

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Hasan Foez Siddique

Mr. Justice A.H.M. Shamsuddin Choudhury

CIVIL APPEAL NO.58 OF 2012.

(From the judgment and order dated 16.1.2011 passed by the High Court Division in Writ Petition No.9927 of 2008.)

Mohammad Zafar Iqbal and others:

Appellants.

=Versus=

Bangladesh, represented by the Secretary of the Ministry of Liberation War Affairs, Bangladesh Secretariat, Ramna, Dhaka and others:

Respondents.

For the Appellants:

Mr. Manjill Murshid, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.

For Respondent Nos.1:

Mr. Murad Reza, Additional Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For Respondent No.5:

Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For Respondent Nos.2-4:

Not Represented.

Date of hearing: 4th March, 2014.

J U D G M E N T

Prelude:

Surendra Kumar Sinha, J: Admittedly during nine months of the historic struggle for national liberation, the Pakistani Occupation Army along with their collaborators such as the Rajakars, Al-sams, Shanti Committee, Biharis created a reign of terror

in this country by killing *en masse* intellectuals, professionals, litterateur, journalists, students, members of the minority community, women and freedom fighters and dumped their dead bodies at different mass graveyards all over the country. Gary J. Bass wrote, Lt. General A.A.K. Niazi, who soon became the millitary commander in East Pakistan, would later frankly write of 'killing of civilians and a scorched-earth policy' condemning 'a display of stark cruelty, more merciless than the massacres by Changes (Genghis) Khan or at Jallianwala Bagh by the Bitish General Dyer'. (The Blood Telegram, page 70). General Niazi admitted the 'indiscriminate use of force' that 'earned for the military leaders names such as, 'Changez Khan' and 'Butcher of East Pakistan (Ibid). 'Although Pakistani forces had concentrated on Awami League activists, "Hindus Seem (to) bear brunt to general reign of terror". (Ibid P.72). Desaix Myers, a brash young development official, says, 'I was running around Chittagong in my white car, going up to millitary guys, saying, 'I've heard

rumors about young guys violating women, and I know that you as a disciplined officer would not want that to get out to the international press'. We felt we had diplomatic immunity. It just didn't seem that risky at the time' (Ibid). Myers wrote a desolate letter home to his friends lamenting what he had seen in a small, improvised Hindu village in the country side. The Army had 'lined up people from their houses, shot down the lines, killing close to six hundred'. (Ibid). "AT THE WHITE HOUSE, KISSINGER'S AIDES WERE SHAKEN BY BLOOD'S reporting. 'It was a brutal crackdown', says Winston Lord, Kissinger's special assistant, who says he read some of the cables. 'In retrospect, he did a pretty good reporting job, says Samuel Hoskinson, about Blood. 'He was telling power in Washington what power in Washington didn't want to hear.'" (Ibid, P.73).

'The more the news from East Pakistan accumulates, the more harrowing it becomes. Senseless murder, hysterical cruelty and what trust be a creeping fear run like a current throughout this

packed mass of human beings. All this the distant observer may assume despite the protests of East Pakistan Government at some of the stories that have been given circulation. By now the picture is a little more clear and a great deal more gruesome. Enough first-hand reports from Dacca(Dhaka) itself and from some of the major towns have come into confirm that what is happening is far worse than what might have been expected in a war of East Pakistan resisting the forces of the Central Government in their demand of independence. The accounts piling up make conditions in East Pakistan sound only too much like the massacres that broke out between Muslims and Hindus in the months leading up to the partition of India'. (Bangladesh Document, Pages 391-391).

Such devilish exultation of devastating large and furious ethnic clinching were never found in the history. It is detected after a thorough survey later on by different organizations, social workers, historians that about three million people were butchered by them. It was also revealed that in some

cases citizens were buried alive with hellish cruelty and brutal exultation. The Government of Bangladesh, Ministry of Liberation War Affairs undertook a project pro-forma, annexure-G, for construction of monuments at 9 slaughter places of 1971 and their preservation initiality at a cost of Tk.597.36 (in lakh). The main objective of the project is to conserve and to develop slaughter places used by occupied army and their local accomplices during war of liberation. It was pointed out that thousands of heroic sons of this soil were victims of genocide unleashed by the occupied forces in different clean places scattered through of the country in 1971. Of them, 9 places have been chosen to develop under this project and serial No.5 is the "killing spot at East Pahartali of P.S. Panchlaish, District-Chittagong.

