

16 SCOB [2022] HCD 1

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3141 of 2019

Spice Television Private Limited

.....Petitioner

-Versus-

Government of Bangladesh and others

..... Respondents

Mr. Moudud Ahmed, Senior Advocate
with

Mr. Syed Tazrul Hossain, Advocate

..... For the petitioner

Mr. A.K.M Alamgir Parvez Bhuiyan,
Advocate

..... For the respondent No. 3

Heard on 17.08.2020, 20.08.2020,
25.08.2020, 27.08.2020, 03.09.2020 and
Judgment on 13.09.2020

Present:

Mr. Justice Md. Ashfaqul Islam

And

Mr. Justice Mohammad Ali

Editors' Note:

The petitioner after obtaining permission from Ministry of Information for running a Satellite Television Channel made an application to the Bangladesh Telecommunication Regulatory Commission (BTRC) praying for allocating frequency for running the Television Channel under the name and style Spice TV. BTRC upon receiving the application from the petitioner, issued letters requesting (a) the Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI to furnish their opinion/clearance. The Director General, DGFI and the Director General, NSI provided their clearances. But Ministry of Home Affairs did not provide the same. As a result, BTRC did not allocate frequency to the petitioner on a permanent basis but allowed it to import transmission equipments and also allocated frequency of 6 Megahertz from 5.850-6.425 Gigahertz, on a temporary basis. It is at this stage the petitioner filed the instant writ petition and obtained the Rule and order of direction. The argument of the petitioner was that under section 55 of the Bangladesh Telecommunication Act, 2001, allocation of frequency is under the exclusive authority of Bangladesh Telecommunication Regulatory Commission and in section 56(8) of the said Act a prescribed time limit has been provided within which the Commission shall dispose of an application for license or frequency or a technical acceptance certificate. The High Court Division accepted the argument and held that BTRC was absolutely in a position to take a decision in the matter in question. The Court also found that this particular case is guided by the principle of reasonableness so far legitimate expectation is concerned and directed BTRC to do the needful in terms of the Rule in accordance with law.

Key Words:

Article 102(2)(a)(i) of the Constitution of the People's Republic of Bangladesh; writ mandamus; Legitimate expectation; section 55 and 56 (8) of the Bangladesh Telecommunication Act, 2001

Constitution of Bangladesh, Article 102(2)(a)(i):

This is a writ in the nature of mandamus. A direction has been sought by the petitioner upon the respondent No. 3. Let us have a clear idea what constitution has mandated under Article 102(2)(a)(i) :- It says “on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do.” The writ of mandamus as enshrined in the Constitution enjoins how in a given situation authority should act in accordance with law. This is the elementary principle of writ mandamus. ... (Para 13)

Section 55 and 56(8) of বাংলাদেশ টেলিযোগাযোগ নিয়ন্ত্রণ আইন, ২০০১, authority of Bangladesh Telecommunication Regulatory Commission (BTRC) in granting license:

What we have seen in the instant case that from the very beginning though the respondent No. 3 (Bangladesh Telecommunication Regulatory Commission (BTRC)) tried its best to do the needful for obtaining clearance from the three agencies, two of which had already given their clearance but the added respondent No. 4, Ministry of Home Affairs did not accord any clearance though there was repeated request by the respondent No. 3. There is no denying that respondent No. 3 had all along the good intention in this regard.... On a plain reading of the laws we have found that respondent No. 3 was absolutely in a position to take a decision in the matter in question.

... (Paras 14 and 16)

Criteria to satisfy a claim of the legitimate expectation:

Moreover, this particular case is also guided by the principle of reasonableness so far legitimate expectation is concerned. We unequivocally and respectfully agree with the decision of Dhaka City Corporation vs. Firoza Begum 65 DLR AD 145 where our Appellate Division set up 12 criteria to satisfy a claim of the legitimate expectation. In the case in hand, as we have found that out of those criteria, (iv) and (v) shall apply. Criteria No. (iv) says : “ An expectation to be legitimate must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation and a Minister cannot found an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government.” Criteria No. (v) says : “ A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest.” Therefore, considering the overall aspect it is our considered view that before the agog of wait ends in whimper on the part of the petitioner, the respondent No. 3 should immediately act in accordance with law in the manner as mentioned above by taking appropriate steps.

