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

Writ Petition No. 15376 of 2023

IN THE MATTER OF :

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

-And-

IN THE MATTER OF :

Mrs. Nilufar Hossain alias Mrs. Fina Nilufar Shawkat
…… Petitioner

-Versus-

The Government of the People`s Republic of Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Ramna, Dhaka-1000 and others
…….Respondents

Mr. Fida M. Kamal, Senior Advocate with
Mr. Ekramul Haque Tutul, and
Ms. Zibon Nesa Mukta, Advocate
…….for the petitioner

Mr. Amit Das Gupta, DAG with
Mr. Md. Zakir Hossain Masud, AAG
Mr. Toufiq Sajawar Partho, AAG and
Mr. Md. Rashedul Islam, AAG
……for the respondent No.1

Mr. Md. Mehedi Hasan Chowdhury, Advocate with
Mr. Md. Imam Hasan, Advocate
……for the respondent No.5

Heard on: 04.02.2024 , 07.02.2024 & 13.02.2024

Judgment on :*22.02.2024*

Present:
Ms. Justice Naima Haider
&
Ms. Justice Kazi Zinat Hoque

Naima Haider, J;

In an application under Article 102 of the Constitution, this Division by order dated 04.12.2023 issued Rule Nisi in the following terms:

Let a Rule Nisi be issued calling upon the respondents to who cause as to why the impugned Notice issued by the respondent No. 04 vide Memo No. 110 L.A. Case No. 03, 15, 08/2023-2024 dated 29.10.2023, under Section 4(1) of the Acquisition and Requisition of the Immovable Property Act, 2017 (Annexure-I) should not be declared to have been issued without lawful authority and is of no legal effect and as to why a direction should not be given upon the respondents to relocate or redesign the Entry-Exit, Fire Exit ventilation Duct point of Notun Bazar Metro Rail Station BMTCL MRT Line-1 at petitioner's plot No.10, Block-J, Pragati Sarani Road, Baridhara, Dhaka which the respondents are bound by law to do so and/or such other or further order or order pass as to this Court may seem fit and proper.

Interim order was also passed by in the following terms:

Pending hearing of the Rule, the respondent No. 4 is directed to dispose of the application dated 12.11.2023, so far as it relates to the petitioner's plot No. 10, Block-J, Pragati Sarani Road, Baridhara, Dhaka as evident from Annexure-J within 15(fifteen) days from the date of receipt of a copy of this order, in accordance with law.

Against the order dated 04.12.2023 passed by this Division, appeal being Civil Petition for Leave to Appeal No. 80 of 2024 was preferred. The Hon'ble Appellate Division passed an order directing this Division to dispose of the Rule within a specified time. The order passed by the Hon'ble Appellate Division is quoted below:

"It is desirable that the Rule issuing Bench of the High Court Division shall dispose of the Rule expeditiously preferably within a period of 21(twenty one) days from date."

In view of the aforesaid order passed by the Hon'ble Appellate Division, the Rule is taken up for hearing on a priority basis.

The dispute between the contending parties relate to the legality of acquisition of petitioner's property. Simply put, the petitioner's contention is that the acquisition was not in accordance with law and therefore, the allegedly acquired property cannot be used by the respondents. The respondents on the other hand argue that acquisition of property, including the petitioner's property was for national interest and all procedures pertaining to acquisition were duly complied with and therefore, there is no scope to intervene.

The learned Counsels appearing for the petitioner and the contesting respondents advanced elaborate submissions. The submissions advanced by the learned Counsels have given rise to certain important issues which we will endeavor to address in this Judgment.

The facts leading to filing of the instant writ petition, in brief, are as follows: land measuring 8(eight) Katha and 11 Chatak located at Holding No. 10, Block-J, Prgati Swarani Road, Baridhara R/A was allocated to the petitioner's mother though a lease deed dated 30.06.2002 executed by RAJUK. The original allottee-petitioner's mother thereafter made a gift of the said land in favour of her daughter- the present petitioner. Subsequently the said land/property mutated in the name of

the petitioner. The petitioner had been in possession of the land/property in question. She had been paying the applicable taxes to the Government. The petitioner also had her name mutated with the office of RAJUK so that she can proceed with construction of multi storied building. In 2017 the petitioner entered into a contract with a developer for construction of 14 storied building and obtained necessary regulatory approvals from RAJUK. The construction work was initially delayed due to Covid-19 outbreak but subsequently, the developer company started preparation for construction work. Suddenly the petitioner came to know, from a banner/bill board, that the land in question was selected for construction of MRT Line-1. The petitioner's son and the management of the developer company visited the office of the respondents and requested them for re-location and in this regard filed an application dated 24.09.2023. No heed was paid thereto. The petitioner filed several representations subsequently. Again, no heed was paid thereto. Under compelling circumstance, the petitioner moved this Division and obtained the instant Rule.