The project was aimed for preservation of "national tradition" of historical memory and preservation of killing spot used for genocide by Pakistani occupied army and their local aids during great war of independence as a symbol of patriotism

to inspire the consciousness of nationality and preservation of memory of the national heroes through construction of monuments. The main objective of the project is 'to conserve and develop slaughter places used by the occupied army and their local accomplices during war of liberation. Thousands of heroic sons of the soil were victims of genocide unleashed by the occupied forces in different killing places scattered throughout the country in 1971'. While explaining the nature of benefits from the project it was pointed out that 'The unvaluable contribution made by the victim(s) of brutal forces genocide during the war of liberation through which People's Republic of Bangladesh emerged as an independent and sovereign state, will be exposed to the whole nation as well as to the world. Thousands of people of all ages from different corners of the country and also from abroad will visit the project area and this would be an important and attractive tourist centre in international standard. This will inspire the people

of the country and uphold the glory and dignity of Bangladesh in the world'.

It was pointed out that independence of Bangladesh through great war of independence was the best achievement in the history of Bangalees during the last thousand years. The Bangalees were to face cruel assassination and mass killing of the Pakistani barbarous occupying army in this life and death war of independence. It was further observed that "This monument to be built in the killing spot bring the blood of great proud of unparalleled sacrificing lives of freedom fighters hero Bangalees for the independence, in one side and in another side the memory of unbearable misdeed of killing men by the Pakistani occupying beast, the rust of the civilized world, its collaborator Rajakar, Al-bodor, Al-shams, some part of the Biharis and members of Peace Committee will remain as evidence of the history and will motivate the people with purity, sanctity and honesty and strength through generation to generation".

Thereafter three models of the proposed monuments were selected through countrywide competition. The then Prime Minister approved the model which stood first according to recommendation of the expert committee. Subsequently, the Prime Minister's office advised to take initiative for acquiring land under private ownership by letter under memo dated 20th December, 1998, written by the Ministry of Cultural Affairs. In the selection process first decision was taken for preservation of killing spots situated at 8 places in 6 districts of Bangladesh and to construct monuments on those places. In the inter ministerial meeting held on 7th January, 2001, decision was taken to construct monument at 9 places. Estimates have been received from 7 Deputy Commissioners in respect of area of land and determination of its price. Then Prime Minister promised implementation of the project without delay in a freedom fighters convention at Paltan Moydan on 23rd March, 2002, on the occasion of national day. Besides, decision was taken for

processing approval of the project in inter-ministerial meeting held in the Ministry of Liberation War Affairs on 5th March, 2002. The project was approved by the Planning Commission on 24th August, 2002, with an estimated costs as mentioned above. The former Prime Minister declared to undertake such project during discussion with Projanma-71 and subsequently Prime Minister's office advised to take initiative for acquiring land under private ownership.

Facts:

The Ministry of Cultural Affairs on proper survey located B.S. Plot Nos.152 and 153 measuring an area of 1.754 acres of land under East Pahartali mouza as the location of mass graveyard and decided to acquire the said plots and issued notices under section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982 upon the owners to file objections, if there be any, for construction of war memorial monument on 8th September, 2003. The authority directed the requiring body to deposit

Tk.94,00,000/- for payment as compensation to the affected persons. Pursuant thereto, the requiring body deposited the money.

University of Science and Technology (USTC), the respondent No.5, instituted Other Class Suit No.217 of 2002 in the Second Court of Joint District Judge, Chittagong seeking its right, title and interest in respect of those two plots on the averments inter alia that it had purchased the same by deed dated 19th May, 2002, from the recorded owners for the purpose of establishing USTC and started cleaning and preparing ground for construction of seven storey outdoor-indoor hospital complex under the name Shahid Zia-ur Rahman Complex and it also submitted a plan to the Chittagong Development Authority (CDA) for approval. It is further stated that when the expansion of the project was on going, local police suddenly stopped the construction works which constituted the cause of action for filing the suit. After institution of the suit it prayed for interim injunction and the court passed an interim order of

injunction on 28th November, 2002. The matter ultimately came up to the High Court Division in Civil Revision No.1891 of 2003 and the proceedings of the suit was stayed by order dated 15th November, 2003.

