

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

Writ Petition No. 3494 of 2023

IN THE MATTER OF:

An application under Article 102 of the Constitution of People's Republic of Bangladesh, 1972.

-AND -

IN THE MATTER OF:

Bangladesh Inland Water Transport Authority (BIWTA), represented by its Chairman, BIWTA Bhaban, Dhaka.

.....**Petitioner**

= V E R S U S =

The Government of Bangladesh and Others

.....**Respondents**

Mr. Md. Moklesur Rahman, Advocate
.....For the Petitioner
Mr. Md. Motaher Hossain, Advocate
.....For the Respondent No. 02

Present:

Mr. Justice Md. Jahangir Hossain

And

Mr. Justice S. M. Masud Hossain Dolon

Heard on: 09.11.2023, 27.11.2023,
28.11.2023, 04.12.2023 12.12.2023.

Judgment on: 18.12.2023

S. M. Masud Hossain Dolon, J:

The Bangladesh Inland Water Transport Authority (in short as the "BIWTA") preferred an application under Article 102 of the Bangladesh Constitution challenging the propriety of the Tender Notice dated 05.03.2023 issued by the Narayanganj City Corporation

pursuant to which the Rule Nisi has been issued in the terms set out as below:-

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the Tender Notification vide Memo No. 46.16.0000.032.31(15).015.23/73 dated 05.03.2023, published by the respondent No. 3 in the daily “Jugarchinta” on 07.03.2023 for leasing out the area of Ghat Nos. 4 and 5 (both side of the road), situated under ward No. 15 of the Narayanganj City Corporation for the year 2023-2024 (Annexure-C) should not be declared to be illegal, malafide without jurisdiction and is of no legal effect and/or pass such other or further order or orders as to this court may seem fit and proper.”

The pivotal and relevant facts for the effective disposal of the Rule, in brief, are that the BIWTA, turns out to be the Conservator of the areas of Ghat No. 4 and 5 (both sides of the road) pursuant to the Gazette Notification (Dacca Gazette) published by the Government on 12.09.1960 in accordance with the provisions of Clause (a) of Sub-Section (1) of Section 4 read in conjunction with Clause (9) of Section 3 of the Ports Act, 1908.

The Government of Bangladesh amended the name and areas (Limits of the Port) of the Narayanganj River Port through recourse of the official Gazette issued on 20.10.2004 vide S.R.O. No. 302-Ain/2004 in exercise of the power conferred under Clause (a) of Sub-Section (1) of Section 4 (1) (a) read with Sub-Section (2) of Section 4 of the Ports Act, 1908. It is claimed that the areas as referred to in

Serial Nos. 1 to 4 of the Gazette Notification issued vide S.R.O. No. 302-Ain/2004 are nothing but the areas of river Bank of Shitalakkhya River for which the areas come under the jurisdiction of the BIWTA.

The areas of the Ghat Nos. 4 and 5 (Shitalakkhya River Bank Areas) are situated in Ward No. 15 of the Narayanganj City Corporation and the said areas are under direct control and supervision of the Petitioner. The Petitioner constructed road in the said areas for the purpose of smooth navigation as well as for smooth carriage of goods. The Petitioner being the Conservator of the river port areas has the authority, jurisdiction and power to lease out the said areas. The Petitioner has been maintaining the said areas and also has been for a long period of time and the revenue generated by leasing out the said areas are engaged for meeting up the management and administrative expenditures of the Narayanganj River Port. Over the last long period of time and until 2023 no authority including the Narayanganj City Corporation came forward to lease out the said areas.

When the Petitioner was taking preparation for leasing out the Ghat Nos. 4 and 5 in 2023, the Petitioner to its utmost surprise learnt that a Tender Notification was already published by the Narayanganj City Corporation in the daily newspaper "Jugarchinta" on 07.03.2023 and that the tender was scheduled to be opened on 23.03.2023. The depictions of the Tender Notification issued by the Respondent, read as "সায়রাত মহলের নাম: সিটি কর্পোরেশনধীন ১৫ নং ওয়ার্ডস্থ

ঘাট নং ৪ ও ৫ এর মধ্যবর্তী রাস্তার দুই পার্শ্বের অস্থায়ী মাছ বাজার।”。 But, evidently the areas as referred to in the impugned Tender Notice published in the “Jugarchinta” on 07.03.2023 are the very areas that are under the direct control, supervision and management of the Petitioner being the Conservator of the Narayanganj River Port and the said areas pursuant to the operation of the law of the land.

