

8 SCOB [2016] HCD 59**HIGH COURT DIVISION
(Special Original Jurisdiction)**

Writ Petition No. 1836 of 2011

...Respondents

An application under Article 102 of the
Constitution of the People's Republic of
BangladeshMr. Sarwar Ahmed, with
Mr. Zaidy Hasan Khan, Advocates
...for the petitioner**Fatema Enterprise**

...Petitioner

Mr. Tapash Kumar Biswas, Advocate
...for the respondents

Verses

Heard on: 15.04.2015

Judgment on: 06.05.2015

Bangladesh and others**Present****Mr. Justice Quazi Reza-Ul Hoque****And****Mr. Justice Abu Taher Md. Saifur Rahman****A matter of law of contract can be looked into in a writ jurisdiction if Government is a party:****Basic principle of offer and acceptance:****The crux of the issue is as to whether after receiving the consideration value in the form of earnest money as has been stipulated by the respondents through their own valuation and tender can be changed. Although, this is a matter of law of contract, however, since Government is a party, so this can be looked into in a writ jurisdiction. The basic principle of offer and acceptance is – the offer is binding upon the offeror (proposer) the moment the offeree (acceptor), puts the acceptance into motion. In the instant case, the offer and acceptance both were complete since the tender was invited (offer) the petitioner participated and it was accepted by the respondent No. 2 and part consideration was also paid in the form of earnest money and in such circumstance the respondents, i.e. the offeror Government has no other option left except transferring the land in favour of the petitioner. The property in the goods in fact passes over to the buyer when the sale is complete and in the instant case the sale became binding from the moment the payments were made in compliance with the tender. ... (Para 22)****Principles of legitimate expectation:****The above principles are directly applicable in the instant case as the respondents promise to transfer the land on payment of consideration had been overridden by the further invitation of tender or initiating a new valuation without cancelling the previous tender or returning the money of the Petitioner. ... (Para 28)****Grounds of judicial review:****The House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal head, namely– illegality, procedural impropriety and irrationality, illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision**

making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures, such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. ... (Para 30)

Judgment

Quazi Reza-Ul Hoque, J:

1. The instant Rule was issued on 02.03.2011 calling upon the respondents to show cause as to why the Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure-E), issued by respondent No. 2 under signature of respondent No. 4 proposing valuation of plots to be leased by respondent No. 2, shall not be declared without lawful authority and is of no legal effect and why the respondents shall not be directed to execute lease deed and hand over possession to the petitioners of Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka advertised by respondent No. 2 vide auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A) and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The facts necessary for disposal of the Rule, as has been stated by the petitioner, in short, is that the petitioners seek a direction upon the respondents to execute lease deed and hand over possession of plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka (hereinafter referred to as the plot) in favour of the petitioner advertised vide auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A).

3. The petitioner also impugns memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure-E) issued by respondent No. 2 under signature of the respondent No. 3 proposing valuation of plots to be leased by respondent No. 2 the petitioner who prays for a direction upon the respondents to lease out the plot to the petitioner.

4. Rajdhani Unnayan Karttripakha (RAJUK) through auction tender No. 1/2007-2008 dated 30.04.2008 (annexure- A) invited sealed offers for leasing out the plots scheduled therein, which included Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka. And by memo dated 05.06.2008; RAJUK extended the last date for submission of sealed bids for the aforesaid tender to 30.06.2008 (annexure- B).

5. The petitioner participated in the said tender upon purchase of tender document at the price of Taka 2, 000/- and submitted bids of Taka 4,90,00,000/- (Taka four crores and ninety lacs only) (at Taka 49,00,000/- per katha) for plot No. 65 measuring 10 kathas in Uttara Commercial Area, Sector 13 (annexure- C). Each bid was accompanied by pay orders for earnest money of Taka 20, 00,000/- against each plot, as required by the terms and conditions of the tenders (annexure- D).

6. The bids of the petitioner at Taka 49,00,000/- (forty nine lac only) was much higher than the value of Taka 20,00,000/- per katha for the plots in Uttara as estimated at the time by RAJUK. The petitioner's bid for the said plot was found to be the highest and accordingly, the said plots ought to have been allotted to the petitioners by RAJUK. However, RAJUK has

since been prevaricating on the issue, and the plot has not been allotted and leased to the petitioner till date.