In the mean time 5 kathas of land near the disputed plots were donated for the construction of a monument by the owners on the request of the Mayor of the Chittagong City Corporation. During the intervening period, the USTC continued its construction works on the disputed plots as it appeared from its statements. The Executive Engineer, Chittagong Public Works Department by its letter under memo dated 31st May, 2003, sent detailed information and design of the proposed work of memorial monument at East Pahartali mass graveyard site. Accordingly, the appellant No.2, son of a martyr lodged a complaint to the area commander of Chittagong Cantonment. The CDA also prohibited the USTC to make any constructions on the site of war mass graveyard. The CDA did not approve the plan and

advised the USTC to obtain clearance from the Ministry of Liberation War stating that the site was earmarked for memorial monument and 'no objection' of the Ministry of Liberation War was required to construct its building at the site of mass graveyard. After discussions with the representative of the USTC, the said Ministry intimated that the monument would be constructed on 20 decimals of land to be donated by respondent No.5 in favour of the Ministry of Liberation war. Accordingly, USTC donated 20 decimals of land by a registered deed. Pursuant thereto the Ministry of Liberation War by letter under memo dated 22nd December, 2005, intimated the acquiring authority that a decision was taken to construct the memorial monument on 20 decimals of land donated by the USTC.

On receipt of the said intimation, the acquiring authority by letter under memo dated 31st May, 2006, revoked the acquisition proceedings and directed the Ministry of Liberation War to take back Tk.94,00,000/- deposited earlier. This order of the

acquiring body has been challenged by the appellants, who are heirs of martyrs by a writ petition in the High Court Division. Their claim is that the said decision is arbitrary, malafide and issued with collateral purpose of conferring undue benefit to the USTC. They further claimed that the decision to revoke the acquisition proceedings has been taken on the influence of the USTC authority and that this decision has been taken for giving undue advantage to the USTC to perpetuate its abuse of power and total disregard to the public interest in persevering the site of the mass graveyard as enshrined in Article 24 of the Constitution. USTC denied the allegations made in the petition and claimed that after revocation of the acquisition proceedings, the CDA approved the plan of the USTC and thereupon it constructed a building on the said plots and that the concerned Ministry directed for construction of the memorial monument on the site of land donated by it.

Findings:

The High Court Division observed that on the day of issuance of rule no cause of action in respect of the first component of the rule existed since the Ministry of Land accorded approval of the order of revocation of the acquisition proceedings on 18th February, 2008, as the rule was issued on 14th December, 2008, and that the mausoleum on the gifted land and the academic building of USTC are almost complete. It was further observed that the location of the East Pahartali mass graveyard is a disputed question of fact. However, the High Court Division observed that the amendment of the project proforma by the Planning Commission is definitely an act of revision of the earlier decision of the Government and concluded by observing that "We strongly feel that inspite of the existence of the under-construction academic building of the USTC on the disputed property, it is always at the discretion of the Executive to initiate a new process of acquisition of the East Pahartali mass graveyard from its identification and conservation. That exclusively

belongs to the province of the Executive. If need be, the Government may appoint high-powered committee for proper identification and conservation of all war must graveyards across the country."

Leave was granted to consider whether the revocation of the acquisition proceedings tantamount to giving undue advantage to the USTC in total disregard to the public interest in preserving the site of mass graveyard; secondly, whether the action of the respondents was arbitrary and malafide; and thirdly, whether the High Court Division has considered the conservation of the mass graveyard located at East Pahartali Mouza appertaining to B.S. Plot Nos. 152 and 153 while maintaining the revocation order.

