

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

WRIT PETITION NO.9529 of 2023

IN THE MATTER OF:

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

And

IN THE MATTER OF:

***Moheshkhali Pourashava represented by the
Mayor Moksud Mia***

- Petitioner

-vs-

Bangladesh and others.

..... For the Respondents.

And

Mr. Syed Mamun Mahbub, Advocate

Mr. Md. Abdul Bari, Advocate

.... For the Petitioner.

Mr. Md. Mokleshur Rahman, Advocate

... For the respondent No.3

Mr. Samarendra Nath Biswas, D.A.G. with

Mr. Md. Abul Kalam Khan (Daud), A.A.G. and

Mr. Md. Modersher Ali Khan (Dipu), A.A.G.

....For the Respondents-government.

Heard on: 17.01.2024, 18.01.2024, 22.01.2024

28.01.2024 and Judgment on: 01.02.2024

Present:

Mrs. Justice Farah Mahbub.

And

Mr. Justice Muhammad Mahbub Ul Islam

Farah Mahbub, J:

The petitioner, Moheshkhali Paurashava represented by its Mayor,
who as being the member of the respective Committee designated with
due authorisation to give lease of the “ফেরীঘাট” situated within Cox’s Bazar

District having “উভয়পাড়া ভিন্ন ভিন্ন পৌরসভার অন্তর্ভুক্ত” and being authorised by the Moheshkhali Municipality by adopting a resolution to that effect in its meeting dated 23.07.2023 (Annexure-A) filed the instant writ petition under Article 102 of the Constitution of the People’s Republic of Bangladesh challenging the impugned tender process of Moheshkhali Ghat namely Gorokghata jettighat, Upazilla-Moheshkhali, Paurashava-Moheshkhali, District Cox’s Bazar by publishing respective tender notices dated 11.06.2023 and 04.07.2023 respectively by the Deputy Director (Lease), BIWTA for the financial year 2023-2024 (Annexure-F and F1 respectively) and obtained the present Rule Nisi with interim direction upon the respective contending parties to maintain *status-quo* in respect of position and possession of the jetty in question for a prescribed period.

Being aggrieved with the ad-interim direction BIWTA, respondent No.2 moved the Hon’ble Appellate Division by filing CPLA No. 2875 of 2023. Upon the hearing the respective contending parties, the Appellate Division vide order dated 30.11.2023 directed both the parties to maintain *status-quo* on the subject matter of the case till disposal of the Rule. At the same time this Bench has been directed to hear and dispose of the Rule on merit within a prescribed period.

In support of the statements so made in the writ petition, the categorical contentions of the petitioner is that vide SRO No.171-Ain/2001 dated 28.06.2001, published in gazette on 28.06.2001 the government vide Rule 4(2) of the Declaration and Alterations of Municipalities Rules, 1978 (in short, the Rules,1978) upon taking final decision and being authorized under Section 4(a) of the Paurashava Ordinance, 1977 had declared respective areas of Gorokghata Mouja

along with 2(two) other moujas of Gorokhgata Union as “মহেশখালী Municipality (পৌরএলাকা)” under Rule 5 of the said Rules, 1978 (Annexure-B). Even in the enquiry report submitted by the Upazilla Nirbahi Officer (UNO) and Assistant Commissioner (Land)(Aa:Da:), Moheshkhali, Cox’s Bazar on 27.01.2013 (Annexure-B1) on the objection being raised by the petitioner against the decision to create “সংরক্ষিত বন এলাকা সংগঠন” it has been emphatically stated, *inter-alia*, that Gorokhgata Mouja is included in Moheshkhali Paurashava.

In that view of the matter, the emphatic contention of the petitioner is that Moheshkhali, Cox’s Bazar Ferry Ghat being situated within Moheshkhali Paurashava hence, in view of clause 1(ছ) of the “হস্তান্তরিত - ফেরীঘাটের ইজারা ও ব্যবস্থাপনা এবং উদ্ভূত আয় বন্টন সম্পর্কে নীতিমালা” (in short, the Guidelines) published by the Local Government Division, Ministry of Local Government, Rural Development and Co-operatives vide Memo No. প্রজই-২/ফ-১/২০০৩/২৬২ (৫২৭২) dated 19.04.2003 (Annexure-C) it is being controlled and managed by the Committee comprises the concerned Deputy Commissioner as Convener, 2(two) members including the petitioner Paurashava and one Member Secretary. Moreover, since 2010, the respondent No.6, Deputy Commissioner, Cox’s Bazar has been collecting revenue through khas collection and vide clause 5(gha)(2) of the said Guidelines the petitioner Paurashava is receiving 50% of the revenue being collected each year, for, “ফেরীঘাটের উভয় পাড় ভিন্ন ভিন্ন পৌরসভায় অবস্থিত”(Annexure-D to D3 and Annexure-E respectively).

