

In the Supreme Court of Bangladesh
 High Court Division
 (Special Original Jurisdiction)
Present
Madam Justice Kashefa Hussain
And
Madam Justice Kazi Zinat Hoque

Writ Petition No. 9324 of 2019

In the matter of:

An application under Article 102 read with Article 44 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

The Committee for protection of Monthan Pond, represented by its Member Palash Kantinag

..... Petitioner

Vs.

The Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Segun Bagicha, Dhaka-1000 and others

..... Respondents

Mr. M. Liton Ahmed, Advocate

..... For the petitioner

Mr. Arobindh Kumar Roy, Advocate

..... for the Respondent No. 6

Mr. Noor Us Sadik Chowdhury, D.A.G

with Ms. Syeda Sabina Ahmed Moli, A.A.G

with Ms. Farida Parvin Flora, A.A.G.

.... for the respondents

Heard on: 07.08.2022, 10.08.2022,

31.08.2022 and

judgment on: 04.01.2023.

Kashefa Hussain, J:

Rule Nisi was issued calling upon the respondents to show cause as to why the inaction of the Respondents in disposal of the application

dated 20.06.2019 filed by the petitioner from earth filling and construction of shopping center at Monthan Pond, Rangpur should not be declared to have been done without lawful authority and 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 is The Committee for protection of Monthan Pond, Rangpur represented by its member Palash Kantinag son of Babul Nag of Village- Rothbari, Police Station- Rangpur Sadar, District- Rangpur

The respondent No. 1 is the Government of Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Segun Bagicha, Dhaka-1000, respondent No. 2 is the Secretary Ministry of Environment, Forest and Climate Change, Bangladesh Secretariat, Segun Bagicha, Dhaka-1000, respondent No. 3 is the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Segun Bagicha, Dhaka-1000, respondent No. 4 is the Chairman, Land Reform Board, Ministry of Land 141, BIWTA Bhaban, 143 Motigheel Road, Motijheel, Dhaka-1000, respondent No. 5 is the Director General, Department of Environment, Paribesh Bhaban, E/16 Agargaon, Sher-e-Bangla Nagar, Dhaka-1207, respondent No. 6 is The Director General, Bangladesh water Development Board, Wapda Building (2nd Floor) Motijheel C/A, Dhaka-1000, respondent No. 7 is the Director General, Bangladesh Fire Service and Civil Defence, 38-46 Hazi Alauddin Road, 38-47, Fulbaria, Dhaka-1000, respondent No. 8 is the Divisional Director (Deputy Director), Bangladesh Fire Service and Civil Defense, Rangpur Division,

Rangpur, respondent No. 9 is The Deputy Commissioner Rangpur, respondent No. 10 is the Mayor City Corporation, Rangpur Sadar, Rangpur.

The petitioner's case inter alia is that the Fire Service Unit, Rangpur started earth filling on several hundred years old Monthan Pond located adjunct to the Fire Service Station, Rangpur Sadar, Rangpur containing 1.04 acres of land situated in Mouja Radaballob, Police Station Rangpur Sadar, J.L. No. 12 recorded in Khatian No. 13801 Plot No. 14083 in the name of the respondent No. 1. The original copy of the khatian lies in the custody of the respondents and the petitioner has managed to obtain a copy of the same.

That on 19.06.2019 the elite persons from the Community formed a Committee known as "The Protection of Traditional Monthan Pond Committee" to protect Monthan Pond, Rangpur consisting of 13 members from the community presided over by its secretary.

That on 20.06.2019 the secretary of the aforesaid committee filed an application to the respondents to take necessary steps to stop the respondents from earth filling and constructing shopping center at Monthan Pond, Rangpur which has been duly received by the office of the respondent No. 9 by putting its seal and signature on it.

That on 21.06.2019 news was published in "the Daily Prothomalo" reporting the news on earth filling at Montan Pond, Rangpur and the concerned people from the community stood against

the action of the Rangpur Fire Service by creating human chain protest in front of the office of the Rangpur Fire Service and Civil Defense.

That on 24.06.2019 the committee for Protection of Traditional Monthan Pond, Rangpur under the signature of the petitioner filed an application before the respondent No. 10 requesting to stop earth filling and constructing shopping center at Monthan Pond, Rangpur which was has been duly received by the respondent No. 10 but till today the respondents has have not taken any initiative to comply with the application of the petitioner.