Reasons and decisions:

There is no dispute that the mass graveyard of the martyrs of the war of liberation is located at East Pahartali. It is also not disputed that an acquisition proceedings was initiated for acquisition of B.S. Plot Nos.152 and 153 measuring an area of

1.754 acres of land for the purpose of preservation of national tradition of historical memory and the preservation of killing spot used for genocide by the Pakistani occupation army and their collaborators during the war of liberation as a symbol of patriotism to inspire the consciousness of nationality through the construction of a monument. The notices upon the owners of the land were also issued in order to enable them to file objection against such acquisition. It is also not disputed that the requiring body in pursuance of the requisition of the acquiring body deposited Tk.94,00,000/- for payment of compensation to the affected persons within the stipulated time. These admitted facts manifestly suggested that before proceeding with the acquisition process, the acquiring body surveyed the area and after ascertaining and satisfying the location formed its opinion to acquire B.S. Plot Nos.152 and 153. The law gives the Deputy Commissioner to acquire any property if he is satisfied that the property is needed for

public purpose. In the notice the Deputy Commissioner specifically mentioned the purpose for which the notice was served that it was for the public purpose of Baddyabhumi. This order clearly spelt out the actual existence of requirement for a public purpose within the meaning of section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982. If the reason for the issuance of the notice of acquisition was not one contemplated by law, the initiation of the proceedings would be void. It is the Deputy Commissioner who is primarily the judge of the facts which would attract section 3 of the ordinance. This opinion cannot be replaced by any other authority.

The order of revocation does not reveal the purpose for such revocation. This shows that the decision communicated by the respondent No.1 was a colourable exercise of power. Before proceeding with the acquisition process the acquiring authority obtained Ministry of Planning Commission's approval. The High Court Division also observed that a portion

of the mass graveyard is located on the extended under construction academic building of the USTC. Therefore, the conclusion arrived at by the High Court Division that the location of East Pahartali mass graveyard is a disputed question of fact is a self contradictory finding. To say otherwise, the High Court Division made this observation without application of its judicial mind.

During the pendency of the writ petition the High Court Division directed to hold an inquiry for ascertaining the disputed location of the mass graveyard. A Kanungo of the office of the Land Acquisition Officer was deputed for the purpose, who submitted a report in which he could not pin-point the location of East Pahartali mass graveyard and submitted a conflicting report. The High Court Division based its decision relying upon it. It committed a fundamental error in arriving at such conclusion in failing to consider that before the USTC came to the scene, there was no dispute about the location of East Pahartali mass graveyard on plot

Nos.152 and 153 and the authority after ascertaining the location proceeded with the acquisition process. This location, under no stretch of imagination was determined by experts having expertise in the field since the Ministry of Liberation Affairs is the competent authority on the subject and the Planning Commission had accorded approval of the project on being satisfied with the documents submitted with it.

What's more, even if it is assumed that there is dispute about the exact location of the East Pahartali mass graveyard, the ascertainment of the same ought not to have been given upon an employee like a kanungo of the Land Acquisition Office. It ought to have directed to hold inquiry by specialized persons in the field through the Ministry of Liberation War or through the Curator of national museum or the archaeology department. The decision should not be based on a report of a third class employee like a kanungo since the USTC had raised objection about the exact location of East Pahartali mass graveyard. It is under this juncture, we felt it

desirable to ascertain the exact location. Accordingly, we directed the Secretary, Ministry of Liberation War Affairs to constitute an expert committee including one person each from the appellants and the USTC excluding the appellant No.2 Gazi Salauddin, against whom there was objection from the side of the USTC to ascertain and pin-point the exact location of East Pahartali mass graveyard and to report before this Division.

In pursuance of this direction, the concerned ministry constituted a seven member committee. USTC did not raise any objection against any of the members of the committee. On perusal of the annexures submitted with the report, we noticed that the committee had examined 20 persons. Mr. Kazi Aminul Islam is the son of a martyr who stated that B.S. Plot Nos.152 and 153 are the disputed site where the Pakistani army and their collaborators killed his father; that though he along with his brother Kazi Anwarul Islam was taken with his father, incidentally he along with his brother had survived and that he

saw the incident of killing. Mr. Mahbubul Alam also stated that he saw the dead bodies of martyrs in the disputed plots where the USTC has undertaken construction of Zia Pratisthan. Mr. Abdul Quddus is a freedom fighter and he also stated that on the disputed plots the USTC has undertaken construction. Zahed Ahmed is the son of a martyr who corroborated the said statements. Same are the statements with respect to A.K.M. Sorowar Kamal, Gazi Taher Uddin and other persons. Some of them are freedom fighters and all of them stated in unison that their near ones were killed and buried on the disputed plots where the USTC has undertaken construction of one of its buildings.