The cause of action arose when BIWTA by publication of tender notice dated 11.06.2023 and 04.07.2023 (Annexures-F and F1 respectively) initiated process of tender for leasing out “জেটিঘাট এলাকা” of

“কক্সবাজারে নদী বন্দরের সীমানায় গোরকঘাটা জেটিঘাট মহেশখালীঘাট” without reference to any memo number nor giving schedule of the said jettyghat.

Hence, the application.

In support of the above contentions of the petitioner, Mr. Syed Mamun Mahbub, the learned Advocate appearing with Mr. Md. Abdul Bari, the learned Advocate for the petitioner submits that vide SRO No.171/Ain/2001 (Annexure-B) Gorokghata Jettyghat, situated within Gorokghata Mouja, is under Moheshkhali Paurashava, which is being managed and controlled by the respective Committee constituted under “হস্তান্তরিত ফেরীঘাটের ইজারা ও ব্যবস্থাপনা এবং উদ্ধৃত আয় বন্টন নীতিমালা” (Annexure-C) either by leasing out the same or is put under khas collection and that the revenue which is being collected is accordingly distributed between two paurashavas, one is the petitioner Paurashava and the other is Cox’s Bazar Paurashava (Annexure-D to E respectively) under clause 5(gha)(2) of the said Guidelines. In the given position of facts, he submits, publishing two impugned tender notices dated 11.06.2023 (Annexure-F) and 04.07.2023 (Annexure-F1) respectively at the behest of the respondent No.2 is tainted with malafide as well as a reflection of glaring instance of abuse of administrative power of the said respondent; hence, is without jurisdiction.

Mr. Md. Mokleshur Rahman, the learned Advocate by filing affidavit-in-opposition on behalf of respondent No.3 submits that the area as has been mentioned in the schedule of the gazette dated 28.06.2001((Annexure-B of the writ petition) as urban area named Moheshkhali Municipality is nothing but the territorial jurisdiction of said municipality. It does not go to mean that the forest, river foreshore, jetty

or like other structures situated and established within the said schedule area are under the control and management of said municipality.

He further submits that vide Section 4(1)(a) and (2) of the Ports Act, 1908 (in short, Act, 1908) the government has defined the local limits of the “Cox’s Bazar (Kosturaghat) River Port”, by publishing in Bangladesh Gazette (Extraordinary) dated 06.02.2010 (Annexure-2). In continuation thereof vide Section 7(1) of the Act, 1908 the government has declared BIWTA as the “Conservator” of river port. As such, he goes to submit that by operation of law only the Conservator has the legal authority to maintain the same under “East Pakistan Port Rules, 1966”. In view of the said legal position the petitioner Paurashava or any other local authority has no legal authority to maintain the said jettyghat.

In this regard, he further submits that the Guidelines dated 19.4.2003(Annexure-C) is applicable in respect of such ferry ghats which are being maintained by the Roads and Highways Division, LGED except those which are being maintained by BIWTA and Zilla Parishad. As such, he submits that the petitioner has no *locus-standi* to challenge the impugned tender notices issued by the BIWTA basing on the said Guidelines.

He again submits that being the Conservator of “Gorakghata Jetty Ghat (Moheskhali Ghat)”, the respondent BIWTA invited the impugned tender notices dated 11.6.2023 and 04.7.2023 respectively for giving lease of the same under Sections 15(1)(vi), 19(2) (c) (vi) of the Inland Water Transport Authority Ordinance,1958 (as modified upto 11th March, 1977). However, pursuant to the impugned tender notices, said “ghat” has already been leased out to the lessee named Expo Marketing for the

financial year 2023-2024 and that prior to issuing the instant Rule Nisi, Notification of Award (NOA) has also been issued in favour of the said lessee on 17.07.2023. In the given context, he submits that this Rule being devoid of any substance is liable to be discharged.

Controverting the said assertion of the respondent No.3, the learned Advocate for the petitioner submits that the office of the Deputy Commissioner, Cox's Bazar, the respondent No.6 vide Memo No.05.20.2200.126.08.005.2023.345 dated 02.08.2023 (Annexure-J) issued under the signature of the Deputy Director (Acting), Local Government Branch, Cox's Bazar stated, *inter-alia*, that it was necessary to make dredging and to improve the facility of Cox's Bazar-Moheshkali Ferry Ghat i.e. Gorakghata Jettyghat (Moheskhali Ghat). From the said letter it is very much apparent that the "ghat" in question is under the management and control of the Committee constituted under the Guidelines (Annexure-C).

