoirabi Mouza and Miarchar Charfakhordia Mouza under Haimechar Upozilla, Chandpur and Razrajeswar Mouza, Nilarchar Mouza, Ibrahimpur Moua, Zafrabad Mouza, Safarmali Mouza, Shakhua Mouza, Ichuli Mouza, Chaltati Mouza, Gunanandi Mouza, Gorapia Mouza and Induli Mouza, under Chandpur Sadar Upozilla, Chandpur at the cost of the petitioner and to submit a hydrographic survey chart and report to the Respondent No.2 and 4 and also to the petitioner whether sand/earth (Balu) is in existence therein and to allow the petitioner for extraction of sand/earth from the above mentioned area if any sand/earth is found after hydrographic survey chart for public interest at the own cost of the petitioner by country made dredger for the proper navigability of the river and/or pass such other or further order or orders as to this Court may seem fit and proper.”

5. In the writ petition it is contended that the writ-petitioner is the sitting Chairman of No.10 Lokkhipur Model Union Parishad under Chandpur Sadar Upazilla, District-Chandpur and also a conscious citizen of Chandpur district. Siltation at the river bed creates problem to the navigability to the river and also becomes a major source of flood. Bangladesh Inland Water Transport Authority (**BIWTA**) as well as the Ministry of Land allow dredging in the river bed, the Government every year investing a huge amount of money in the river for dredging of river in order to keep up the proper navigability, but there are some char/pastureland under water in the river bed Meghna situated at the Mouzas in question and unless these area are dredged it is not possible to protect the river bank from river erosion.

6. By informing the real scenario of the said dubochar area on 15.06.2015, the petitioner filed two separate applications to the Hon'ble Minister, Ministry of Shipping and Senior Secretary, Ministry of land and requested to allow him to extract sand/earth from the aforesaid area at the cost of the petitioner for the proper navigability of the river. On 16.06.2015 and 17.06.2015 respectively, the Hon'ble Member of Parliament requested the Hon'ble Minister, Ministry of Shipping, the Chairman, BIWTA and the Senior Secretary, Ministry of Land to allow the petitioner to extract sand/earth from the said Mouzas at his own

cost by country made dredger for the wellbeing of public of that area for the proper navigability of the river. But the authority concerned did not allow the petitioner to extract sand/earth from the said Mouzas.

7. Hence, the writ petitioner compelled to file the writ petition.

8. During pendency of the writ petition, the writ-petitioner-respondent filed an application before the High Court Division seeking direction to allow him to deposit money to the concerned authority for a hydrographic survey report within 30 days upon the aforesaid mouzas and accordingly the High Court Division allowed his prayer on 15.12.2015. However, said order was not interfered by this Division in civil petition for leave to Appeal No.875 of 2016. Pursuant to the order of High Court Division the writ petitioner-respondent on 11.12.2017 through a pay order deposited amounting to Tk.28,30,568.22 (Taka twenty-eight lac thirty thousand five hundred sixty eight and poisa twenty two) only in favour of the BIWTA for doing a hydrographic survey upon the said mouzas in question. Upon receiving the money BIWTA held hydrographic survey upon the said mouzas. Secretary, BIWTA vide a letter dated 31.01.2018 informed the Deputy Commissioner, Chandpur that within the said mouzas the survey authority found 45.08 lac cubic meter sand under survey chart No. CD 647/2018A and 41.22 lac cubic meters sand under survey chart No.CD647/2018B totaling 86.30 lac cubic meters.