7. By a memo dated 27.01.2009, i.e. subsequent to the invitation of the above tender and submission of the bid, RAJUK, by reference to the said tender sent a proposal to the Secretary, Ministry of Public works and Housing for approval of revision of, amongst others, the values for commercial plots in Uttara to Taka 1,20,00,000/- per katha (annexure- E).

8. Subsequently the Ministry by a memo asked R AJUK to give a comparison between the proposed values and the earlier values and by memo dated 18.10.2009, RAJUK confirmed the previous values of Taka20,00,000/- per katha in Uttara. By a memo dated 15.11.2009 the Ministry asked for the basis of such valuation and the rules and regulations pertaining thereto. Since then, no further action has been taken (annexure- F and F-1).

9. Under clause 4(2) of the Tender Schedule, RAJUK was obligated to refund the earnest money of the unsuccessful bidders and accordingly RAJUK refunded the same to all bidders except the petitioner who was adjudged to be the highest successful bidder which is evidenced by the minutes of the meeting of the Board of RAJUK being Board Memo no. 09/2008 of the meetings dated 03.09.2008, 04.09.2008 and 07.09.2008 and as such the prolongation of awarding and leasing out the plot in the favour of the petitioner is nothing but an abuse of process (annexure- I).

10. The admitted position that the petitioner's bids for the plots was the highest, being much more than the value of the plot estimated by RAJUK at the time of the bid. Hence the petitioner is entitled to have the plot allotted and leased in its name. However, RAJUK has not done so, despite having retained the earnest money for a period which has now exceeded two years. RAJUK's inaction in this regard has continued despite the petitioners letter dated 10.10.2010 and 20.12.2011 (annexure- G and G-1).

11. Having received no response from RAJUK, the petitioner finally was forced to send a notice demanding justice dated 22.12.2011 upon the respondents, but without any avail (annexure- H). It is stated that till date RAJUK has not rejected the bids of the petitioner.

12. Mr. Sarwar Ahmed, with Mr. Zaidy Hasan Khan, the learned Advocates appearing for the petitioner submitted that it is apparent on the face of the records that admittedly the petitioner was the highest bidder offering Taka 61,00,000/- per katha, which was much higher than the prevailing valuation of Taka 20 lac per katha as stipulated by RAJUK in the Tender Notice. The petitioner made the payment of earnest money which is retained by RAJUK till date. The bid of the petitioner has not been cancelled.

13. He further submitted that the petitioner had/have a legitimate expectation to the effect that pursuant to the payment of the earnest money in compliance with the terms and conditions of the tender, the respondents should have transferred the properties in favour of the petitioner upon executing and registering deed of transfer but without doing so, they have committed gross illegality and acted beyond their jurisdiction in not honouring the bid as per law.

14. He again submitted that the impugned order (annexure-E) is *ex facie* illegal without any lawful authority and is of no legal effect in as much as it has been issued without cancelling the tender and retaining the entire earnest money from the petitioner without giving them an opportunity of being heard inasmuch as admittedly no show cause notice had

ever been issued upon the petitioner before issuing the impugned order, which therefore have been issued without lawful authority and therefore that is of no legal effect.

15. Mr. Ahmed, again submitted that the petitioner have acquired a vested right in the scheduled land, in as much as, pursuant to their application, the respondents had accepted his bid as the highest bid and the vested right has been denied and curtailed by the impugned order which is an act of blatant arbitrariness and without jurisdiction committed by the respondents.

16. He further submitted that the impugned order has been passed proposing a so called valuation report which was yet to be approved, which was prepared after the payment of earnest money was made in compliance with the tender and, as such, the issuance of the impugned order on the ground of valuation of a subsequent date cannot be tenable in the eye of law in as much as it cannot have any retrospective effect.

17. He again submitted that the impugned order is issued without applying the judicial mind by the respondents affecting the right to property and right to be treated in accordance with law of the petitioner guaranteed under Articles 31 and 42 of the Constitution. And in this regard he referred to the persuasive decision of Union of India vs. Hindustan Development Corporation, AIR 1994 SC 988 wherein the Supreme Court of India held inter alia that;

It is true, as today, that the Government on a welfare State has the wide powers in Regulating and dispensing of special services like leases, licenses and contracts etc. the magnitude and range of such Government function is great. The Government while entering into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. In the matter of awarding contracts inviting tenders is considered to be one of the fair ways. If there are any reservations or restrictions then they should not be arbitrary and must justifiable on the basis of some policy or valid principles which by themselves are reasonable and not discriminatory.

