

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Obaidul Hassan
-Chief Justice

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaquul Islam

Mr. Justice Md. Abu Zafor Siddique

CIVIL APPEAL NO.67 of 2022

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NO.861 of 2022.

(From the order dated 29.07.2019 and 11.11.2021 passed by this Division and the High Court Division in Civil Petition for Leave to Appeal No.1613 of 2019 and Civil Revision No.1040 of 2020 respectively).

M/s. Sonar Bangla Service Filling Station (CNG) Limited, represented by its Managing Director Rana Chowdhury :Appellant/Petitioner.

-Versus-

M/s. Nasir CNG Filling Station, represented by its Proprietor Nasir Uddin and others. :Respondents.

For the Appellant/Petitioner. : Mr. Kamal-Ul-Alam, Senior Advocate (In both the cases) (with Ms. Shahanaj Akter, Advocate) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent No.1. : Mr. M. Qumrul Haque Siddique, Senior Advocate (With Mr. A.B.M. Altaf Hossain, Senior Advocate) instructed by Ms. Shahanara Begum, Advocate-on-Record. (In both the cases)

For Respondent Nos.2-7. : Not represented. (In C.A. No.67 of 2022)

For Respondent Nos.2-10. : Not represented. (In C.P. No. 861 Of 2022)

Date of Hearing. : The 08th & 15th November, 2023.

Date of Judgment. : The 21st November, 2023.

J U D G M E N T

Borhanuddin, J.: This civil appeal arises out of the leave granting order dated 26.05.2022 in Civil Review Petition No.381 of 2019 tagged with Civil Petition for Leave to

Appeal No.861 of 2022 for review of the order dated 29.07.2019 passed by this Division in Civil Petition for Leave to Appeal No.1613 of 2019 dismissing the same as barred by limitation.

Facts relevant for disposal of the civil appeal are that the respondent no.1 herein as writ-petitioner preferred Writ Petition No.14870 of 2016 seeking direction upon the writ-respondents to supply gas connection to his CNG filling station namely, 'M/s. Nasir CNG Filling Station' in terms of the Memo No.আবিবি-বিআর/প্রস/৩২/৪৫০, dated 16.07.2007, contending interalia, that the petitioner is the proprietor of 'M/s. Nasir CNG Filling Station', which is proposed to be set up; The petitioner applied to the writ-respondent no.4, Titas Gas Transmission and Distribution Company Limited, for supply of gas at the proposed CNG station and accordingly, respondent no.4 accord consent by letter dated 16.07.2007; The petitioner invested huge amount for the proposed CNG Filling Station and obtained necessary permissions from the concerned authority but the respondents started dilly dallying in connecting gas line; The petitioner knocked the respondents several times but without any response; To set up the

filling station, petitioner borrowed loan from the bank but due to non-cooperation of the respondents failed to start CNG filling Station and thus suffering huge loss; The petitioner made a representation to the respondent no.4 stating his hardship with a request to take necessary steps for providing gas connection but no such step has yet been taken by the respondents; Hence, the petitioner invoked the writ jurisdiction under Article 102 of the Constitution.

Upon hearing the writ-petitioner, a Division Bench of the High Court Division issued a Rule Nisi upon the respondents and ultimately disposed of the Rule vide judgment and order dated 08.05.2017 with the following direction:

"Considering the facts and circumstances of the case, we are of the view that the petitioner is also entitled to get the gas connection for which, under the circumstances, we direct the concerned respondents to give gas connection to the CNG filling station of the petitioner namely M/s. Nasir CNG Filling Station of Village-Maijhati, Police Station-Pakundia, District-Kishoreganj, within a period of sixty days from the date of receipt of this judgment and order subject to fulfillment of all the requirement by the petitioner and availability of gas in the local area.

In the result, the Rule is disposed of with the above directions."

Being aggrieved, writ-respondent no.4 as petitioner filed Civil Petition for Leave to Appeal Nos.2113 and 2114 of 2017 before this Division and after hearing, those were dismissed vide order dated 31.07.2017.

Against the order dated 31.07.2017, respondent no.4 preferred Civil Review Petition Nos.463-464 of 2017 which were also dismissed vide order dated 08.01.2018.

After disposal of the civil review petitions while the Titas Gas Transmission and Distribution Company Limited initiated process for implementation of the judgment and order passed by the High Court Division in Writ Petition No.14870 of 2016, the writ-petitioner filed an application on 26.02.2018 before the High Court Division for correction of order in portion of the judgment and order by changing the place of its CNG establishment at "Village-Nandula, Post Office-Chaddashwar, Police Station-Kishoreganj Sadar, District-Kishoreganj" in place of "Village-Maijhati, Police Station-Pakundia, District-Kishoreganj" and the High Court Division allowed the same vide order dated 27.02.2018.