The expert committee in its report stated that after inspection of the mass graveyard area, a public hearing was held and in the said hearing eye witnesses of different areas were present and gave evidence including the members of martyrs, the freedom fighters and national professor Dr. Nurul Islam made statements. Dr. Nurul Islam told the

committee that on one side of the mass graveyard the USTC donated 20 decimals of land to the Ministry of Liberation War where the monument was being constructed. Upon perusal of the statements of the witnesses, it was ascertained that the East Pahartali mass graveyard was known to the local people as "Jallad Khana"; that the USTC's under construction building is the exact location of mass graveyard; that the Ministry of Cultural Affairs' constituted committee decided in 1999 to construct the monument on the land earmarked as Baddyabhumi (mass graveyard); that the local people mentioned it as 'Jallad Khana' since 1971 and that the survivors from 10th November incident also located the area as mass graveyard. The concluding findings are reproduced below;

- (১) ১৯৯৯ সালে সংস্কৃতি মন্ত্রণালয় কর্তৃক গঠিত কমিটি স্থানটি বধ্যভূমি হিসেবে চিহ্নিত করে জায়গা অধিগ্রহণ ও স্মৃতিস্তম্ভ নির্মাণের সিদ্ধান্ত নেয়।
- (২) ২০০০ সালে সরকার এই জমি অধিগ্রহণের জন্য ৯৪ লক্ষ টাকা বরাদ্দ করে।
- (৩) চট্টগ্রামে ক্যান্টনমেন্টও স্থানটি সংরক্ষণের জন্য উদ্যোগ গ্রহণ করে। কিন্তু, সরকার উদ্যোগ গ্রহণ করায় তারা আর অগ্রসর হয়নি।
- (৪) মুক্তিযুদ্ধ যাদুঘর উদ্বোধনের সময় এ বধ্যভূমি থেকে মাটি সংগ্রহ করে নিয়ে যায়।
- (৫) স্থানীয় জনগণ ১৯৭১ সাল থেকে এই স্থানটিকে জল্লাদখানা হিসেবে অভিহিত করত।

- (৬) ১৯৭১ সালে যারা এই এলাকায় বসবাস করতেন ও যে দুইজন ব্যক্তি ১০ নভেম্বর হত্যাকাণ্ড থেকে বেঁচে গেছেন তারা, এই স্থানটিকে বধ্যভূমি হিসেবে চিহ্নিত করেছেন।
- (৭) গণশুনানীর সময় সবাই একযোগে দাবি করেন এই স্থানটি বধ্যভূমি এবং তা সংরক্ষণ করে যাতে শহীদদের প্রতি শ্রদ্ধা ও তাদের রুহের মাগফেরাত কামনা করা যায় তার জন্য প্রয়োজনীয় ব্যবস্থা গ্রহণ করতে হবে।
- (৮) জমির মালিক এই স্থান থেকে বধ্যভূমির স্মৃতি সংরক্ষণের জন্য পাঁচ কাঠা জমি দান করেন।
- (৯) ডাঃ নূরুল ইসলাম নিজেই বধ্যভূমি স্মৃতি সংরক্ষণের জন্য ২০ শতাংশ জমি দান করেছেন।

This report was signed by the members of the committee including professor Sams Ud-doha, Registrar, USTC who is also a member of the fact finding committee of East Pahartali mass graveyard location. Therefore, there is no scope on the part of the USTC to dispute the correctness and impartiality in locating the exact spot of the mass graveyard. Though the USTC contested the leave petition through its learned counsel by filing caveat, and the investigation was also conducted in its presence, it did not file any concise statement and also did not contest the appeal. This conduct of the USTC sufficiently indicated that it having realized that one of its extension buildings is being constructed on the site of mass graveyard, as no fruitful purpose

would be served to contest the matter it refrained from contesting the appeal. More so, the acquiring body before proceeding with the acquisition process on being satisfied that the East Pahartali mass graveyard is located on B.S. Plot Nos.152 and 153, decided to acquire those plots. This satisfaction of the acquiring body is corroborated by the investigation report by the fact finding committee. This fact has been admitted by the USTC's founder Dr. Nurul Islam and its Registrar. There is no gainsaying that the gift of 20 decimals of land as made by the USTC was not bonafide rather it was made with a view to frustrate the acquisition process. If it was convinced that the mass graveyard was not located on the disputed plots, no question had arisen at all on its part to donate this area of land for the purpose of construction of mausoleum. It could have prayed for a local investigation in its suit for ascertaining the dispute by excavating the site when there was no construction thereon.