18. And the said principle has also seen reflected in our jurisdiction in the case of Golam Mustafa vs. Bangladesh and Others, 15 BLT 128, wherein legitimate expectation has been enunciated in the following terms:

The work order was issued in favour of the Principal Information Officer, Department of Information but it was known to all the respondents that earlier on an open tender notified by the Ministry of Information, the petitioner alone was selected to print and market the said sets of 'Dalilpatra', that there was no other printer or publisher other than the petitioner who was authorized to do so for and on behalf of the Respondent No.2 that in any case the respondent No.4 himself or his department was not going to print, bind and supply the said sets, that earlier the respondent No.4 himself acknowledged that Hakkani Publishers would print, publish and deliver 2317 sets of Dalilpatra (annexure-L). As such, when the work-order was issued on 27.05.2004, it was presumed to be known to all concerned in both the Ministries of the Government that Hakkani Publishers was going to supply the required sets. this presumption was not denied by any of the respondents. Under such circumstances, on the issuance of the work order on 27.05.2004, the petitioner now can claim that it can legitimately expect that he would be entitled to supply 2317 sets of Dalilpatra' by 10.06.2004 and receive the payment thereon. Although the petitioner earlier when he participated in

the tender had no legal right to supply the sets of dalilpatra' to the selected schools under the project but by now on the conducts and various representations of the concerned respondents as narrated above, it was no longer a hope or wish or an anticipation not even a mere expectation but it ripened into a legitimate expectation clothing the petitioner with the legal rights to force the respondents to honour and fulfill their commitments indicated in their various correspondences, culminated in issuing the work-order dated 27.05.2004. This expectation was independent of any contractual right. It appears that thereafter by his letters dated 07.06.2004 and 08.06.2004 (annexure-O and O1), the petitioner informed the respondent No.4 that the total number of 2317 sets of the 'Dalilpatra' were then ready for delivery and he asked for the place where those sets are to be delivered. But in the meantime suddenly the work order itself had been cancelled by the memo dated 07.06.2004 (annexure-P) issued by the respondent No.6, addressed to the respondent No.4- as such, the cancellation of the work order dated 27.05.2004 (annexure-P1) issued by the respondent no.5 were irrational and perverse and also in violation of the legitimate expectation of the petitioner as he was debarred from supplying the 'Dalilpatra' or distribution in 2317 selected schools, as such, illegal.

...Apparently, this decision to cancel the work-order was arbitrary, unfair and unreasonable. The petitioner, although may not have strict legal rights against any of the respondents but has a legitimate expectation to supply 2317 sets of "Dalilpatra' to the respondent No.6, as such, has right to challenge the said decision.

19. He concluded his submission by saying that in the facts and circumstances, the Rule may kindly be made absolute, with cost, and the impugned order being Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure- E), issued by respondent No. 2 under signature of respondent No. 4 proposing valuation of plots to be leased by respondent No. 2 should be declared to have been made without lawful authority and is of no legal effect and the respondents be directed to lease out to the petitioner, the Scheduled Plot advertised by respondent No. 2 vide auction tender No. 1/2007-2008 dated 30.04.2008.

20. None appeared to contest the Rule.

21. On perusal of the submission of the learned Advocates of the both the parties, the petition and the available documents, it is apparent that by auction tender No.1/2007-2008 dated 30.04.2008 RAJUK invited sealed offers for leasing out the plots scheduled therein, which included Scheduled Plot. By a memo dated 05.06.2008, RAJUK extended the last date for submission of sealed bids for the aforesaid tender to 30.06.2008. The petitioner participated in the said tender upon purchase of tender documents at the price of Taka 2,000/- for auction documents and submitted bids of Taka 4,90,00,000/- (at the rate of Taka 49,00,000/- per katha) for the Scheduled Plot. Bid was accompanied by pay orders for earnest money of Taka 20,00,000/- against the Scheduled Plot, as required by the terms and conditions of the tenders. The bids of the petitioner was much higher than the value of Taka 20,00,000/- per katha for the plots in Uttara as estimated at the time by RAJUK, which is clearly embraced in the Tender Advertisement/ documents. The petitioner's bid for the said plot was found to be the highest by the convenor of the Auction Committee. The Committee also suggested refunding the rest earnest money retaining the highest bid. Accordingly, the Scheduled Plot expected to have been allotted to the petitioner by RAJUK. However, RAJUK has since been prevaricating on the issue, and the plots have not been allotted and leased to the petitioner till date. By a memo dated 27.01.2009, i.e. subsequent to the invitation of the