9. The High Court Division having considered the said survey report, coupled with the fact that on behalf of the writ-respondents no affidavit-in-opposition has been filed and accordingly disposed of the Rule on the following manner:

“The respondents are directed to co-operate substantively with the petitioner allowing him for dredging/extracting of 86.30 lac cubic meter (i.e 30 crore and 48.10 lac cubic feet) sand/earth from the dubochar of Meghna river bed situated under Charsholadi Mouza, Paschim Charkrishnapur Mouza, Charjahiruddin Mouza, Nilkomol Mouza, Monipur/Kutubpur Mouza, Bajapti Mouza, Nilkomol Mouza, Monipur/Kutubpur Mouza, Bajapti Mouza, Gazipur Mouza, Charbhoirabi Mouza and Miarchar Charfakhordia Mouza under Haimchar Upozila, Chandpur and Razarajeswar Mouza, Nilarchar Mouza, Ibrahimpur Mouza, Zafrabad Mouza, Safarmali Mouza, Shakhua Mouza, Ichuli Mouza, Chaltatli Mouza, Gunandi Mouza, Gorapia Mouza and Induli Mouza, under Chandpur Sadar Upozilla, Chandpur (as per annexure L) by country made dredger.”

10. Feeling aggrieved by and dissatisfied with the said judgment the writ-respondents have filed this leave petition.

11. Mr. Kazi Mynul Hassan, learned Deputy Attorney General, appearing for the leave petitioners submits that-

i) the High Court Division failed to appreciate that the Hydrographic Survey report pursuant to section 9(1) (Kha) of the Balumahal and Mati Babosthapon AIn, 2010 is not a sole basis for sand extraction from any river. The Hydrographic Survey report ought to be send to the Deputy Commissioner and to be considered in the light of parameters/assessment stipulated under section 9(2) and (3) and there being no as such assessment under section 9(2) and (3) of the Balumahal and Mati Babosthapon AIn, 2010 by the office of the

Deputy Commissioner, Chandpur in any manner and in the absence of declaration by the Divisional Commissioner as Balumahal for the Mouzas referred in the writ petition, direction passed by the High Court Division allowing sand extraction by the writ-petitioner-respondent No.1, has got no legal basis;

ii) the High Court Division failed to appreciate that there is a specific provision for lease in open tender in case of 'Balumahal' pursuant to Sections 10,11,12,13 and 14 of the Balumahal and Mati Babosthapon AIn, 2010 along with applicable Rules under Balumahal and Mati Babosthapon Rules, 2011. In the instant case there being no such lease, direction upon the writ respondents-petitioners to co-operate substantively allowing the writ-petitioner-respondent No.1 to dredging/extracting of 86.30 lac cubic meter (i.e. 30 crore nad 48.10 lac cubic feet) sand/earth from the dubochar of Meghna river bed situated at the Mouzas in question is absolutely without any lawful basis, therefore direction passed by the High Court Division is liable to be interfered;

iii) the Bangladesh Fish Research Institute, Nandi Kendra, chandpur; Bangladesh Water Development Board (BWDB) and BIWTA by their respective officials expressed grave concern against the nature and manner of sand extraction by the writ-petitioner-respondent;

iv) the way writ-petitioner-respondent extracted sand causing continuing prejudice to eco-diversity, fish production, livelihood of local people by river erosion and same is done by violation of the Act, 2010 and Rules, 2011 as such direction passed by the High Court Division is liable to be set aside.

12. Per contra, Mr. Ajmalul Hossain, learned senior Advocate appearing with Ms. Tania Amir, learned Senior Advocate, supports the impugned judgment making the following submissions:

i) the writ petitioner being the public representative of the local area for the interest of proper navigability of the river Meghna has taken various steps, in particular to remove the sand/earth from the area in question;

ii) the petitioner as per the order of the High Court Division, which was not interfered by the Appellate Division, deposited the cost for hydrographic survey of the mouzas in question and accordingly, survey had been done and the High Court Division having satisfied rightly given direction to the writ-respondents to allow the writ petitioner for dredging/extracting of 86.30 lac cubic meter (i.e. 30 crore and 48.10 lac cubic feet) sand/earth from the dubochar of Meghna River bed situated under the mouzas in question.

iii) the High Court Division in passing the impugned judgment giving direction to the writ-respondents did not exceed its jurisdiction.