Having come to know about the impugned Tender Notice issued on 07.03.2023 by the Respondent the Joint Director of the Port sent a letter on 12.03.2023 vide Memo No. 18.11.6758.067.12.007.17 খন্ড-২ (সিটি কর্পোরেশন)/৭২১ to the Chief Executive Officer (in short as the “CEO”) of the respondent requesting the CEO not to proceed further in respect of the Tender Notice, dated 07.03.2023, in question. It was also asserted in the said letter issued by the Joint Director of the Port that the said Ghat Nos. 4 and 5 and adjacent areas referred to in the Schedule of the said Tender Notice are under direct control and supervision of the Petitioner being Conservator of the Port under the operation of the statute namely the Ports Act, 1908. The CEO of the Narayanganj City Corporation received the letter sent by the Joint Director, but till date the Respondent maintained arbitrary inaction to the grave prejudice of the Petitioner by not stopping the impugned tender process.

Having no other equally efficacious remedy, the Petitioner filed the instant writ petition and obtained the Rule.

Mr. Md. Moklesur Rahman, the learned Counsel for the Petitioner submits that although the Respondent suffers lack of legal authority, the Respondent published Tender Notice and went on to continue with the proceedings with the regard to the Tender proceedings without any prior permission from the Petitioner who was at all material times the lawful authority and Conservator of the Port and its adjacent land areas including the land referred to in the impugned Tender Notice published in the daily "Jugerchinta" on 07.03.2023. The learned Counsel for the Petitioner next submits that the areas referred to in the impugned Tender Notice dated 07.03.2023 are the properties belonged to the jurisdiction, control and management of the Petitioner and that the said areas of land are mentioned in the Serial Nos. 1 to 4 of the Bangladesh Gazette dated 20.10.2004 and by dint of the operation of the said Gazette dated 20.10.2004, the BIWTA attained sole and complete authority of leasing out the said areas of land. He then submits that irrespective Respondent's lack of legal authority, the Respondent went on to publish the impugned Tender Notice most illegally, out of malafide and arbitrarily. He further submits that pursuant to the express provisions of Sub-Section (1) of Section 7 read with Clause (a) of Sub-Section (2) of Section 7 of the Ports Act, 1908, the BIWTA was declared as the Conservator of the Port and the land areas adjacent to the Port vide Gazette Notification No. 463 HTD, dated 09.09.1960, and this means that the Ghat Nos. 4 and 5 and its adjacent land areas

are within the limit of jurisdiction of the Petitioner and not within the jurisdiction of the Respondent therefore, legally cannot publish the impugned Tender Notice dated 07.03.2023 with regard to Ghat Nos. 4 and 5.

Mr. Rahman further submits that the areas as referred to in the schedule of the impugned Tender Notice dated 07.03.2023 most popularly known as "Fishery Ghat" and the same is situated in between Ghat No. 4 (Jetty) and Ghat No. 5 and both the Ghat Nos. 4 and 5 are very much part of the foreshore of the River Shitalakkhya. He then submits that the Petitioner and the Deputy Director (Survey) of the Department of Land Record and Survey sent letters consecutively on 04.05.2021 and 13.06.2021 respectively asked the Zonal Settlement Officer of Dhaka Zonal Settlement Office requesting to submit a report after survey of the areas of land in question. In response of the said letters, a joint survey had been conducted by the Zonal Settlement Office of Dhaka as well as the Upazila Settlement Office of Savar. After conduct of a meticulous survey by the said Settlement Offices, a detailed report was prepared on 27.09.2021 and the same report was forwarded to the Petitioner on 05.10.2021 vide Memo No. 31.03.2692.022.05.022.12-258(6). That the report was prepared based on C.S. and R.S. mouza line along with C.S. Map and R.S. Map and it has clearly been mentioned that the Fishery Ghat Nos. 4 and 5 are situated within the Narayanganj River

Port Area which are exclusively the foreshore of the River “Shitalakkhya”.