Having aggrieved by the said order, present appellant as third party-petitioner preferred Civil Petition for Leave to Appeal No.1613 of 2019 before this Division, stating interalia, that the present appellant has been running its business under the name and style '*M/s. Sonar Bangla Service Filling Station (CNG) Limited*' situated at Board Bazar, Chaddashwar, Kishoreganj Sadar, District-Kishoreganj, which is adjacent to the new address of writ-petitioner and if the writ-petitioner is allowed to establish its CNG Filling Station in its new address then the business of the present appellant would be seriously affected and the same will also be violative of the Gazette Notification dated 27.09.2009 by which criteria has been fixed for establishment of new CNG Station.

After hearing the parties, this Division dismissed the Civil Petition for Leave to Appeal No.1613 of 2019 vide order dated 29.07.2019.

Having aggrieved, present appellant as petitioner filed Civil Review Petition No.381 of 2019 invoking Article 105 of the Constitution and leave was granted on the following grounds:

- I. Because of after disposal of civil petitions and civil review petitions the High Court Division became 'functus officio' and cannot change the order in portion of the judgment and order and as such the order dated 27.02.2018 has been passed without lawful authority and beyond the jurisdiction of the High Court Division and thus the same is liable to be set-aside.
- II. Because of the present petitioner has been running his business in the name and style of "M/s. Sonar Bangla Service Filling Station (CNG) Limited" situated at Board Bazar, Chaddashwar, Kishorganj Sadar, District-Kishorganj, which is adjacent to the new address of writ-petitioner and, if, the writ-petitioner is allowed to establish its CNG Filling Station in its new address the business of the present petitioner will be seriously affected and the same will be violative to Gazette Notification dated 27.09.2009 by which the criteria has been fixed for establishment of new CNG Station and, since the new address of the writ-petitioner is situated within 3(three) kilometers from the present petitioner's CNG Station, the same is not sustainable in law, and, as such the present petitioner has filed this instant petition.

Consequently, instant civil appeal arose.

To address the ground no.1, it requires to see whether the High Court Division after passing the judgment and order became 'Functus Officio'.

The term '*Functus Officio*' means that the jurisdiction of a designated authority comes to an end once he/she has performed his functions for which he/she was appointed. This term is equally applicable for all other offices including the Courts.

It is settled principle that when a court has reached its final decision in respect of a matter, such court cannot vary/change its own decision, unless it is permitted by the specific provision of law.

The Supreme Court of Canada in the case of *Canadian Broadcasting Corp. vs. Manitoba*, reported in (2021) SCC 33, held:

"In its contemporary guise, functus officio indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see Chandler v. Alberta Association of Architects, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848, at p.860; Reekie v. Messervey, 1990 CanLII 158 (SCC), [1990] 1 S.C.R. 219, at pp.222-23; Doucet-Boudreau v. Nova Scotia (Minister of Education), MANU/SCCN/0059/2003: 2003 SCC 62, [2003] 3 S.C.R. 3, at paras.77-79). A court loses jurisdiction, and is thus said to be functus officio, once the formal judgment has been entered (R. v. Adams, 1995 CanLII 56 (SCC), [1995] 4 S.C.R. 707, at

para.29; R. v. Smithen-Davis, 2020 ONCA 759, 68 C.R. (7th) 75, at paras.33-34)."

In the case of *Re: V.G.M. Holdings, LTD.*, reported in 1941 (3) All. ER 417, it was held that:

"It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction."

From the principle enunciated in the referred cases, our considered view is that after disposal of the Rule Nisi issued in writ petition vide judgment and order dated 08.05.2017 and also after disposal of civil petition as well as civil review petition, the High Court Division became functus officio in respect of the judgment and order dated 08.05.2017 passed in the Writ Petition No.14870 of 2016.

Ground no.2 relates to violation of the criteria fixed by the Gazette Notification dated 27.09.2009 for establishment of new CNG station.

Relevant portion of the Gazette Notification is reproduced below:

"২। নতুন সিএনজি স্টেশনের স্থাপনের অনুমোদনের ক্ষেত্রে নিম্নবর্ণিত বিষয়সমূহ যথাযথভাবে প্রতিপালন করতে হবে।

(১) শহরের বাহির ও ভিতরে একই সড়কের একই পার্শ্বে একটি সিএনজি ফিলিং স্টেশন থেকে আরেকটি সিএনজি ফিলিং স্টেশনের ন্যূনতম দূরত্ব যথাক্রমে ৬ কিঃ মিঃ ও ৩ কিঃ মিঃ। শহরের বাহির ও ভিতরে একই সড়কের বিপরীত পার্শ্বে একটি সিএনজি ফিলিং স্টেশন থেকে আরেকটি সিএনজি ফিলিং স্টেশনের দূরত্ব যথাক্রমে ৪ কিঃ মিঃ ও ২ কিঃ মিঃ হতে পারে।"

(emphasis supplied)

From the above, it is crystal clear that criteria for establishment of new CNG Filling Station is that minimum distance between two CNG Filling Station on the same side of a road in the city requires to be 6 kilometre and 3 kilometre respectively whereas on the opposite side of the same road minimum distance requires to be 4 kilometre and 2 kilometre respectively.