13. We have considered the rival submissions of the learned Advocates for the respective parties, perused the impugned judgment and other materials as placed before us as well as the provisions of relevant law and Rules i.e. বালুমহাল ও মাটি ব্যবস্থাপনা আইন, ২০১০ (hereinafter referred to as **Ain, 2010**) and বালুমহাল ও মাটি ব্যবস্থাপনা বিধিমালা ২০১১ (hereinafter referred to as **Bidhimala, 2011**)।

14. Section-2(7) of the বালুমহাল ও মাটি ব্যবস্থাপনা আইন ২০১০ has defined "বালুমহাল" as under:

“(৭) বালুমহাল অর্থ পরিবেশ অক্ষুণ্ণ রাখিয়া আহরণযোগ্য বা উত্তোলনযোগ্য বালু বা মাটি সংরক্ষিত রহিয়াছে এইরূপ কোন উন্মুক্ত স্থান, চা বাগানের ছড়া বা নদীর তলদেশ যাহা এই আইনের অধীন জেলা প্রশাসক কর্তৃক বালুমহাল হিসাবে ঘোষিত।” (underlines supplied)

15. Section 9 of the said Ain speaks about the procedure for declaration and abolishment of a **Balumahal** which is as follows:

“৯। বালুমহাল ঘোষণা ও বিলুপ্তকরণ।-১) বালুমহাল চিহ্নিত ও ঘোষণাকরণের ক্ষেত্রে, উপ-ধারা (২) এর বিধান সাপেক্ষে, জেলা প্রশাসককে নিম্নবর্ণিত পদ্ধতি অনুসরণ করিতে হইবে-

(ক) সংশ্লিষ্ট এলাকার রাজস্ব অফিসার কর্তৃক পরিদর্শন করা হইয়া ট্রেসম্যাপ ও তফসিলসহ স্বয়ংসম্পূর্ণ প্রতিবেদন গ্রহণ করিবেন;

(খ) নৌ-বন্দর সীমার বাহিরে নির্ধারিত নৌ পথে যেখানে বালু বা মাটি আছে সেই সকল স্থানে বাংলাদেশ অভ্যন্তরীণ নৌ-পরিবহন কর্তৃপক্ষ (বিআইডব্লিউটিএ) এর মাধ্যমে হাইড্রোগ্রাফিক জরিপ করা হইয়া স্বয়ংসম্পূর্ণ প্রতিবেদন গ্রহণ করিবেন;

(গ) দফা (ক) ও (খ) এর অধীন গৃহীত প্রতিবেদনের আলোকে বিভাগীয় কমিশনারের নিকট এতদসংক্রান্ত প্রস্তাব প্রেরণ করিবেন।

(২) উপ-ধারা (১) এর দফা (গ) এর অধীন প্রস্তাব প্রেরণের পূর্বে জেলা প্রশাসক পরিবেশ, পাহাড় ধ্বংস, ভূমি ধ্বংস অথবা নদী বা খালের পানির স্রোতের গতিপথ পরিবর্তন, সরকারি স্থাপনার (যথাঃ ব্রিজ, কালভার্ট, রাস্তাঘাট, ফেরিঘাট, হাটবাজার, চা-বাগান, নদীর বাঁধ, ইত্যাদি) এবং আবাসিক এলাকার কোনো ক্ষতি হইবে কিনা সেই বিষয়ে সংশ্লিষ্ট কর্তৃপক্ষের মতামত গ্রহণ করিবেন।

(৩) কোন বালুমহালে উত্তোলনযোগ্য বালু বা মাটি না থাকিলে, বা বালু বা মাটি উত্তোলন করিবার ফলে পরিবেশ ও প্রতিবেশ বিনষ্ট বা সরকারি বা বেসরকারি গুরুত্বপূর্ণ স্থাপনা ক্ষতিগ্রস্ত বা জনস্বার্থ বিঘ্নিত হইবার আশংকা থাকিলে, জেলা প্রশাসক, বিভাগীয় কমিশনারের নিকট উক্ত বালুমহালে বিলুপ্ত ঘোষণা করিবার প্রস্তাব প্রেরণ করিতে পারিবেন।”

16. From the above, it is crystal clear that the Deputy Commissioner of the concerned district has empowered to declare a certain area as '**Balumahal**' subject to fulfillment of certain conditions with the approval of concerned Divisional Commissioner.