Mr. Rahman, the learned Counsel for the Petitioner, then submits that the road as referred to in the impugned Tender Notice dated 07.03.2023 is most popularly known as “Bandar Road” which has been under direct control, supervision and jurisdiction of the Petitioner since 1960. The Petitioner’s learned Counsel then submits that the said Fishery Ghat has been leasing out by the Petitioner since 1960 to different lessees so as to collect levies, handling charges, taxes, and other charges as permitted by the relevant laws and rules of the land. The lessees deposit revenue for lease to the Petitioner by Pay Order and neither the Petitioner nor the employees of the Petitioner collect any taxes, rents and so on for their personal gains or interest, but those rents, rates and taxes were collected for the greater interest of the people of Bangladesh.

The learned Counsel for the Petitioner lastly submits that the areas of land which have been mentioned in the impugned Tender Notice dated 07.03.2021 are situated in between the Ghat No. 4 (Jetty) and Ghat No. 5 and these are areas which are absolutely the foreshore of the River Shitalakkhya as well as notified and protected areas of the BIWTA and therefore, the Narayanganj City Corporation has no authority to lease out the said areas in question without taking license from the BIWTA as required under Rule 54 of Port Rules, 1966 (published in the “Dacca Gazette on 03.11.1966”). In

support of his submissions Mr. Rahman, the learned Counsel for the Petitioner, cited unreported case namely Md. Shahidullah Kaiser and Zila Parishad, Kurigram Vs. Government of Bangladesh and Others in Writ Petition No. 5349 of 2022 and Writ Petition No. 7827 of 2022 and Bera Paurashava represented by its Mayor Md. Abdul Baten, Pabna Vs. Government of People's Republic of Bangladesh, represented by the Secretary, Ministry of Shipping and Others in Writ Petition No. 1738 of 2020.

Now that it is pertinent to consider the submissions of Mr. Md. Motaher Hossain, the learned Counsel appearing for and on behalf of the Respondents. Mr. Hossain contested the writ petition by filing an affidavit in opposition controverting the Petitioner's case. Mr. Hossain in his oral submission strenuously pressed that the present writ petition has been filed in connection with the lease of temporary fish bazar which is located both sides of the road and the said road was recorded in the name of the Government of Bangladesh represented by the Deputy Commissioner of Narayanganj pertaining R. S. Dag No. 399, Mouza-Narayanganj, J.L. No. 6, Narayanganj as evident from the R.S. Khatian No. 1 as well as the R.S. Map of the concerned areas. Accordingly, the Serial No. 6 of the Schedule, all areas under "Narayanganj Mo Khanda" *i.e.* R.S. Dag Nos. 1 to 2153 have been included under the jurisdictional area of the Respondents. Consequently, the possession and management of the road pertaining to R.S. Daag No. 399 under "Narayanganj Mo Khanda"

mouza has been vested to the Respondent. Mr. Hossain further submits that the Narayangonj City Corporation is enjoying the administrative control and authority over the areas of land pertaining to R.S. Daag No. 399 uninhibitedly at all material times. Mr. Hossain then refers to a set of Principles *i.e.* Nitimala framed in 2011 under the title of “সরকারি হাট বাজারসমূহের ব্যবস্থাপনা, ইজারা পদ্ধতি এবং উহা হইতে প্রাপ্ত আয় বন্টন সম্পর্কিত নীতিমালা, ২০১১ (framed on 01.03.2011 by Ministry of Local Government, Rural Development and Cooperative)”. The said 2011 Nitimala empowers all the City Corporations including the Narayangonj City Corporation the statutory fiat to lease out Haat-Bazar under their territorial jurisdictions.