Since implementation of any project requires the Government to acquire land, the petitioner inquired whether the land/property in question had been acquired. At that point, the petitioner came to know of acquisition under the Acquisition and Requisition of Immovable Property Act 2017 ("the 2017 Act"). The petitioner did not receive the statutory notice envisaged under Section 4 of the 2017 Act. Upon

inquiry, it transpired that the notice was served upon one Mr. Md. Mokbul Hossain Akondo who has no connection with the petitioner, directly or indirectly. It is also important to note that the petitioner has not obtained any compensation for the said acquisition and that the petitioner is not interested in compensation. Her position is that if this Division does not intervene, the respondents would be permitted to proceed with construction work over her land without acquisition which would violate her fundamental right to property as well as her fundamental right to be treated in accordance with law and only in accordance with law.

The Rule is opposed. The respondent No.5 filed an Affidavit in Opposition. The respondent No.5 contends that the acquisition process was initiated properly by serving notice in terms with Section 4 of the 2017 Act and therefore, there is no illegality in the acquisition process. The respondent No.5, through the Affidavit in Opposition states that the acquisition process followed the *"Strategic Transport Plan for Dhaka"* which was duly approved by the Government and that the acquisition was for public purpose. In the Affidavit in Opposition, from paragraph No. 15 to paragraph No. 32, the respondent No.5 elaborately sets out different aspects of the project which is intended to be implemented. It appears from paragraph No.15 onwards is that the acquisition of the properties including the property in question is for implementation of a project to make the traffic system in Dhaka more efficient. We also note

from the Affidavit in Opposition that complex financial issues are involved in implementation of the project. Not only that the implementation of the project involves rather complex bilateral issues with among others, foreign lenders. According to the respondent No.5 necessary permissions had been taken for implementation of the project; RAJUK by letter dated 09.02.2023 and Ministry of Housing and Public Works by letter dated 14.02.2023 issued No Objection Certificate for acquisition of 2.307 acres of land for completion of the project and in particular, for construction of three underground MRT Lines. The respondent No.5 also points out that the value of the project is Taka 52561 cores and approximately Taka 592.75 crores have been paid to the Foreign Consultants under the Technical Project Proposal of the project. The respondent No.5 also states that detailed designs are in place and at this point in time, there is no scope but to implement the project. According to the respondent No.5, the Rule is misconceived and is liable to be discharged.

The Affidavit in Opposition filed by the respondent No.5 is comprehensive and mostly deals with the project structure and financials connected to the project. We have carefully perused the said details but in delivering this Judgment, we feel that we need not elaborately set out those facts as those are not strictly relevant.

However, we do agree with the respondents that the project is for public purpose. We also agree that the implementation of the project

involves complicated economic considerations. The learned Counsel for the petitioner, Mr. Fida M. Kamal, Senior Advocate also candidly shares the same view.

An Affidavit in Reply was filed by the petitioner. Paragraph No. 8 of the said affidavit is important. The petitioner points out that though the CS Consultant of MRT Line-1 opined that the relocation of S08 Notun Bazar Station is not possible, he did not mention that it would not be possible to redesign it in a way that would not require the petitioner's land. In the Affidavit in Reply the petitioner points out that notice under Section 4 of the 2017 was not served; rather there was a sign board referring to the acquisition containing no signature or seal of the acquiring authority. In the Affidavit in Reply, it was pointed out that for the purpose of re-adjusting the design only to that extent which affects the petitioner's land, alternative plot under the control of RAJUK may be used under the acquisition policy of JICA.

Interestingly, though the acquiring body-respondent-Deputy Commissioner is the appropriate authority to address the issue of lawfulness of the acquisition, neither the Deputy Commissioner nor the office of the Deputy Commissioner filed any affidavits. No argument(s) were also placed on their behalf as to how they have proceeded with the acquisition of the petitioner's property. While the requiring body i.e. the respondent No.5 filed Affidavit in Opposition, it is our view that given the importance of the issue involved it was the responsibility of the

concerned Deputy Commissioner to address the issue of legality of the acquisition; it is the Deputy Commissioner who acquired for the respondent No.5 and not the other way and it is primarily the action of the Deputy Commissioner which is under challenge.

To begin with, we wish to make it absolutely clear that the petitioner is not concerned with the implementation of the project. The petitioner's concern is limited to use of her land/property in the absence of acquisition. The petitioner is in favour of implementation of the project and as such suggested slight re-adjustment which would not only ensure effective implementation of the project but at the same time would ensure that petitioner's proprietary right to her property would not be curtailed.