17. In the instant case, the alleged 'Dubochars' of Meghna River bed under the mouzas in question have never been declared as '**Balumahal**' by the concerned Deputy Commissioner complying the provisions of relevant law i.e. Ain 2010.

18. Now, the pertinent question is whether the High Court Division in exercising power under Article 102 of the Constitution can declare a particular area as '**Balumahal**' assuming the power of a Deputy Commissioner wherein there is a specific law and Bidhimala to deal with the matter.

19. The answer is very simple-“No”.

20. The High Court Division cannot assume the power and jurisdiction of a particular authority conferred by a specific law/statute in exercising power under Article 102 of the Constitution of the People's Republic of Bangladesh and thus, the High Court cannot declare a particular area as '**Balumahal**' making a particular law i.e. Ain 2010 nugatory or redundant. Thus, in this particular case the High Court Division has traveled beyond its jurisdiction declaring the mouzas in question as '**Balumahal**'.

21. From the impugned judgment it transpires that the High Court Division without taking consideration of the provision of section 9 of the Ain, 2010 straight way treated the

Dubochars of Meghna River bed under mouzas in question as '**Balumahal**' and directed the writ-respondents-petitioners to allow the writ petitioner to extract sand from the said mouzas. Section 10 of the Ain of 2010 provisions about the procedure for leasing a 'বালুমহাল' runs as follows:

“১০। বালুমহাল ইজারা প্রদান, ইত্যাদি।-(১) সকল বালুমহাল, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, উন্মুক্ত দরপত্রের মাধ্যমে ইজারা প্রদান করিতে হইবে।

২) এই আইনের অধীন ইজারা প্রদান সংক্রান্ত সকল বিষয়ে জেলা প্রশাসককে সহায়তা করিবার জন্য প্রতিটি জেলায় জেলা বালুমহাল ব্যবস্থাপনা কমিটি নামে একটি কমিটি থাকিবে।

(৩) উপ-ধারা (২) এর অধীন গঠিত জেলা বালুমহাল ব্যবস্থাপনা কমিটির গঠন ও কার্যপদ্ধতি বিধি দ্বারা নির্ধারিত হইবে।

(৪) উপ-ধারা (১) এর অধীন উন্মুক্ত দরপত্রে জেলা প্রশাসনের নিকট এই আইনের অধীন তালিকাভুক্ত কোন ব্যক্তি বা প্রতিষ্ঠান ব্যতীত অন্য কেহ অংশগ্রহণ করিতে পারিবেন না।

(৫) উপ-ধারা (৪) এর অধীন তালিকাভুক্তির শর্তাদি, মেয়াদ ও পদ্ধতি বিধি দ্বারা নির্ধারিত হইবে।

(৬) কোন বালুমহাল ইজারার প্রস্তাব অনুমোদিত হইবার পর, জেলা প্রশাসক ইজারা প্রদত্ত বালুমহালের সুনির্দিষ্ট বর্ণনাসহ ইজারার শর্তসমূহ সুনির্দিষ্টভাবে উল্লেখপূর্বক বিধি দ্বারা নির্ধারিত পদ্ধতি ও ফরমে, ইজারা চুক্তি সম্পাদন করিবেন।

(৭) ইজারা মূল্যের সম্পূর্ণ অর্থ আদায়ের পর সংশ্লিষ্ট ইজারাহীতাকে বালুমহালের দখল হস্তান্তর করিতে হইবে।” [underline supplied]

22. From the above provision of law, it is clear that a '**Balumahal**' shall be leased out through open tender, and after acceptance of lease proposal, concerned Deputy Commissioner would execute lease agreement in specific manner and procedure and after receiving the lease money the possession of leased '**Balumahal**' will be handed over to the lessor.