The learned Counsel for the Respondent further submits that the Petitioner has categorically stated in the present writ petition that the BIWTA is the Conservator of Ghat, but dishonestly concealing that the fish market is located between Ghat Nos. 4 and 5 which is situated at Narayanganj Mouza pertaining to Daag No. 399 and the respondent is legal owner and controller of the scheduler land by way of Gazette Notification published on 05.05.2011. Mr. Hossain then submits that the Petitioner misconceived and misconstrued the facts and incorrectly stated that the Respondent had made an attempt of leasing out the Petitioner’s Ghat or any part thereof. The respondent, on the contrary, has leased out the temporary fish bazar on both sides of the road which is under the control, territorial jurisdiction and ownership of the Respondents. He then submits that

since the administrative control and management of the road pertaining to Daag No. 399 has been entrusted upon the respondent by Gazette Notification dated 05.05.2011, the Petitioner does not enjoy any legal right and title of the fish bazar and that the fish bazar is not part of any Ghat which has been leased out by the Petitioner and these aspects of vital facts are evident from Annexure-B to B-4 of the writ petition, and, hence, the present writ petition is misconceived and misconstrued for which the writ is liable to be discharged.

Mr. Hossain, the learned Counsel for the Respondent further submits that the purported joint survey report dated 27.09.2021 (Writ Annexure-K-1) unequivocally concluded that the areas under "Narayanganj Mo Khanda" Mouza are the very areas where the fish bazar has been established. He then submits that the report also stated that since the river is situated to the north and the railway station is situated to the south of the disputed area, no reference point could have been established as per C.S. and R.S. layout.

Mr. Hossain then submits that although the survey team is termed as joint survey team, but to the utmost surprise no representative of the Narayanganj City Corporation was invited and included in the joint survey team who prepared the survey report relating to the disputed land. As such, it is manifestly evident that the report is unreliable and cannot be used as credible evidence. Mr. Hossain also submits that another reason as to why the survey report

is not worthy of any credit lies in the fact that the survey team put in use the digital method but not manual method for fixing reference point, although the Sketch Map (Writ Annexure-K-2) purports that the Sketch Map is based on the C.S. Map which was drawn up by using traditional and manual method. Since the disputed Sketch Map had not been drawn up by applying the manual methodology, the same Sketch Map cannot be the Sketch Map drawn on the basis of C.S. Map, and as such the said Sketch Map turns out to be the disputed document genuineness and authenticity of which cannot be examined by the Hon'ble High Court Division under Article 102 of the Bangladesh Constitution. He then submits that the joint survey report and sketch map can only be determined before a competent civil court.

Mr. Hossain, the learned Counsel for the Respondent, further submits that the survey report relied upon by the Petitioner relates to ascertaining the C.S. and R.S. line of "Narayanganj Mo Khanda", but the Narayanganj Port area in dispute was not referred to within the four corners of the said report. The report is vehemently denied by the Respondent in its entirety since it has been prepared in reliance of fictitious digital pillar which has no legal basis, whatsoever, and which suffers credibility in law.

Mr. Hossain then refers to Annexure-K-2 of the writ petition which is the R.S. Map and the said R.S. Map clearly shows that there is a walkway which has been constructed by the Petitioner on the

foreshore of the river rendering the same walkway as part of the bank of the river. Adjacent to the walkway, there is wide and long empty area of land, marked in white, which demarcates the bank of the river. Right after the empty space, the road in question is situated and the Respondent has in actual fact leased out temporary fish market adjacent to the road. It is evident from the Map that the road in question does not fall within foreshore of the river, and, therefore, the Petitioner does not have any authority and jurisdiction over the said road.

Mr. Hossain then draws our attention to the Petitioner's cited writ cases such as Writ Petition No. 1738 of 2020, Writ Petition No. 5349 of 2022 with Writ Petition No. 7827 of 2022 and submits that all the three writ petitions deal with the issue of lease of Ghat of Port area but not any fish bazar, whether temporary or not, and, therefore, the writ cases of the Petitioner do not have any bearing in any manner in the facts and circumstances of the instant writ petition.