Mr. Fida M. Kamal, Senior Advocate, appears for the petitioner. He takes us through the writ petition, Affidavit in Reply and the documents annexed therein. Mr. Kamal, at the outset candidly submits that the implementation of the project would benefit the country and that implementation of the project is desirable. Mr. Kamal raised his concern from a different perspective. He takes us through the scheme of the 2017 Act and submits that the said Act was enacted facilitate acquisition for implementation of projects. He submits that projects are to be implemented on property properly acquired. He refers to the acquisition for construction of Padma Bridge. Mr. Kamal submits that unless the acquisition is in accordance with law, there is no scope for

implementation of the project in question or any project. Mr. Kamal submits that under the 2017 Act, properties are to be acquired first and in so acquiring the procedure set out therein must be followed. He points out that right to property is a fundamental right and cannot be taken away without following the due process of law. In this context Mr. Kamal submits that in the absence of service of a valid notice under Section 4 of the 2017 Act, there can be no acquisition and in the instant case, the notice was not valid and at the same time, there was no service upon the petitioner, as is statutorily required. In this regard he points out that service of a so called notice to a third party, who is not in any way connected to the petitioner cannot be treated as compliance of Section 4 of the 2017 Act and therefore, subsequent proceedings are nullity. Mr. Kamal also submits that there is no need to stop the development work; alternative plots are available and slight re-adjustment would suffice. In this regard, Mr. Kamal submits that in many mega constructions, slight adjustment(s) to designs to ensure compliance with law is no uncommon. Mr. Kamal also submits that the petitioner does not challenge the legality of the implementation of the project but merely seeks intervention from this Division to ensure that her right to property, as guaranteed under Article 42 of the Constitution is not taken away in violation of Article 31 of the Constitution in guise of development work. On these grounds Mr. Kamal submits that the Rule should be made absolute.

Mr. Md. Mehdi Hasan Chowdhury, the learned Advocate appears on behalf of the respondents. He takes us through the Affidavit in Opposition and vehemently opposes the Rule. The learned Advocate for the respondent No.5 submits that the notice under Section 4 of the 2017 Act had been duly served and therefore, the proceeding was initiated lawfully and consequentially, the acquisition was legal. He also points out that since the petitioner would be entitled to compensation she cannot in strict sense of the word be termed as aggrieved person within the meaning of Article 102 of the Constitution. The learned Advocate for respondent No.5 elaborately places the scheme of the project and the manner in which the project is intended to be implemented and thereafter submits that the project is of national importance and implementation of the project is a "policy decision" of the Government and therefore this Division should refrain from intervening. He also submits that the implementation process of the project is preceded by extremely complex fiscal and foreign relation issues and that this Division lacks expertise to adjudicate on this; any intervention by this Division would tantamount to dealing with such issues and would be nothing short of usurping the function of the executives. He also questions the locus standi of the petitioner to file the instant writ petition. The learned Advocate for the respondent No. 5 also submits that the petitioner has not come with clean hand and is not entitled to relief sought for. Primarily on these grounds,

the learned Advocate for the respondent No.5 submits that the instant Rule is misconceived and is liable to be discharged.

We have perused the writ petition, its annexures, affidavit-in-opposition filed by the respondent no.5 and other materials on record placed before us.

We wish to once again state, that this writ petition is not filed challenging the implementation of the project. Rather the scope of the writ petition is limited to the primary question being *"Whether the petitioner's land was duly acquired for the project to be implemented thereon"*. It is in connection with addressing this issue and in light of the submissions of the contesting parties we are required to address certain interesting issues.

At the outset, it is stated that there is no dispute that implementation of any infrastructure project over private land is to be preceded by acquisition of the private land. Article 42 of the Constitution clearly provides that acquisition must be sanctioned by law.

Part III of the Constitution deals with fundamental rights. It is our view that fundamental rights do not merely play a defensive function but a protective one as well. They are not just rights against the State but entitlements to State protection. Thus, to have fundamental right to privacy, for example, is not just to have a claim against the State that it refrains from interfering with one's privacy interests—say through searches and seizures—but also an entitlement to positive state action

directed towards the protection of one's privacy interests against the interference of third parties, namely through the law of defamation, data security legislation and so forth. Fundamental rights therefore confer rights to individuals and at the same time impose duties upon the State to protect such rights. Therefore, fundamental rights being "*recognized special rights"* cannot under any circumstances, be flouted with. It is the constitutional obligation of this Division to ensure this.

Article 42 of our Constitution recognizes right to property as fundamental right. The wordings of Article 42 make it clear that no property shall be subject to compulsory acquisition, nationalization or requisition unless authorized by law.

Article 31 of the Constitution is important in the present context. It deals with *"Right to protection of law".* Article 31 reads as follows:

> *To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.*

In our view, Article 42 is to be read with Article 31. The effect of reading these constitutional provisions simply means (a) deprivation of property right is permissible only if authorized by law; and (b) the authority/executives must strictly apply the law that curtails the right to property. In our view, since right to property is a fundamental right, the laws that deal with acquisition, requisition or nationalization, must be

carefully applied by the executives and the application of such law must be carefully reviewed by this Division in exercise of powers under Article 102 of the Constitution. We wish to make it very clear that when the executives take any steps affecting fundamental right, they must be extremely cautious about how they proceed; they must ensure that the fundamental right(s) are not violated. There is no scope for error.