A mausoleum for the memory of martyrs of the war of liberation is normally constructed on the site where the martyrs were killed and buried. This site cannot be shifted to another site. It is because a monument is built on the killing spot with a view to remember the memories of martyrs who sacrificed their lives for the independence of the country. The preservation of the memory of the martyrs and the national heroes is necessary because this would remind our next generation the cruel assassination and mass killing by the Pakistani occupation army with their accomplices and also to show the outsiders that this is the evidence of our history of liberation war. If this memory is erased from the memory of our next generation, the very cause for which martyrs had sacrificed their lives would be fruitless. The University may shift its academy building to another place but the location of a mass graveyard cannot be shifted because the history of our glorious liberation struggle lies in it, and the sentiments of

the heirs of martyrs and the freedom fighters are enshrined in it.

A country's civilization can be traced from its past history. In Egypt the great civilization which produced the Pyramids and Sphinx and many other things which we cannot go into now. In China we can trace vast periods of time during which it grew into a great central empire and developed writing and silk-making and many beautiful things. In India at the old civilization represented now by the ruins of Mohenjo-Daro in the Indus valley; and the Dravidian civilization. If we see the relics of Mohenjo-Daro and Harappa, there can be little doubt that there lie many such buried cities and other remains of the handiwork of ancient men in between these two areas; that in fact, this civilization was widespread over large part of India. Sir Johan Marshall tells us one thing that 'stands out clear and unmistakable both at Mohenjo-daro and Harappa is that the civilization hitherto revealed at these two places is not an ancient civilization, but one already age-old and

stereotyped on Indian soil, with many millenniums of human endeavour behind it. Thus India must henceforth be recognized, along with Persia, Mesopotamia, and Egypt, as one of the most important areas where the civilizing process were initiated and developed'.

There is no gainsaying that a historical site is so valuable to a nation that needs no further elaboration and the same should be preserved in the manner the relics are preserved in a museum. It is worth in this juncture to mention some remarks of Jawahralal Nehru, 'Indeed, to learn history one should have as many maps and as many pictures as possible; pictures of old buildings, ruins, and such other remains of those times as have come down. These pictures fill up the dry skeleton of history and make it live to us. History, if we are to learn anything from it, must be successions of vivid images in our mind, so that when we read it, we can almost see events happening. It should be a fascinating play which grips us, a comedy sometimes, more often a

tragedy, of which the stage is the world, and the players are the great men and women of the past.

'Pictures and maps help a little to open our eyes to this page out of history. They should be within reach of every boy and girl. But better even than pictures is a personal visit to the ruins and remains of old history. It is not possible to see all of these, for they are spread out all over the world. But we can always find some remains of the past within easy reach of us, if we keep our eyes wide open. The big museums collect similar remains and relics. In India there are plenty of remains of past history, but of the very ancient days there are very few. Motenjo-Daro and Harappa are perhaps the only instances so far Or, go nearer still, to the old Ashoka pillar in our city of Allahabad or Prayag. See the inscription carved on it at the bidding of Ashoka, and you can almost hear his voice across 2000 years'. (Glimpses of world history, P.31-32)

A mausoleum is an external free-standing building constructed as a monument enclosing the

interment space or burial chamber of a deceased person or people. A mausoleum may be considered a type of tomb or the tomb may be considered to be within the mausoleum. Historically, mausolea were, and still may be, large and impressive constructions for a deceased leader or other persons of importance. In the Roman Empire, these were often ranged in necropolises or along roadsides: the via Appia Antica retains the ruins of many private mausolea for miles outside Rome. A mausoleum encloses a burial chamber either wholly above ground or within a burial vault below the superstructure. This contains the body or bodies, probably within sarcophagi or interment niches.