Mr. Hossain lastly submits that careful perusal of the provisions of the acts and rules such as the Port Act, 1908, the Inland Water Transport Authority Ordinance, 1965 and the Port Rules, 1966 reveal that none of these acts and rules confers any power upon the Petitioner any road or market vested in the local government authority, for instance, the Narayangonj City Corporation. On the other hand, the Nitimala – “সরকারি হাট বাজারসমূহের ব্যবস্থাপনা, ইজারা পদ্ধতি

এবং উহা হইতে প্রাপ্ত আয় বন্টন সম্পর্কিত নীতিমালা, ২০১১” empowers the Respondent to lease out any area under its territorial jurisdiction, and, therefore, the Respondent is the right legal authority to be lawfully published the Tender Notice in respect of the temporary fish bazar located on the roadside adjacent to the road in exercise of the power as conferred upon the respondent under the said 2011 Nitimala. Mr. Hossain finally submits that the Rule is not maintainable for which the same Rule is liable to be discharged.

We have perused the writ petition and annexed documents in support of the contents of the said writ petition. We have also perused the affidavit in opposition filed by the Respondent and the annexed documents in support of the contents of the affidavit in opposition. We have heard both the Petitioner and the Respondent patiently. It appears that the Petitioner i.e. the BIWTA is the Conservator of the Ghat Nos. 4 and 5 of the Narayanganj River Port which was entrusted by the Gazette (Dacca Gazette) Notification dated 12.09.1960 by the then Government under the express provisions of Clause (a) of Sub-Section (1) of Section read with Clause (9) of Section 3 of the Ports Act, 1908. On the contrary, the Respondent claims that the ownership of the temporary fish bazar situated both the sides of the road between Ghat Nos. 4 and 5 pertaining to R.S. Daag No. 399, Mouza Narayanganj, JL No. 6, District-Narayanganj as evident from the R.S. Khatian No. 1.

It also appears from the record that in exercise of power conferred by Sub-Section (1) of Section 7 read with Clause (a) of Sub-Section (2) of Section 7 of the Ports Act, 1908, the Government declared the BIWTA as the Conservator of the Ghat Nos. 4 and 5 and pursuant to the provisions of Rule 54 of the Bangladesh Port Rules, 1966, the BIWTA enjoys exclusive jurisdiction to make any construction or to carry out any excavation of any kind on the river bed or over the foreshore land so as to enable smooth navigable water ways within the Port areas, and no person or authority can carry out construction or excavation without prior express permission of the BIWTA. Again, pursuant to express provisions of the Ports Act, 1908 and the Bangladesh Port Rules, 1966, the BIWTA enjoys exclusive jurisdiction and authority to lease out the area of their ports, river banks/shores, ghats, labour handling points and so on.

The learned Counsel for the Petitioner strenuously asserted that the Bandar Road is constructed and maintained by the BIWTA, but in reply the learned Counsel for the Respondent denied the same and presented e-Tender, agreement dated 19.07.2018 and work completion certificate marking the same documents consecutively as Annexure-X-3, X-4 and X-5. After meticulous consideration of the Respondent's Annexures, it transpires to us that the Respondent had spent the amount of BDT 4,39,81,670.83/= (Taka Four Crore Thirty Nine Lac Eighty One Thousand Six Hundred Seventy and Paisa Eighty

Three Only) for repairing the Bandar Road. But, the Petitioner failed producing any document to show that the BIWTA has in actual fact constructed and maintained the Bandar Road.

It pertinent to mention here that by the letter dated 12.03.2023 (Annexure-D) vide Memo No. 18.11.6758.067.12.007.17 খন্ড-২(সিটি কর্পোরেশন)৭২১ that fishing boats arrived at the Ghat in the morning. We also scrutinized Tender Notices issued by the Petitioner from 2018-2019 to 2022-2023 that are marked as Writ Annexure- B, B-1, B-2, B-3 and B-4 where it transpires that the Petitioner called Tender Notices for duty collection and labour handling from the Fish Ghat situated between Ghat Nos. 4 and 5. The Petitioner can only lease the port area in accordance with the “ইজারা প্রদান পদ্ধতি” and the Petitioner called tender notice for leasing out the Fish Ghat pursuant to provisions of Section 3 (4) (9) of the Ports Act, 1908. But, the Petitioner could not produce before us any document indicating that the Petitioner has leased the Fish bazar. There is no mention of Fish Market in the Tender Notices issued or published by the Petitioner, since the BIWTA cannot lease out the fish market or bazar. It can only collect levies, handling charges, taxes and other charges in respect of Ghat of the Port area.