That on 27.06.2019 “the Dainikjugeralo” and “the Dainikbayannoralo” and on 28.06.2019 “the Daily Prothomalo” published the news reporting that the bank of the aforesaid pond was damaged because of removing earth from the bottom of the aforesaid pond by the respondent No. 8.

That the respondent No. 10 vide letter under Memo No. 46.18.0000.101.99.001.19-2178 dated 03.07.2019 requested the respondent No. 8 to protect Monthan Pond, Rangpur.

That the Member of the aforesaid Committee submitted “Smaroklipi” requesting the respondent No. 8 to stop illegal earth filling on Monthan Pond, Rangpur and the respondent No. 8, the Deputy Commissioner, Rangpur through his mobile phone directed the respondent No. 7 to stop earth filling at Monthan Pond. The said news was published in “The Daily Protidiner Barta” on 03.07.2019.

That thereafter on 05.07.2019 the newly joint Deputy Commissioner, Rangpur arranged a meeting in Circuit House, Rangpur regarding protection of the Monthan Pond but the meeting was finished undecided. The said news was published in “The Daily Karatoa”.

That on 07.07.2019 “the Dainik Kalerkantho” published a report stating that the Committee for protection of the Traditional Monthan Pond and the Fire Service, Rangpur were in face to face conflicting situation regarding Monthan Pond issue in which the respondent No. 7 has been building a shopping centre by earth filling on the Monthan Pond.

That on 13.07.2019 in a Press Conference at Ahar Hotel in Rangpur the Secretary of the “Protection of Traditional Monthan Pond Committee” demanded to stop construction work at Monthan Pond, Rangpur and demanded to save the aforesaid pond for the pupose of ecological balance in the Rangpur Sadar. The said news was published in “Swadesh Pratidin” and in “the Daily Bayannor Alo” on 14.07.2019.

That on 06.08.2019 the petitioner filed an application to the respondent No. 5 requesting to preserve the Monthan Pond, Rangpur from earth filling and to stop construction of shopping center in the aforesaid pond. The said application was duly received by the respondent No. 5 by putting its seal and signed on the application. The original copy of the said application lies in the custody of the respondent No. 5 and the petitioner has the copy of the same.

That the respondent No. 8 has been filling earth on the Monthan Pond and constructing shopping center without obtaining lease from the Government causing damage to ecological balance upon filling earth on the retention pond located in the heart of Rangpur Sadar causing irreparable loss and injury to the people in the community. Therefore interference by the High Court Division is necessary to restrain the respondent No. 8 from earth filling and construction of shopping center at Monthan Pond, Rangpur. Hence the writ petition.

Learned Advocate Mr. Liton Ahmed appeared on behalf of the petitioner learned Advocate Mr. Arobindh Kumar Roy appeared for the respondent No. 6, learned advocate Mr. Monirujjaman appeared for the respondent No. 7, learned Deputy Attorney General Mr. Noor Us Sadik Chowdhury with Ms. Syeda Sabina Ahmed Moli, A.A. with Ms. Farida Parvin Flora, A.A.G appeared for the respondent No. 9.

Learned Advocate for the petitioner submits that the respondents in particular the respondent No. 7 to fulfill their unlawful purpose have been attempting to fill up the old age pond for purpose of construction of a shopping center. He submits that the owner of the traditional Monthan Pond is the government but however the Fire Service Department in collusion with some other government officials for purposes arising out of their own interests have been making attempts to fill up the old age pond and thereby destroy the ecological balance of the area. He submits that it is evident from some of the annexures marked in the writ petition that the pond is adjacent to private residents wherein the local residences

of the locality are living with their families. He takes us to annexure-F series wherefrom he points out that it was published in a local daily news report that the banks of the said pond was damaged because of removing earth from bottom of the pond. He next points out that the members of the petitioner committee submitted a স্মরণলিপি requesting the respondent No. 8 Fire Service to stop earth filling at Monthan Pond but however the respondents did not any pay any heed to the petitioners request. He takes us to Annexures- I, J, K, K1 and Annexure- L and M of the writ petition. He submits that all these annexures clearly manifest that the age old pond was being unlawfully filled up to build a shopping center at the instance of some interested quarters being officials of the Fire Service Department in collusion with other officials of the government.