Claim of the appellant is that distance of the new address of the writ petitioner and the existing CNG station of the appellant is less than 2(two) kilometer and thus violative of the Gazette Notification dated 27.09.2009.

To ascertain the distance of two CNG Filling Stations a local investigation was held in Miscellaneous Appeal No.26 of 2020 arose out of Other Class Suit No.23 of 2020 filed by the appellant as plaintiff impleading the respondent no.1 and others as defendants. After holding

local investigation, the appointed Advocate Commissioner submitted his report stating that:

"১। আমি সরেজমিনে গিয়ে আর.এস. চৌদ্দশত ও মতলবপুর মৌজার নকশাদ্বয় প্রাপ্ত হইয়া উক্ত চৌদ্দশত ও মতলবপুর মৌজার আর.এস. নকশা ভাওরাইয়া সরেজমিনে জরিপ পরিমাপ করিয়া সোনার বাংলা সার্ভিস সি.এন.জি. ফিলিং স্টেশন কোন দাগে বিদ্যমান তাহা নির্ণয় করিয়াছি এবং মেসার্স নাছির সি.এন.জি. ফিলিং স্টেশন কোন মৌজার কোন দাগের অন্তর্গত তাহাও নির্ণয় করিয়াছি। এতে দেখা যায় যে, সোনার বাংলা সার্ভিস সি.এন.জি. ফিলিং স্টেশন চৌদ্দশত মৌজার আর.এস. নকশার ২নং সীটের যাহা আর.এস. ২৪৫০নং দাগের অন্তর্গত এবং মেসার্স নাছির সি.এন.জি. ফিলিং স্টেশন মতলবপুর মৌজার আর.এস. নকশার ১নং সীটের যাহা আর.এস. ২৮১ ও ২৮৪ দাগের অন্তর্গত।

আমি আমারকৃত নকশায় সোনার বাংলা সার্ভিস ফিলিং স্টেশনকে B নং প্লটের মাধ্যমে এবং মেসার্স নাছির সি.এন.জি. ফিলিং স্টেশনকে K ও L নং প্লটের মাধ্যমে দেখাইয়াছি। B নং প্লটের ৯নং স্টেশন থেকে L নং প্লটের ২৩নং স্টেশন পর্যন্ত অর্থাৎ সোনার বাংলা সার্ভিস সি.এন.জি. ফিলিং স্টেশন হইতে মেসার্স নাছির সি.এন.জি. ফিলিং স্টেশনের দূরত্ব ৮৬০০ লিংক বা ৫৬৭৬ ফুট বা ১৭৩০ মিটার বা ১.৭৩ কিলোমিটার অর্থাৎ পৌনে দুই কিলোমিটার প্রায়।

উপরোক্ত মোকদ্দমায় আমার কৃত নকশায় আর.এস. লাইনগুলো কালো কালির রং দ্বারা, চেইন লাইনগুলি সবুজ কালির দ্বারা, স্টেশনগুলি নীল কালির রং দ্বারা এবং বেনালিশী প্লটগুলি বেগুনি কালির রং দ্বারা এবং সোনার বাংলা সার্ভিস সি.এন.জি. ফিলিং স্টেশনকে হলুদ কালির রং দ্বারা এবং মেসার্স নাছির সি.এন.জি. ফিলিং স্টেশনকে নীল কালির রং দ্বারা চিহ্নিত করিয়া দেখানো হইল। উক্ত মোকদ্দমায় আমার কৃত প্রতিবেদন ও মোকদ্দমার ফিল্ডবুক, নকশা যাহা আমার প্রতিবেদনের অংশ তাহাই অত্র সহ দাখিল করা হইল।"

(emphasis supplied)

From the report as quoted above, it is apparent that the CNG Filling Station of the appellant namely M/s. Sonar Bangla Service Filling Station (CNG) Limited is situated at a distance of 1.73 kilometer from the new address of the writ petitioner-respondent no.1.

From the discussions made above, it is clear that the new address of the writ-petitioner for proposed CNG station is violative of the Gazette Notification dated 27.09.2009.

Under the facts and circumstances of the case and for the reasons stated above, we are inclined to allow the Civil Appeal No.67 of 2022.

Accordingly, the appeal is allowed.

Order dated 27.02.2018 passed in Writ Petition No.14870 of 2016 is hereby set-aside.

The Civil Petition for Leave to Appeal No.861 of 2022 is disposed of in the light of the judgment and order delivered in the Civil Appeal No.67 of 2022.

However, no order as to costs.

CJ.

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