We have carefully and meticulously perused the records of the present writ petition relating to the lease of the temporary fish bazar which is located next to a road and situated between Ghat Nos.4 and 5. The aforesaid road was recorded in the name of Deputy

Commissioner of Narayanganj pertaining to R.S. Daag No. 399 and the same was transferred to the Narayanganj City Corporation by Gazette Notification published on 05.05.2011 and the said R. S. Daag No. 399 is demarcated as the area of “Narayanganj Mo Khanda” and the Petitioner demanded that “Narayanganj Mo Khanda” is exclusively the area of foreshore and the fish bazar in question is located therein. But, the Respondent denied this claim of the Petitioner and asserted that the “Narayanganj Mo Khanda” is never meant to be the river bed or foreshore. Admittedly the Bandar Road is throughout pertaining to R.S. Daag No. 399. The BIWTA constructed the walkway on the foreshore/bank of the river and after the said foreshore there is a wide and empty area. Thereafter the Bandar Road is situated pertaining to R.S. Daag No. 399.

We are satisfied based on the materials available on record of the instant writ petition to the effect that the “Narayanganj Mo Khanda” was demarcated by the Gazette Notification and the same falls under the jurisdiction of the Respondent. On a query made by us during the hearing, the learned Counsel for the Petitioner found it difficult to deny the fact that the fish bazar/market in question was situated in the “Narayanganj Mo Khanda” and that the Petitioner also admitted that the Petitioner is the Conservator of the Ghat only but not fish bazar. Again, we have noticed that BIWTA never tendered the fish bazar previously. Most importantly it is evident that presently no authority is collecting tolls from the fish bazar, but

unscrupulous people are encroaching public money from the said temporary fish bazar in question. In view of the stated facts and circumstances as disclosed from the materials available on record of this writ petition, we are compelled to draw a conclusion that the Narayanganj City Corporation is proper authority to maintain and collect tolls from the temporary fish bazar.

We have carefully noticed from the materials available on record and from arguments and counter arguments of both the Petitioner and the Respondent that the moot question in this writ petition lies in the fact that whether the “Narayanganj Mo Khanda” where the fish bazar is located is within the territory of the foreshore/bank of the river and thus it becomes part of the port thereby making it jurisdiction of BIWTA, or whether the “Narayanganj Mo Khanda” is beyond the river foreshore/bank and, therefore, becomes part of the Narayanganj City Corporation. In view of this moot question, we are of the view that determination of this question is fundamentally based on disputed point of facts. In *Bangladesh and Another Vs. Habib Zamil*, 52 DLR (2000), A. D., 174 it was held that writ under Article 102 of the Constitution of Bangladesh is a summary proceeding and in such a summary proceeding a disputed point of facts cannot be determined. *Shamsunnahar Salam and Others Vs. Mohammad Wahidur Rahman and Others*, 51 DLR (1999), A.D., 232 and *Bangladesh Railway Vs. Most. Monowara Begum*, 5 LM (2018), A. D., 13, their Lordships of

the Appellate Division held that a Writ Court cannot decide any disputed point of facts where there is need for taking evidence for the settlement of the disputed point of facts.

Since the question as to whether “Narayanganj Mo Khanda” is part of river foreshore/bank or not is a disputed point of facts, such a disputed point of fact cannot be determined under the summary jurisdiction of writ under Article 102 of the Bangladesh Constitution. The Petitioner BIWTA may file a case before a competent court of civil judicature or a petition to the proper authority, if the Petitioner at all so desires, to ascertain as to whether the “Narayanganj Mo Khanda” is part of the riverbed or river foreshore/bank. Hence, we conclude that since this writ petition encompasses a disputed point of facts, this writ petition is not maintainable.

Thus, we find no merit in this Rule.

Accordingly, the Rule is discharged. The order of stay granted earlier by this court is hereby vacated.

However, there would be no order as to costs.

Md. Jahangir Hossain, J.

I agree.