The 2017 Act was enacted by repealing the Acquisition and Requisition of Immovable Property Ordinance 1982 ("the 1982 Ordinance"). We have reviewed both the 2017 Act and the 1982 Ordinance. While these are drafted differently, they are both based on same premise; to safeguard the interest of the landowner and at the same time, to ensure that Government can utilize private land through acquisition or requisition, in the event it is in the public interest to do so.

As stated before, the 2017 Act is to ensure acquisition of private land/property for Government use. The whole purpose of the 2017 Act is to ensure lawful acquisition. Therefore, from initiation of the acquisition process till the completion of the process, the executives must strictly follow the law and they must be extra careful because application of the 2017 Act results in curtailment of property right of a citizen.

The process of acquisition is initiated through notice under Section 4 of the 2017 Act. The part of Section 4, relevant in the present context, is set out below for ease of reference:

৪। স্থাবর সম্পত্তি অধিগ্রহণের জন্য প্রাথমিক নোটিশ জারি।-(১) জেলা প্রশাসকের নিকট কোনো স্থাবর সম্পত্তি জনপ্রয়োজনে বা জনস্বার্থে আবশ্যক মর্মে প্রতীয়মান হইলে তিনি উক্ত

সম্পত্তি অধিগ্রহণের প্রস্তাব করা হইয়াছে উল্লেখ করিয়া উক্ত সম্পত্তির উপর বা সম্পত্তির নিকটবর্তী সুবিধাজনক স্থানে, নির্ধারিত ফরম ও পদ্ধতিতে নোটিশ জারি করিবেন।

Let us break down the scope of Section 4(1) quoted above. Section 4 is triggered only when it appears to the Deputy Commissioner that any immovable property is necessary and needs to be acquired for জনপ্রয়োজনে বা জনস্বার্থে. Once this condition precedent is fulfilled, the Deputy Commissioner can proceed with the next stage. The next stage is issuance of notice; the notice must contain statement to the effect that সম্পত্তি অধিগ্রহণের প্রস্তাব করা হইয়াছে. This notice must be served "উক্ত সম্পত্তির উপর বা সম্পত্তির নিকটবর্তী সুবিধাজনক স্থানে. The notice is to be issued in the prescribed format.

Section 4(1) does not provide for manner of service of notice. That is dealt with by Section 42 [নোটিশ ও আদেশ জারি]. Section 42 is relevant in the present context because this provision in our view supplements Section 4 of the 2017 Act. Section 42 reads as follows:

৪২। নোটিশ ও আদেশ জারি।-(১) এই আইন ও তদধীন প্রণীত বিধিতে ভিন্নরূপ কোনো কিছু না থাকিলে, এই আইনের অধীন জারিকৃত বা প্রস্তুতকৃত সকল নোটিশ বা আদেশ, ঠিকানায় উল্লিখিত ব্যক্তির উপর অথবা যাহার উপর জারি করা প্রয়োজন তাহার উপর জারি নিশ্চিত করিতে হইবে।

(২) নোটিশ বা আদেশ জারির জন্য উপযুক্ত ব্যক্তির অনুপস্থিতিতে উহা প্রদান করা সম্ভবপর না হইলে, উক্ত ব্যক্তির পক্ষে যে কোনো নিযুক্ত ব্যক্তি অথবা তাহার সহিত বসবাসরত পরিবারের কোনো প্রাপ্তবয়স্ক সদস্যকে উক্ত নোটিশ বা আদেশ প্রদান করিতে হইবে, অথবা কোনো নিযুক্ত ব্যক্তি বা পরিবারের সদস্যকে নোটিশ প্রদান করা সম্ভবপর না হইলে, উক্ত নোটিশ বা আদেশের অনুলিপি বাহিরের দরজা বা উক্ত ব্যক্তি সাধারণত যে স্থানে বসবাস করেন কিংবা ব্যবসা করেন অথবা ব্যক্তিগতভাবে লাভজনক কাজ করেন, উক্ত স্থানের সংলগ্ন কোনো অংশে লটকাইয়া জারি করিতে হইবে এবং অন্য একটি অনুলিপি জারিকারক

কর্মকর্তার কার্যালয়ে লটকাইতে হইবে এবং সম্ভব হইলে সংশ্লিষ্ট সম্পত্তি সংলগ্ন কোনো বিশেষ অংশেও লটকাইতে হইবেঃ

তবে শর্ত থাকে যে, সংশ্লিষ্ট কর্তৃপক্ষ বা কর্মচারীর নিকট হইতে নির্দেশপ্রাপ্ত হইলে, নোটিশ বা আদেশ প্রাপকের ঠিকানায় অথবা, ক্ষেত্রমত, শেষ জ্ঞাত আবাসস্থল, ব্যবসাকেন্দ্র বা কর্মস্থলের ঠিকানায় রেজিস্ট্রি ডাকযোগে প্রেরণ করা যাইবে।