In the United States, the term may be used for a burial vault below a larger facility, such as a church. In 2010, a woman was discovered to have exhumed her deceased husband and twin sister, and was keeping the remains in her Wyalusing, Pennsylvania home. Notable mausolea are; Mausoleum of Mohammad V; The Dr. John Garang De Mabior Mausoleum in Juba,

South Sudan; Agostinho Neto's Mausoleum in Luanda, Angola; Kwame Nkrumah Mausoleum; Marien Ngouabi's mausoleum in Brazzaville, the Republic of Congo; The Pyramids of ancient Egypt and Nubian pyramids are also types of mausolea; Abdel Nasser Mosque, is the Mausoleum of Gamal Abdel Nasser, in Cairo, Egypt.; Taj Mahal at Agra, India; Humayun's tomb at Delhi, India; Mausoleum of the First Qin Emperor biggest underground mausoleum; the pyramids of ancient China are also types of mausolea; Mausoleum of Genghis Khan in Ordos City, Inner Mongolia; Tomb of Jahangir at Shahdara, near Lahore, Pakistan; Mausoleum of Mao Zedong, Beijing, National Chiang Kai-shek memorial Hall, Taipei; Quezon memorial, in Quezon City, Philippines; Hamilton Mausoleum at Hamilton in Scotland; Mausoleum of Augustus in Rome, Italy; Abraham Lincoln's tomb in Spring Field, Illinois; Eaton Mausoleum, Toronto, Ontario; The Meiji Jingu Shrine in Tokyo are amongst a few around the globe.

The findings of High Court Division that the first component of the rule non-existed on the day of

issuance of the rule are inconsistent and based on non-application of judicial mind. It failed to notice that the appellant had challenged the revocation of the acquisition proceedings on the ground that the USTC authority on prevailing upon the Ministry of Liberation War secured the order of revocation arbitrarily with malafide motive and for collateral purpose, and that the writ petition was not for enforcement of the policy of the Government. It was field for the purpose of preserving the spot of glorious history of liberation war and the sacrifice made by potential people as victims of war criminals atrocity are to be commemorated through the establishment of a monument. It has stressed upon the technicalities of the language used in the rule issuing order without looking at the totality of the cause for which the appellant sought judicial review. I have pointed out earlier that the object of the project is to conserve and develop slaughter places used by the Pakistani occupation army and their cohorts, and this will expose to the whole nation as

well as the world the brutal orgies demonstrated by them during our liberation struggle period.

Arbitrary and malafide act:

It is on record that the Ministry of Liberation War Affairs, the respondent no.1, selected the disputed site for construction of a mausoleum for the memory of the martyrs of War on being satisfied that mass graveyard is located there. Initially it did not accord approval of the USTC's plan for construction of academic building when the CDA sought its opinion. However, at later stage the USTC raised objection in the selection of the site and made a representation with a proposal to construct the mausoleum on a chunk of land to be donated by it near the site of mass graveyard. Thereafter, for reasons not known, the respondent No.1 made a u-turn and approved the CDA's proposal for approval of the USTC's building construction plan. It did not assign any reason for reversing its earlier decision. It ignored the historical importance of the construction of the monument on the exact location. There are allegations

of collusion and arbitrary exercise of power in revoking the acquisition proceedings against the respondent No.1. Except the USTC, none including the Ministry of Liberation War Affairs filed affidavit-in-opposition refuting the allegations. Therefore those allegations must be taken as true. The very conduct of the respondents irresistibly indicated that the decision was taken on being prevailed upon by the USTC.

The project description consists components such as (i) main stambha, (ii) circular wall, flag stand and alter with base, (iii) central yard, (iv) main entrance, (v) alter for expressing esteemed greeting stating that PWD had already implemented a similar project at Rayer Bazar Baddyabhumi. This shows that the project was taken by citing the Rayer Bazar Baddyabhumi as model and the monument will be constructed in the similar manner. If that being so, it is difficult to adhere to the opinion that such project can be implemented on 20 decimals of land. If the Rayer Bazar baddyabhumi project was taken as the

model, the authority was justified in undertaking to implement the project on 1.754 acres of land and in no case, such project can be implemented on 20 decimals of land. The latter decision is thus arbitrary and taken in colourable exercise of power is apparent from the above fact.