above tender and submission of the bid, RAJUK, by reference to the said tender, sent a proposal to the Secretary, Ministry of Public Works and Housing for approval of revision of, amongst others, the values for commercial plots in Uttara to Taka 1,20,00,000/- per katha. The Ministry by a memo asked RAJUK to give a comparison between the proposed values and the earlier values and by memo dated 18.10.2009, RAJUK confirmed the previous values of Taka 20,00,000/- per katha in Uttara. By a memo dated 15.11.2009, the Ministry asked for the basis of such valuation and the rules and regulations pertaining thereto. Since then, no further action has been taken. It is the admitted fact that the petitioner's bid for the above plot was the highest, being much more than the value of the plots estimated by RAJUK at the time of the bid. However, RAJUK has retained the earnest money till date. RAJUK's inaction in this regard has continued despite the petitioner's letter dated 16.05.2010. Seeing no response from RAJUK, the petitioner finally caused a notice demanding justice dated 22.12.2011 to be served upon the respondents, but without any avail. The respondents, RAJUK have not rejected the bids of the petitioner.

22. The crux of the issue is as to whether after receiving the consideration value in the form of earnest money as has been stipulated by the respondents through their own valuation and tender can be changed. Although, this is a matter of law of contract, however, since Government is a party, so this can be looked into in a writ jurisdiction. The basic principle of offer and acceptance is – the offer is binding upon the offeror (proposer) the moment the offeree (acceptor), puts the acceptance into motion. In the instant case, the offer and acceptance both were complete since the tender was invited (offer) the petitioner participated and it was accepted by the respondent No. 2 and part consideration was also paid in the form of earnest money and in such circumstance the respondents, i.e. the offeror Government has no other option left except transferring the land in favour of the petitioner. The property in the goods in fact passes over to the buyer when the sale is complete and in the instant case the sale became binding from the moment the payments were made in compliance with the tender.

23. The respondents' plea that the valuation was much lower than the true market value is not at all sustainable since there is no stipulation that there was any interference by the petitioner in ascertaining the value of the property, rather the valuation of RAJUK was Taka 20 lac per katha when the petitioner offered Taka 49,00,000/- per katha. A mere plea of public interest applying against public itself must have some basis.

24. The governing principles was laid down by the Court of Appeal in *R v North and East Devon Health Authority exp Coughlan* [2001] QB 213, at paragraph 57, wherein three categories of case were identified:

- i. Those where the public authority was only required to bear in mind its previous policy giving weight, but no more, if it thinks right to the promise before deciding to change course.
- ii. Those where the promise is of consultation before a particular course is adopted.
- iii. Those where the promise has induced a legitimate expectation of a benefit which is substantive.

25. In the first category of case the Court of Appeal held that it could only intervene on traditional *Wednesbury* [1948] 1KB 223, sense. In the second category of case the consultation has to be given unless there is an overriding reason to resile from the promise. Here the Court judges the requirement of fairness. In the third category of case the Court will require the promise to be performed, if it frustrates the promise, which is so unfair as to

amount to an abuse of power. The Court will weigh upon the requirement of fairness against any overriding interest relied upon for the change of policy.

26. There is a recent and significant decision of the Court of Appeal in R (Bhatt Murphy) and Others v Secretary for the Home Department, [2008] EWCA Civ 755, wherein it was held that:

The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of if the stipulated amount is paid as per conditions contained in the letter of intent.