It is a cardinal principle of statutory interpretation that two provisions must be interpreted harmoniously. Section 4 contemplates service of notice on উক্ত সম্পত্তির উপর বা সম্পত্তির নিকটবর্তী সুবিধাজনক স্থানে. Section 42 also contemplates service on property. Therefore, these two provisions are not irreconcilable. In our view, Section 42 is to be read in Section 4 of the 2017 Act. That means notice under Section 4 must first be served upon " উল্লিখিত ব্যক্তির উপর অথবা যাহার উপর জারি করা প্রয়োজন তাহার উপর জারি নিশ্চিত করিতে হইবে।"

In the event it is not possible to do so, then notice would have to be served on নিযুক্ত ব্যক্তি অথবা তাহার সহিত বসবাসরত পরিবারের কোনো প্রাপ্তবয়স্ক সদস্য and in the event this is not possible, বাহিরের দরজা বা উক্ত ব্যক্তি সাধারণত যে স্থানে বসবাস করেন কিংবা ব্যবসা করেন অথবা ব্যক্তিগতভাবে লাভজনক কাজ করেন, উক্ত স্থানের সংলগ্ন কোনো অংশে লটকাইয়া জারি করিতে হইবে. Still if this is not possible then notice be served সম্পত্তির নিকটবর্তী সুবিধাজনক স্থানে. In our view, the sequence is to be maintained. The last method of service cannot be regarded as first method of service.

Section 42 of the 2017 Act starts with "এই আইন ও তদধীন প্রণীত বিধিতে ভিন্নরূপ কোনো কিছু না থাকিলে. In our view, wordings of Section 4 does not show an intention that Section 42 will not apply; to the contrary, in our

view, Section 4 envisages application of the procedure set out in Section 42 and if, for some reason, the circumstances set out in Section 42 cannot be applied, notice is to be served on সম্পত্তির নিকটবর্তী সুবিধাজনক স্থানে.

Having said so, we now turn to the purpose of the notice. The notice will enable the owner of the property to consider *"whether to object to the acquisition of his property".* The right to object is a statutory right set out in Section 5 of the 2017 Act. Therefore, it is necessary that the owner of the property, who has the right to object to acquisition, is aware of the decision to acquire. From the reading of Section 4 and Section 42, it appears to us that Parliament was extremely cautious to ensure that the statutory right under Section 5 of the 2017 can be availed before the property vests with the Government. Since the service of the notice is directly related to the decision whether to object to the acquisition, Section 4 is not to be treated to be "technical". The right to receive notice is a substantive right since the right to object, being statutory right, depends on whether the notice was received by the correct person, in the correct manner and in the correct form.

In paragraph No. 8 of the writ petition, the writ petitioner specifically alleged that *"notice was served upon one Md. Mokbul Hossain Akondo, not upon the petitioner..."*. Paragraph No. 5 of the Affidavit in Opposition deals with paragraph No. 8 of the writ petition. In paragraph No. 5, the respondent No. 5 did not deny that it was not served upon the petitioner; paragraph No. 5 does not provide any

explanation that steps were taken to serve the notice upon the petitioner or anyone as envisaged under Section 42. The said paragraph merely states *"That the statements made in paragraph No. 8 is partly matter of record and partly not true and correct..."* and then proceeds to state that notice under Section 4 was duly served. This is neither here nor there. What this means, without any further explanation is that the notice under Section 4 of the 2017 Act was served upon Mr. Akondo who is unconnected to the petitioner.

The petitioner claims herself to be the owner of the property/land in question. It is in her favour, record of right is prepared. In support, she has annexed documents. That is not disputed by the respondent No.5. However, interestingly, the respondent No.5 states that notice was served upon the *"latest recorded tenant"*. The last recorded tenant is the petitioner and not Mr. Akondo. Therefore, what is clear to us is that the service of notice was not proper.

What thus transpired is that the notice under Section 4 was not (a) served upon the petitioner or anyone specified in Section 42 of the 2017 Act; and (b) notice was served upon a person who has no connection with the petitioner. Such service is no service under Section 4 of the 2017 Act. Therefore, even assuming that the notice was in correct format, absence of service renders the proceeding initiated by the respondents illegal.

It is a settled principle that any notice issued must be meaningful and not vague. Thus in ***CCC V Brindavan Beverages (P) Limited*** *[(2007) 5 SCC 388],* the Supreme Court of India held that if the notice is vague, lack details and/or unintelligible, it cannot be construed as an effective notice. We are in full agreement with the view expressed by their Lordships.

The petitioner points out that she came to know of the acquisition for the first time when she saw the bill board that referred to construction of MRT Line-1. The wordings of the bill board are as follows:

> *"এখানে বাংলাদেশের প্রথম পাতাল মেট্রোরেল এমআরটি লাইন ১ এর স্থাপনা নির্মাণের জন্য স্থান চূড়ান্ত করা হয়েছে । এখানে কোন প্রকার স্থাপনা নির্মাণ না করার জন্য বিশেষভাবে অনুরোধ করা হলো ।*

What does the word এখানে mean? What areas are covered by এখানে? To whom is this addressed and who are affected? Nothing is specified. If this is a form of notice then it is grossly vague. Furthermore Section 4(1) of the 2017 Act does not contemplate service of notice through bill board. Therefore, this cannot be termed as notice under Section 4 of the 2017 Act.