He next argues that it is needless to state that ecological balance is one of the primary priorities of the government and to that effect the government enacted the বাংলাদেশ পরিবেশ সংরক্ষন আইন-১৯৯৫। He assails that the provisions of the বাংলাদেশ পরিবেশ সংরক্ষন আইন-১৯৯৫ clearly intend that no waterbody (including some other places) shall be filled up except in respect of any national interest. He substantiates his submissions by drawing our attention to Section 2ক (কক) of the বাংলাদেশ পরিবেশ সংরক্ষন আইন-১৯৯৫। He points out that Section 2ক (কক) provides the definition of জলধার (waterbody) From Section 2ক (কক) he points out that the term পুকুর (Pond) is clearly included within the definition of জলধার (waterbody). Next he takes us to Section 6(ঙ) of the Ain of 1995 wherefrom he shows

that the general intention of the Ain is that notwithstanding anything contained in any other law for the time being in force, the nature of any জলাধার (waterbody) cannot be changed by earth filling or by any other manner cannot be changed except for national interest and only after obtaining permission from the concerned authority. He argues that by no stretch of imagination can it be contemplated that building a shopping center to serve the interest of the Fire Service Department can fall within the ambits of indispensable national interest (অপরিহার্য জাতীয় স্বার্থ). He continues that since filling up a pond for the purpose of building a shopping center is by no means indispensable national interest (অপরিহার্য জাতীয় স্বার্থ) therefore the conduct of the respondents is totally arbitrary, illegally and malafide intention and without lawful authority. He submits that therefore a direction is necessary to stop the earth filling and restore the pond to its original position.

In support of his submissions he draws us to some photographs of Annexure-N series in the supplementary affidavit. The claims of the respondents is that the area of the pond is not to build a shopping center but rather the pond is being filled up to build footpath for the public and for the public interest. The learned advocate for the petitioner points out to these photos. From these photos he controverts that the photographs clearly manifest that pillars were being constructed on the pond. He submits that it is evident that pillars were being built for construction of building and not for purposes of making a footpath. He submits that therefore the malafide intention and collusory motives of the respondents

particularly the Fire Service Department is as clear as day light. In further support of his submissions he cites a decision of our Appellate Division in Civil Petition For Leave to Appeal No. 1162 of 2013 reported in 9 SCOB[2017] AD 70. He particularly draws our attention to para-19 of this decision. He points out that in this decision our Apex Court held that the prohibition imposed by section 5 of the Joladhar Ain read along with Section 6(Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition is a punishable offence under the Ain. In the light of his over all submissions he concludes his submissions upon assertion that the Rule bears merits and ought to be made absolute for ends of justice.

On the other hand learned Advocate Mr. Monirujjaman representing the respondent No. 7 by filing affidavit in opposition opposes the Rule. He controverts the contention of the petitioner and submits that the pond was not being filled up to construct any market place. He submits that rather the pond was being renovated and there was a proposal that the pond be used for swimming training for fire fighters belonging to the Fire Service and which will bring fruitful consequences for the local residents. He submits that swimming training is necessary for fire fighters for protection from any emergency. He further submits that therefore no building was being constructed on the pond and there will be no change in the nature of the waterbody and therefore there is no threat to change or jeopardize or otherwise cause any hazard to the ecological balance of the area. He concludes his

submissions upon assertion that the Rule bears no merits and ought to be discharged for ends of justice.

Learned Deputy Attorney General represented the respondent No. 9 and also opposes the Rule. He substantively supports the submissions of the respondent No. 7. He also submits that it is not the intention of the respondents to fill up the pond to construct a shopping center. He continues that the respondents were only attempting to use the pond for Duburi Training, Swimming Training, preservation of rain water and water rescue course vide memo dated 23.06.2019. He however submits that the Government has not yet handed over the possession of the pond (Monthona Pukur) to the Fire Service Divisional Office, Rangpur. Upon a query from this bench he submits that the government still is the owner of the property as it has not handed over the pond (Monthana Pukur) to the respondent No. 7.

Learned Deputy Attorney General however concedes that to maintain ecological balance of the environment is an absolute environmental necessity and therefore in accordance with the Ain of 1995 no act can be done which may otherwise cause hazard to the ecological balance of any place.

We have heard the learned counsels and perused the application and materials before us. Both parties made some factual submissions controverting the other side regarding the intention of the earth filling near the pond.

Admittedly the Monthona Pukur is a traditional age old pond situated in the locality and it is also admitted that it is in the ownership of the government still and therefore it is a public property. The petitioner alleged that for some time the respondent No. 7 Fire Service Department in collusion with some other government officials have been attempting to fill up the age old pond to construct a shopping center to serve their own purposes and thereby have been trying to destroy the ecological balance of the locality.