27. In the case of Golam Mostafa vs. Bangladesh and others 2007 (XV) BLT(HCD) 128, the concept of legitimate expectation was explained. The crux of the decision is that a judicial review may be allowed on the plea of frustration of legitimate expectation in the following situations:

- i. If there is a promise by the authority expressed either by their representations or by conducts.
- ii. The decision of the authority was arbitrary or unreasonable within the Wednesbury principle.
- iii. There was a failure on the part of the concerned authority to act fairly in taking the decision.
- iv. The expectation to be crystallized into a legitimate one, it must be based on clear facts and circumstances leading to a definite expectation and not a mere anticipation or a wish or hope and also must be reasonable in the circumstances.
- v. Judicial review may allow such a legitimate expectation and quash the impugned decision even in the absence of a strict legal right unless there is an overriding public interest to defeat such an expectation.

28. The above principles are directly applicable in the instant case as the respondents promise to transfer the land on payment of consideration had been overridden by the further invitation of tender or initiating a new valuation without cancelling the previous tender or returning the money of the Petitioner.

29. In A.K.M. Kawser Ahmed and others vs. Bangladesh, 65 DLR 277, wherein it was observed that:

The potentially important point is that change of policy should not violate the substantive legislative expectation and if does so it must be as the change of policy which is necessary and such a change is not irrational or perverse.

30. The House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal head, namely– illegality, procedural impropriety and irrationality, illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures, such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

31. In a recent case of Chairman, All India Railway Rec. Board vs. K. Shyam Kumar, 2010, the Indian Supreme Court has applied the principle of Wednesbury unreasonableness as well as the doctrine of proportionality. The case involved appointment of some railway employees, where investigation done by the CBI (Central Bureau of Investigation) found mass irregularities including cheating, impersonification etc. The findings of the High Court came before the Supreme Court. The Court very pertinently observed the view of some English author's view that Wednesbury "unreasonableness" principle is at its terminal point having been replaced by the principle of "rationality", as not just.

32. It is to be noted that a Government office must not act in a manner that vitiates the right of a citizen. In this regard our Court observed in Bangladesh vs. Dr. Nilima Ibrahim, 1981 BCR (AD) 177 *inter alia* that:

Any action taken by an authority outside the power conferred is invalid and ultra vires.

33. And also have set its own standard in the light of decisions made in other jurisdictions and of our own, such as, in Bangladesh Soya-Protein Project Ltd. vs. Secretary, Ministry of Disaster Management and Relief 22 BLD (2000) HCD 378; The Chairman, Bangladesh Textile Mills Corporation vs. Nasir Ahmed Chowdhury 22 BLD (AD) (2002) 199; Dhaka WASA vs. Superior Buildings and Engineers Ltd. 51 DLR AD 1999. In Khizar Hayat vs. Zainab, 19 DLR (SC) 372 it was observed *inter alia* that:

...failure to exercise jurisdiction is an error to the root of jurisdiction. The principle is well established that if a statutory tribunal fails to exercise jurisdiction vested in it by law, such failure will open to correction in exercise of power of judicial review.

34. So, in the premises set forth above, we are of the view that the impugned letter receiving the earnest money and asserting the petitioner as the highest bidder was unjust and were done without lawful authority and are of no legal effect.

35. It is further to be noted that there is no allegation of fraud or *mala fides* from the respondents in the process of the first tender in which the petitioner became the highest bidder. Hence, we find that the petitioner is an innocent bidder who had offered more than thrice the amount of the existing valuation.

36. In the result, the Rule is made absolute. The impugned order being Memo No. RAJUK/Estate/Mohakhali/430 Stha dated 27.01.2009 (annexure- E), issued by respondent No. 2 under signature of respondent No. 4 proposing revaluation of plots to be leased by respondent No. 2 (annexure-E) issued by respondent No. 2 under signature of the Respondent No. 4, proposing revaluation of plots is hereby declared without lawful authority and is of no legal effect. The respondents are directed to transfer the land as described in the tender being Plot No. 65 of Uttara Commercial Area, Sector 13, Sonargaon Janapath Road, Dhaka advertised vide auction tender No. 1/2007-2008 dated 30.04.2008 to the petitioner within 30 days of receipt of this judgment and order upon receipt of the rest of the value of the plot, i.e. the bid amount, as per bid dated 30.06.008.

37. There is no order as to costs.

38. Send a copy of this order to the concerned authority immediately.