The right to notice, as envisaged in Section 4 of the 2017 Act, is a substantive right of the petitioner. It is well settled principle that if statute requires notice to be issued prior to initiation of any proceeding, the decision reached in the absence of notice is a nullity ***[Gokak Patel V Vokart Limited AIR 1987 SC 1161]***. The way we look at it, if statute requires notice to be issued and served, in a particular way as pre-

condition for initiation of proceeding and if the proceeding is initiated and decision reached, in the absence of the notice, then the authority taking the decision steps out of jurisdiction and commits jurisdictional error which vitiates the decision.

Let us now see how the acquisition process is initiated and concluded. Under the 2017 Act, the process is initiated through notice under Section 4. Once the notice is served, the affected person may consider filing an application/objection under Section 5 of the 2017 Act. Once the application is received, the concerned Deputy Commissioner after hearing or in appropriate case, after re-investigation, give his opinion within the time stipulated. Depending on the size of the land, the concerned Deputy Commissioner will send the relevant file to the Ministry or the concerned Divisional Commissioner. The Ministry or the Divisional Commissioner, as the case may be, will give decision taking into account the recommendation/opinion of the concerned Deputy Commissioner. The decision taken by the Ministry or the concerned Divisional Commissioner shall be final. Subsequent provisions of the 2017 Act deal with taking possession and compensation.

From the facts before us, we understand that:

(a) Process of acquisition commenced with service of notice upon the petitioner;

(b) The petitioner was not served with a notice in terms of the statutory framework though service of such notice is a condition precedent for acquisition; and

(c) The petitioner, as a result of non-service, was deprived of the statutory right under Section 5 of the 1947 Act.

Therefore, in our view, jurisdictional facts necessary for the acquisition of the petitioner's property/land was absent. Thus it is our considered view that acquisition of petitioner's land/property was tainted with jurisdictional error.

In the celebrated case of ***Md. Jamil Asghar V Improvement Trust, Rawalpindi*** *[(1965) 17 DLR SC 520]*, the Supreme Court held:

> *"... A purely administrative officer who is empowered to pass an order of certain circumstances exist has no jurisdiction to determine those circumstances and the objective existence of those circumstances is an essential condition for the validity of his order. In respect of every order passed by him the Court can make an enquiry and if it finds that all the circumstances needed for passing the order were not present, it will declare the order to be void. Of course, although the officer has been granted no jurisdiction to determine any facts he will have to ascertain whether the requisite circumstances exist for otherwise he cannot pass the order but his conclusion as to existence of those circumstances binds nobody and it is open to any person affected to challenge his act on the ground that those circumstances do not infact exists..."*

We wish to point out that executives do not have what sometimes they understand to be "inherent powers"; their actions are to be guided by the empowering law and only in accordance with the empowering law. They are not permitted to deviate or chose a procedure as they think

fit. In the instant case, we note that in the process of acquisition of the petitioner's land/property, they have clearly stepped out of the permissible course. They have acted beyond authority rendering their decision to be violative of Article 31 and Article 42 of the Constitution. Clearly, the petitioner was not treated in accordance with the law i.e. the 2017 Act.

Generally, in implementation of project of this magnitude, a guideline is prepared. From the annexures, we note that similar guideline is in place. The relevant part of the guideline, as contained in "Punorbashon Pustika" published by the respondent No.5 reads as follows:

> *" ব্যক্তিগত ভুমি অধিগ্রহন যতদূর সম্ভব পরিহার এবং প্রকল্পের যাবতীয় কাজ সরকারি ভুমির উপর করার চেষ্টা করা হবে। " "ক্ষতিগ্রস্থ ব্যক্তিবর্গকে ক্ষতিপূরণ সম্পর্কে বিস্তারিত অবহিত করা হবে এবং বিকল্প ব্যবস্থা সম্পর্কে তাদের মতামত গ্রহণ করা হবে। and* ***মহিলা প্রধান এবং প্রবীণ*** *ও ঝুকিপূর্ণ ব্যক্তি/ পরিবারের প্রতি বিশেষ নজর দেয়া হবে।"*
>
> *(emphasis supplied)*

What is clear is that the guidelines placed emphasis on the need to make every effort to minimize the acquisition of private property, seek input from affected individuals on alternative solutions, and pay special attention to vulnerable groups, including women headed households. There is nothing in the Affidavit that suggests that is has been followed. The quoted part of the guideline, suggests that the respondents should implement the project on Government land, to the extent possible and refrain from acquisition of land belonging to **মহিলা প্রধান এবং প্রবীণ** ও ঝুকিপূর্ণ

ব্যক্তি/ পরিবারের, if there is scope for alternative land. In the instant case, there is a plot belonging to RAJUK that remains unutilized and can be used in the event of slight re-adjustment and the respondents have not controverted this. That being the case, it is our view that the respondent No.5 ought to have taken account into its own policy/guideline in implementation of its project and that was not done. It is rather unfortunate.