He also submits admitting to the contents of Annexure-2 of the affidavit in opposition that the north territory of Kostura Ghat is situated at "উত্তর সীমানাঃ কক্সবাজার জেলার মহেশখালী পৌরসভাধীন গোরকঘাটা মৌজায় অবস্থিত এল. জি. ই. ডি'র দ্বিতীয় জেটির উত্তর পার্শ্ব মহেশখালী চানেলে ২১'৩২'০" উত্তর অক্ষাংশ পর্যন্ত বিস্তৃত।" Whereas, in the report of the Assistant Commissioner (Land), Moheskhali, Cox's Bazar it has been clearly stated that said "ghat" is not situated within the designated area of BIWTA. In the given context, he submits that the stand of the respondent No.3 falls through. Accordingly, he submits that upon declaring the impugned auction notices to have been issued unlawfully, this Rule is liable to be made absolute.

In view of the submissions so have been advanced on behalf of the respective contending parties we have gone through the annexures so have appended to the writ petition, supplementary affidavits, affidavit-in-opposition and supplementary affidavit to the affidavit-in-opposition, in particular Annexures-2 and 4 of the affidavit-in-opposition as well as Annexure-H of the supplementary affidavit to the writ petition, wherefrom it is evident that respondent No.2 has been appointed by the Government under Section 7(1) of the Ports Act, 1908 as the Conservator of the properties as described in the schedule, published in gazette on 06.02.2010 (Annexure-2). However, so far the areas situated at the north boundary of the said schedule is concerned it has been described as follows:

“তফসিল
কক্সবাজার (কস্তুরাঘাট) নদী বন্দরের সীমানা

উত্তর সীমানা : কক্সবাজার জেলার মহেশখালী পৌরসভাধীন গোরকঘাটা মৌজায় অবস্থিত এল.জি.ই.ডি'র দ্বিতীয় জেটির উত্তর পার্শ্বে মহেশখালী চ্যানেলে ২১°৩২'০" উত্তর অক্ষাংশ পর্যন্ত বিস্তৃত।”

On a plain reading of the same, it is apparent that a specific area under Gorokghata mouja, Moheshkhali Paurashava, District- Cox's Bazar situated at the north side of the 2nd jetty of the LGED is within the territorial jurisdiction of the respondent No.2, but there is no specific demarcation of the respective properties. Moreso, in support of the report dated 07.02.2019 prepared at the instance of the Committee constituted under Memo dated 05.11.2017 issued by Deputy Commissioner, Cox's Bazar and the officers concerned of BIWTA, the contention of the respondent No.2 is that the jetty in question is situated at Plot No.1106 of B.S. Khatian No.1 under Mouja Gorokghata, Moheshkhali, but again

without specification of the properties in question. In the face of those official documents, the Assistant Commissioner (Land), Moheshkhali, Cox's Bazar vide Memo No.31.20.2249.000.001.2020.668 dated 18.01.2024 (Annexure-H of the supplementary affidavit) states as follows:

“মহেশখালী পৌরসভার জেটি

মৌজা	বি এস খতিয়ান নং	দাগ নং	মন্তব্য
গোরকঘাটা	১	১১০৬	মহেশখালী পৌরসভার অবস্থিত

মহেশখালী পৌরসভার জেটির চৌহদ্দিঃ

উত্তরে : প্যারাবন
দক্ষিণেঃ রাখাইন শশ্মান ও প্যারাবন
পূর্বেঃ মহেশখালী চ্যানেল
পশ্চিমেঃ রাখাইন পাড়া ও বাজার এলাকা”

In view of the above context, the petitioner does not dispute the fact that the respondent No.2 as being the Conservator is to maintain the properties as described in the gazette dated 06.02.2018 (Annexure-2) and in the report dated 07.02.2019 (Annexure-4) respectively.

However, fact remains that no clear demarcation has been made in those annexures with regard to the placement of the jetty in question. In view of the said vague and unspecified description of the properties so far the jetty in question is concerned, as contained in Annexure-2 and 4 and also, considering the statements so made by the Assistant Commissioner (Land), Moheshkhali, Cox's Bazar, makes the issue disputed. This Court while exercising jurisdiction under Article 102 of the Constitution cannot embark into disputed question of facts.

As such, for proper dispensation of justice, this court directs “মহাপরিচালক, ভূমি রেকর্ড ও জরিপ অধিদপ্তর, তেজগাঁও, ঢাকা” to take necessary steps towards survey of the area in question in accordance with law in the presence of the respective contending parties i.e. respondent Nos.2 and 6 and identify its position with clear demarcation keeping in view of Annexures-2 and 4 respectively of the affidavit in opposition, preferably within 1(one) month from the date of receipt of the copy of this order.

On receipt of the said survey report respondent Nos. 2 and 6 are to take steps over the jetty in question in due compliance of law.

Till completion of the process of survey, the respective contending parties are hereby directed to maintain *status-quo* over the possession and position of the property in question.

With the above observations and directions, this Rule is accordingly disposed of.

There will be no order as to costs.

Communicate the judgment and order to the respondents concerned at once.

Muhammad Mahbub Ul Islam, J:

I agree.