23. But the High Court Division making the Ain, 2010 nugatory most illegally and arbitrarily leased out the mouzas in questions to the writ petitioner for extracting sand. The High Court Division, in fact, had played the role of the lessor, which it cannot do.

24. Further, in section 13 of the Ain, 2010 the tenure of lease of a '**Balumahal**' has been mentioned which is as follows;

“১৩। বালুমহাল ইজারার মেয়াদ।- বালুমহাল ইজারা প্রদানের মেয়াদ হইবে প্রতি বাংলা সনের ১ বৈশাখ হইতে ৩০ চৈত্র পর্যন্ত।”

25. But in the instant case the High Court Division has allowed the writ petitioner to extract sand for indefinite period without fixing any tenure and royalty. Thus, we are constrained to hold that the High Court Division disposed of the writ petition beyond the scope of Article 102 of the Constitution of the People's Republic of Bangladesh.

26. Further, section 11 of the Ain, 2010 clearly contemplates that:

“কোন বালুমহাল ইজারা প্রদান করা না হইয়া থাকিলে, উক্ত বালুমহাল হইতে এই আইনের অধীন ইজারা প্রদান ব্যতীত অন্য কোন পদ্ধতিতে বালু বা মাটি উত্তোলন, পরিবহণ, বিপণন ও সরবরাহ করা যাইবে না এবং এই মর্মে কোন রাজস্বও আদায় করা যাইবে না।”

27. On examination of the above provision, it is clear that a '**Balumahal**' cannot be leased out otherwise, save and except under the Ain, 2010.

28. It is now well settled that *mandamus* may not be issued where there is no violation of a legal right or statutory duty by the authority concerned and that a person can avail writ jurisdiction by way of *mandamus* only for enforcement of his legal right or for redress violation of such right. In this connection we may rely on the case of **Hazerullah vs. Assistant Commissioner, Board of Management of Abandoned property**, 55 DLR (AD) 15.

29. In the case of **Telekhal progressive Fisherman vs. Co-operative Society Ltd. vs.**

Bangladesh and others reported in 1 BLD (AD), 103 this Division has observed to the effect:

“It is well settled that in order to entitle a person to ask for the performance of any public duty by mandamus it is necessary to show that he has a legal right for claiming such performance apart from the fact that he is interested in the performance of such duty. In the case of Queen V. Guardians of the Lewisham Union, (1897) 1.Q.B. 498 it was observed:

This court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that a person who sought its interference had a legal right to insist upon such performance.

It was held that an applicant should have a legal and specific right to enforce the performances of such duties. To quote Bruce J;-

It has always required that the applicant for a mandamus should have a legal specific right to enforce the performance of those duties.

In the instant case apart from the privileges of applying for the lease, the petitioner could not point out too any such specific legal right which inheres in him for which he claims the performance of the statutory duties conferred upon the public functionaries.

In the result, therefore, this petition is dismissed.”

30. In the instant case no legal right or statutory right has been created in favour of the writ petitioner to get lease of the ‘**Balumahal**’ in question and the concerned authority refrains to perform its legal or statutory duty. Mere deposition of the cost for hydrographic survey by the petitioner with the approval of court *ipso facto* does not create any legal or vested right in his favour. The writ petitioner did not come before the court to establish any public right but only to serve his selfish ends. A writ of *mandamus* cannot be indulged for such a purpose.

31. Further, Court cannot give any direction which is contrary to the relevant Act and Rules.

32. It is pertinent to mention here that the Port Rules, 1966 made under the Ports Act, 1908 provides for removal of substance including sand from beds of navigable waterways and also excavation of any kind on the bed or foreshore of navigable waterways. The rule 53, 54 and 55 of the Port Rules, 1966 are as follows:

“53. Removal of substance from beds of navigable waterways-

No person shall remove or cause to be removed gravel, sand, earth or substance from the beds of the navigable waterways of a port, without the prior written permission of the conservator and without the aid or under the supervision of such person, as the conservator may appoint to take part in or supervise the performance of such work.