From the forgoing, it appears to us that the process of acquisition of petitioner's property/land was tainted with jurisdictional error and the acquisition process was not preceded by compliance with law which consequentially resulted in violation of fundamental rights guaranteed under Articles 42 and 31 of the Constitution. Simply put, the petitioner was deprived of her fundamental right to property through a process beyond powers conferred under the 2017 Act.

At this point we wish to point out that we are concerned with the property/land belonging to the petitioner. Our findings do not extend to other properties acquired.

We shall now deal with the submissions of the learned Advocate for the respondent No.5. Mr. Chowdhury argued that the project was of public importance and that implementation of the project would benefit the citizens. We certainly agree with this. However, public importance or public purpose is not the sole ground for acquisition; it is only when there is a public purpose for acquisition, the process can be initiated and

the process so initiated must strictly follow the law. We are not at all casting doubt on the "public purpose" element; what bothers us is the manner in which the petitioner's property was acquired behind her back resulting in violation of her fundamental right to property and also the fundamental right to be treated in accordance with law and only in accordance with law.

The learned Advocate for the respondent No.5 vehemently argues that notice under Section 4 was duly served. It is his submission that there is no requirement to serve notice personally. In support, he refers to the following decisions: *(a)* ***Noel Gregory Mendes V Deputy Commissioner, Chittagong and others*** *[6 MLR (AD) 112]; (b)* ***M. A. Salam alias Abdus Salam V Bangladesh and others*** *[5 MLR (AD) 184; and (c)* ***Ameenah Ahmed and others V Bangladesh and others*** *[12 BLC 514]*. We have perused the decisions cited. These decisions involved interpretation of Section 3 of the 1982 Ordinance. The scheme of 1982 Ordinance is different from the scheme of the 2017 Act. Furthermore the wordings are also different. Under the 2017 Act, specific procedure is set out for service of notice. The acquisition in question is admittedly under the 2017 Act. Therefore, the findings of the judgments cited by the learned Advocate for the respondent No.5, in our view, do not apply in the present context. Having said that, we wish to point out that we express no views on those judgments other than what we have just stated.

We wish to add something here, though not strictly relevant. It is one thing to serve notice to the relevant person in incorrect manner and it is another thing to serve notice to a third party who has no nexus to the relevant person. In the instant case, the person on whom the notice under Section 4 was served is certainly not the recorded owner and since he is not connected to the petitioner, he is not authorized to receive notice under Section 42 of the 2017 Act. We are compelled to hold, once again, that there was no service of the notice and consequentially, the process of acquisition of petitioner's property/land is tainted with jurisdictional error.

The learned Advocate for the respondent No.5 submits that the petitioner would be entitled to compensation and therefore, she cannot be aggrieved in strict sense. We disagree. Under the 2017 Act, once notice is served, the person aggrieved may file objection under Section 5 against the acquisition. Objections can be on any count; it may be that the person considers that there is no public purpose element behind acquisition, it may be that the person objects on the ground that the property in question cannot be acquired under law. Objection can be on humanitarian ground also. The grounds are endless. If compensation was sufficient, then Section 5 of the 2017 Act becomes nugatory and apex Courts have held in series of cases that any interpretation that renders a statutory provision nugatory should be avoided. Clearly the petitioner, who was not aware of the acquisition of her property was directly

aggrieved. Her potential entitlement to compensation does not mean she is not aggrieved and does not have locus standi to file the instant writ petition.

We now focus on the submission of the learned Advocate for the respondent No.5 regarding the fact that the implementation of the project is in the national interest and as such intervention of this Division is unwarranted. Mr. Fida M. Kamal, Senior Advocate appearing for the petitioner also candidly confesses that the implementation of the project is in the national interest. We share the same view. However, that does not mean that the project can be implemented in violation of any law or in a manner that offends the Constitution. The writ petition is not filed with the aim to stop implementation of the project. The writ petition is filed with a view to ensure that *"the project is not implemented on land which has not been acquired"*; all that the petitioner seeks is a slight adjustment to the *"Entry-Exit, fire exit ventilation duct point of Notun Bazar Metro Rail Station DMTCL MRT Line-1"* so that petitioner's property is not affected and in this regard, the petitioner has pointed out alternative unused plot under possession of the Government organization.