The other findings of the High Court Division that the amendment of the project pro-forma by 'the Planning Commission is definitely an act of revision of the earlier decision of the government' and that this revision of the earlier decision 'cannot be termed as irrational or arbitrary or unreasonable in any view of the matter' are not only misleading but also contrary to the material on record. On the one hand it held that the mausoleum has been 'constructed on the disputed property though those are not fully complete as yet' and on the other breath it observed that 'we have no hesitation in holding that the provision of Article 24 are not judicially enforceable'. It failed to consider that the Government had already approved the project and the

appellants are not seeking a direction for taking measures for the protection against disfigurement, damage or removal of monuments project in accordance with Article 24. The High Court Division has arrived at such conclusion basing on the language of the rule issuing order without looking at the dispute in controversy.

The crux of the matter is whether the revocation of the acquisition proceedings on the representation of the USTC and the shifting of the site of monument from B.S. Plot Nos.152 and 153 was bonafide or malafide. If the action of the respondents is found arbitrary and malafide, the judicial review of the decision of the Government is permissible and there cannot be any doubt about it. Secondly, the observation that 'inspite of the existence of the under-construction academic building of the USTC on the disputed property, it is always at the discretion of the Executive to initiate a new process of acquisition of the East Pahartaly mass graveyard for its identification and conservation' and direction to

appoint a high proved committees for proper identification of the mass graveyard speak volume that the High Court Division though satisfied that the mass graveyard is located on the disputed plots, was somehow shirk its responsibility in resolving the main issue in controversy and allowing the USTC to complete the construction works on the disputed plots so that in no case the monument could be constructed on the site of mass graveyard. It has already found that a portion of the mass graveyard is located at the USTC extension building. If the USTC is allowed to complete its construction, the investigation as pointed out for locating the mass graveyard would be a futile attempt after the completion of the USTC building. There is no need at all to ascertain this fact since it has already been ascertained.

Conclusion :

In view of the statements made in the plaint that it had started clearing and preparing ground work for construction of the building, there is no dispute that till the date of institution of the suit

on 28th November, 2002, no construction of the extended building was started. After securing order of injunction it had negotiated with the Ministry of Liberation War to abandon the project and ultimately it convinced the Ministry to shift the site of the project in exchange of 20 decimals of land to be donated by it for the construction of the monument. Thereafter on the basis of a letter issued by the Ministry, the CDA had approved the plan on 4th May, 2003. The appellants asserted that they had no knowledge at all about this secret negotiations and as soon as they came to know about the decision, they moved the High Court Division on 14th December, 2008. This conduct of the USTC sufficiently proved that it had prevailed upon the concerned Ministry with ulterior motive to drop the acquisition proceedings. In view of what stated above, we are satisfied that the impugned order revoking the acquisition proceedings is nothing but sheer arbitrary abuse of the power and this cannot be legally sustainable in law. The High Court Division has totally ignored that

aspect of the matter. The High Court Division in the premises, fell in an error in not interfering with the impugned order of the revocation of the acquisition proceedings initiated for the constitution of the monument at the site of the mass graveyard. The High Court Division also made conflicting findings and this has caused due to non application of judicial mind. The action of the respondents cannot be sustainable in law and the same is liable to be interfered with. Thus we find merit of the appeal.

Accordingly, we issue a writ and direct that the decision of the respondent Nos.1-3 in revoking the order of acquisition of land located at East Pahartali appertaining to B.S. Plot Nos.152 and 153 under police station Khulshi, Chittagong by memo dated 31st May, 2006 and the memos dated 22nd December, 2005 and 18th May, 2006 are declared to have been issued without lawful authority and of no legal effect. The respondent Nos.1-3 are hereby directed to proceed with the acquisition proceedings

in accordance with law. However, we would like to observe that the acquisition notice should be issued upon the USTC which has already purchased the disputed land in question and is entitled to the compensation. The appeal is allowed without any order as to costs.

J.
J.
J.
J.

The 4th March, 2014
Mohammad Sajjad Khan

APPROVED FOR REPORTING