On the other hand the respondents contradicted the submissions of the petitioner by claiming that the respondents have sent proposal to the Ministry of land for allotting the pond for fire fighter Duburi Training, Swimming Training, water preservation etc.

We have examined some of the materials before us. We have also examined Annexure-M with some photographs of the supplementary affidavit filed by the learned advocate for the petitioner. From annexure-A photographs it is apparently manifest that some pillars have been built in the pond. It would be most absurd to contemplate that a pillar has to be built for purposes of swimming training, Duburi Training etc.

It is also to be noted that the respondents have been making some inconsistent submissions before this bench. The respondent No. 7 at one stage of his submissions submitted that the pond was being used to build 'footpath' in the bank of the pond for the public. However the learned Deputy Attorney General representing the respondent No. 9 did not make any such claims. Therefore also from the photo and after hearing

the submissions of the learned counsels we are of the considered view that it is not clear as to what purpose the pillars were being built for.

Moreover we have examined the Ain of 1995. Needless to state that pond comes with the definition of জলাধার under Section 2 of the Ain, 1995. With this in mind we have examined Section 6 (Umn) of the বাংলাদেশ পরিবেশ সংরক্ষন আইন, ১৯৯৫। Section 6(Umn) is reproduced here under:

“আপাততঃ বলবৎ অন্য কোন আইনে যাহা কিছুই থাকুক না কেন, জলাধার হিসাবে চিহ্নিত জায়গা ভরাট বা অন্য কোনভাবে শ্রেণী পরিবর্তন করা যাইবে না। তবে শর্ত থাকে যে, অপরিহার্য জাতীয় স্বার্থে অধিদপ্তরের ছাড়পত্র গ্রহণক্রমে জলাধার সম্পর্কিত বাধা নিষেধ শিথিল করা যাইতে পারে।”

Upon a plain reading of Section 6(Uma) it is clear that notwithstanding anything in any other law for the time being in force, the nature of a waterbody cannot be changed under any other circumstances by earth filling except for indispensable national interest (অপরিহার্য জাতীয় স্বার্থ)। By no stretch of imagination can it be contemplated that Duburi training, Swimming Training for fire fighter can fall within the meaning of ‘indispensable national interest’ (অপরিহার্য জাতীয় স্বার্থ). Our considered view is that Duburi Training, Swimming Training etc. for Fire Fighter do not fall within the ambits অপরিহার্য জাতীয় স্বার্থ. It would be absurd to contemplate that Duburi Training, Swimming Training can fall within the ambits of indispensable National Interest অপরিহার্য জাতীয় স্বার্থ।

Regarding the factual arguments as to whether the intention was to build a shopping center or whether it was to build a footpath or whether it was built for Duburi Training, Swimming training, our considered view that is ascertainment of intention is not a relevant issue for proper adjudication of this matter.

Admittedly the pond is an age old pond and admittedly in government ownership of the property. It falls within the fundamental right of every citizen that no property may be used for a purpose which may cause threat to the ecological balance of any area. Ecological balance must be maintained to save the community from any hazards which may arise from disruption in ecological balance.

It is our duty to intervene if it is revealed that there is any threat to ecological imbalance that it may be destroyed which may cause hazards to the environment. In expressing our views on the priority of maintaining ecological balance, we have drawn support on some settled principle of our Apex Court inter alia Civil Petition for Leave to Appeal No. 1162 of 2013 reported in 9 SCOB[2017] AD 70. Further drawing support from the বাংলাদেশ পরিবেশ সংরক্ষণ আইন, ১৯৯৫ we are of the considered view that the earth filling and construction for shopping center, Duburi Training etc. or whatsoever reason of Monthon Pond such act is unlawful.

Under the facts and circumstances and relying on the relevant laws and observations made above we are of the considered opinion that the Rule bears merit.

In the result, the Rule is made absolute with direction and observation. The respondent No. 7 is hereby directed to demolish all the construction of pillars at its own cost. In default at the respondent No. 9 is directed to demolish the structure/ construction of the said pond (Monthon Pond) positively within 60(sixty) days of receiving this judgment and order.

The order of restraint granted earlier by this court is hereby recalled and vacated.

Communicate this judgment at once.

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(Kashefa Hussain, J)

I agree.

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(Kazi Zinat Hoque, j)

Shokat (B.O)