Slight adjustments in mega projects are not uncommon. We have noted adjustments in projects undertaken in different jurisdictions. For instance, Haizhuyong Bridge in Guangdong Province in China had to undergo slight modification in the form of *"two wings for a limited*

distance" since the land could not be acquired by the Government. Then again the Land Transport Authority of Singapore had been closely monitoring the traffic conditions in Marina Costal Expressway Tunnel as well as the adjoining road network since its opening in 2019 and is making adjustments. Furthermore, new highway Wenling, situated in Zhejiang province in China is wide, well paved and almost finished but had to undergo slight adjustment because the property could not be acquired. What we are trying to point out here, using examples of different jurisdictions is that sometimes implementation of mega project requires slight adjustments in order to ensure compliance with law. In the instant case, what needs to be considered in "slight adjustment" at a certain point and not re-considering or restructuring the entire project.

We also note that implementation of the project was slightly redesigned for Pakistan Embassy which is in close proximity with the petitioner's property. The learned Advocate for the respondent No.5 admits to such re-designing/readjustment. This goes on to show that not only in different jurisdictions but also in respect of the project in question, re-adjustment is not an alien concept. Having said so, in our view, it is only fair that the respondents make slight re-adjustment so that petitioner's land, which in our view has not been lawfully acquired, is not used for implementation of a project of such national importance.

The learned Advocate for the respondent No.5 vehemently argues that the implementation of the project is a policy decision of the

Government and further to the said policy decision, design has been prepared and therefore, there is no scope for the High Court Division to intervene. Our view on this is simple. The doctrine of "Separation of Power" requires the High Court not to, as a matter of practice, interfere in policy matters of the Government. However, the High Court Division should be satisfied that the issue is infact a policy issue. Mere plea of policy will not be sufficient reason for the High Court Division to refuse to exercise jurisdiction. In the case of ***DDA V Joint Action Committee, Allottee*** *of SFS Flats [AIR 2008 SC 1343]* the Supreme Court of India held:

> *"... An executive order termed as policy decision is not beyond the pale of judicial review. Whereas the superior courts many not interfere with nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review..."*.

We would wish to make it clear that even policy decisions may be reviewed by this Division in the event, for instance, the policy decision was taken illegally, the policy decision is grossly unreasonable, the policy decision affects fundamental rights guaranteed by the Constitution but having said so, the Courts should not careful in such examination. However, it is one thing to review policy decision and it is another thing to review the manner in which the policy is implemented.

In this writ petition, we are dealing the latter issue. Our view in this regards is simple; the respondents are not at liberty to implement a policy decision in disregard to the existing laws and in a manner that violates the fundamental rights guaranteed by the Constitution.

The learned Advocate for the respondent No.5 also argues that the project in question is preceded by extremely complex fiscal and foreign relation issues and that this Division lacks expertise to adjudicate on this. The learned Attorney General took us through the Affidavit in Opposition and provided an outline of the complex economic considerations that are in place. He also provided an outline of the foreign relation issues involved in this project. We are not in disagreement with the learned. We are fully conversant with series of cases where the apex Courts of different jurisdictions held that intervention in respect of complex economic decisions is not desirable. However, the issue before us is simple; the writ petitioner is not questioning the underlying transaction pertaining to the project. The petitioner's simple stance is that unless lawfully acquired, she cannot be deprived of her right to property; nothing more nothing less. We agree with the petitioner's stance and accordingly hold that the submissions advanced are not relevant for disposal of the instant writ petition. Let us give an example to illustrate this. No doubt construction of Padma Bridge was further to a policy decision. In course of construction, land was acquired and compensation was paid. If the executives proceeded

with the construction work of Padma Bridge without acquisition of private land over which connecting roads were constructed, would we not have intervened? Surely we would have intervened, regardless of fiscal considerations underlying the construction work. Complex fiscal consideration or complex foreign relation issues are no grounds for the executives to travel beyond the authority set by the Parliament.

For the reason stated aforesaid, we are unable to agree with the submissions advanced by the learned Advocate for the respondent No.5. Before we part with the Judgment we wish to summarize as follows:

(a) This writ petition is filed not to stop the implementation work of the project but rather to ensure that the petitioner's land/property is not utilized without lawful acquisition;

(b) From the facts, it is clear that the petitioner was not served with notice under Section 4 of the 2017 Act. The notice was served upon a third party with whom petitioner has no connection. That cannot be termed as service of notice under the 2017 Act ;

(c) We hold that the Judgments cited by the learned Advocate for the respondent No.5 on interpretation of Section 3 of the 1982 Ordinance are inapplicable in the present context;

(d) The process of acquisition is tainted with jurisdictional error and violated the fundamental rights guaranteed under Articles 42 and 31 of the Constitution;

(e) The respondents should consider slight adjustment to the "Entry-Exit, fire exit ventilation duct point of Notun Bazar Metro Rail Station DMTCL MRT Line-1" so that petitioner's property is not affected;

(f) It is not uncommon for such minor adjustments to take place in mega projects; and

(g) This Judgment does not deal with acquisition of land/property in connection with implementation of the project. The Judgment deals only with the petitioner's case.

In light of the aforesaid, it is our considered view that there is merit in the Rule. The Rule, is therefore, made absolute without any order as to costs.

Communicate the Judgment and Order at once.

Kazi Zinat Hoque, J.

I agree.