54. Constructions and excavations affecting beds of navigable waterways-

(a) No person shall make any construction or excavation of any kind on the bed or foreshore of navigable waterways within a port without a licence from the Conservator.

Any person, who wishes to obtain a licence under clause (a), shall apply in a prescribed form and shall pay an application fee of five rupees only.

55. Licence to construct or excavate-The Conservator may grant a periodical licence applied for under Rule 54 on such terms and conditions as may be specified in the licence and charge and collect a licence fee for such occupation in assessing such free and determining the period of such licence, the conservator shall take into consideration the importance and the nature of

construction or excavation, the importance of the area, the volume of traffic, the landing and shipping charges for such traffic, the maintenance of the regime of the navigable waterways, and the effect of the construction or excavation therein. Any contravention of the terms and conditions as may be specified in the licence shall render the licence to cancellation without any notice and the licence shall be liable to any of the penalties as specified in the Act.

This Rule shall be deemed to apply to all existing encroachment constructions or excavation, if any, in or on the beds or foreshore of waterways within a port.”

33. However, in the present case the provision of Port Rules, 1966 will not be applicable. Because section 3 of the ‘বালুমহাল ও মাটি ব্যবস্থাপনা আইন, ২০১০’ has over-override other laws and Rules. Section 3 of the said Ain is as follows:

“৩। আইনের প্রাধান্য।- Ports Act, 1908 (Act XV of 1908), Inland Water Transport Authority Ordinance, 1958 (E.P.Ord.No.LXXV of 1908), খনি ও খনিজ সম্পদ (নিয়ন্ত্রণ ও উন্নয়ন) আইন, ১৯৯২ (১৯৯২ সনের ৩৯ নং আইন) অথবা অন্য কোন আইন বা তদধীন প্রণীত বিধি বা অন্য কোন আদেশ, প্রজ্ঞাপন বা নির্দেশনায় বালুমহাল ব্যবস্থাপনা এবং এতদসংক্রান্ত অন্যান্য বিষয়ে যাহা কিছুই থাকুক না কেন, এই আইনের বিধানাবলী প্রাধান্য পাইবে।”

(underlines supplied).

34. In view of the above, for the excavation of any kind of bed of navigable waterways or removal of sand (বালু) outside the port area, the provision of ‘বালুমহাল ও মাটি ব্যবস্থাপনা আইন, ২০১০’ will be applicable, even for the purpose of proper and smooth navigation. In this regard Bangladesh Inland Water Transport Authority (BIWTA) has got no authority to deal with the matter under the Port Rules, 1966.

35. Having, considered and discussed as above we have no hesitation to hold that the High Court Division has committed serious error in passing the impugned judgment and order.

36. Before parting it is necessary to note that since 2016 the writ petitioner-respondent had extracted sand (বালু) from the mouzas in question without paying any royalty to the Government in an arbitrary manner which has already incurred a heavy financial loss to the Government.

37. Thus, the concerned authority, in particular the Deputy Commissioner, Chandpur is directed to take necessary steps to realize the royalty for the alleged extraction of sand (বালু) from the petitioner, from the date of the judgment of the High Court Division till the date of order of stay (04.04.2022) passed by this Division.

38. It also surprises us that on behalf of the Government no affidavit-in-opposition was filed before the High Court Division to contest the Rule and the conduct of the concerned law officers are highly suspicious. The concerned Government officials of Chandpur District administration slept over the matter for a long span of time. We express our dissatisfaction with the conduct of the concerned Government Officials of Chandpur District Administration who slept over the matter years together as well as the law officers who did not perform their duties properly before the High Court Division.

39. Accordingly, the leave petition is disposed of.

40. The judgment and order dated 05.04.2018 passed by the High Court Division in writ petition No.7545 of 2015 disposing the Rule with directions is hereby set aside.