... (Paras 17 to 20)

JUDGMENT

Md. Ashfaul Islam, J:

1. This Rule under adjudication, issued on 14.03.2019, at the instance of the petitioner, was in the following terms:-

“Let a Rule Nisi calling upon the Respondents to show cause as to why the respondent No.3 should not be directed to allocate frequency in favour of the petitioner’s Television Channel named Spice Television Limited (Spice TV) as prayed for by its applications dated 27.08.2017 received on 30.08.2017 and 12.02.2019 (Annexure-B and B-1) and/or such other or further order or orders passed as to this court may seem fit and proper.”

2. At the time of issuance of the Rule the respondent No. 3, the Chairman, Bangladesh Telecommunication Regulatory Commission (BTRC) was directed to dispose of the petitioner’s application dated 27.08.2017 received on 30.08.2017 and 12.02.2019(Annexure-B and B-1) within 1 (one) month.

3. Relevant facts leading to the Rule are detailed below:

The petitioner is a private Limited Company registered with Joint Stock Company under the Companies Act. Petitioner filed an application before the respondent No. 1, the Secretary, Ministry of Information for running a Satellite Television Channel and after considering all the necessary papers and the relevant provisions of law no objection Certificate was given to it by the respondent No. 1 under signature of respondent No. 2, Senior Assistant Secretary, Ministry of Information on 09.08.2017. After obtaining the said permission the petitioner made an application to the respondent No. 3 on 27.08.2017 praying for allocating frequency for running the Television Channel under the name and style Spice TV. As the application was not considered the petitioner filed another application through email on 12.02.2019 which was duly received by the respondent No. 3. Since no decision was taken thereof, the petitioner sent notice demanding Justice on 24.02.2019 (Annexure-‘C’). It has been stated that in the permission Annexure-‘A’ dated 09.08.2017 a condition was given (condition No. 8) as under:

“(৮) প্রয়োজ্য ক্ষেত্রে বিটিআরসিসহ সংশ্লিষ্ট মন্ত্রণালয়/সংস্থার অনাপত্তি গ্রহণ করতে হবে।”

In Condition No. 16 it is written

“(১৬) অনাপত্তি প্রদানের তারিখ থেকে ০১(এক) বছরের মধ্যে পূর্ণাঙ্গ সম্প্রচার শুরু করতে হবে।”

4. Be it mentioned that upon receiving the application of the petitioners dated 27.08.2017 the respondent No. 3 issued a letter dated 20.09.2017 requesting (a) the Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI to furnish their opinion/clearance over the matter within a period of 60 days. The Director General, DGFI provided their clearance in April, 2018. Thereafter, respondent No. 3 issued another letter dated 20.05.2018 requesting again (a) Ministry of Home Affairs and (b) the Director General, NSI to provide their opinion/ clearance over the matter within a period of 15 days. Accordingly, the Director General, NSI provided clearance on 20.05.2018. Respondent No. 3 then again issued another letter dated 10.10.2018 requesting Ministry of Home Affairs to accord clearance within 15 days.

5. It has been stated in the affidavit of compliance dated 20.05.2019 that even though respondent No. 3 did not allocate frequency to the petitioner on a permanent basis but in pursuance of a decision dated 13.12.2017 taken in the 210th meeting of the commission, the respondent No. 3 allowed the petitioner to import transmission equipments and also allocated frequency of 6 Megahertz from 5.850-6.425 Gigahertz, on a temporary basis. It is at this at this stage the petitioner filed the instant writ petition and obtained the Rule and order of direction as aforesaid.

6. Mr. Moudud Ahmed, the learned Senior Advocate appearing with Mr. Syed Tazrul Hossain, the learned Advocate for the petitioner after placing the petition and all the relevant annexures and materials on record submits that in addition to the steps taken as narrated above the respondent No. 3 received the order on 15.04.2019 and issued a letter dated 12.05.2019 requesting the Ministry of Home Affairs to provide clearance within 15 days so that the respondent No. 3 could comply with the order of this Division. He submits that respondent No. 3 in its 215th meeting dated 24.07.2018 sent a letter to the concerned security agencies by giving a deadline of 15 days for the last time clearly mentioning that in case of failure it will be deemed that they have no objection in allocating frequency in favour of the petitioner.

7. Next he submits that respondent No. 3 in its 221st meeting dated 03.12.2018 discussed the matter and took three decisions; (ka) to send a reminder letter within 30 days; (Kha) if no opinion is received within 30 days, to issue a letter giving a deadline of 30 days for the last time; (ga) if no opinion is received within 04 (four) months, then the matter shall again be presented to the Commission for decision (as it could be found from affidavit of compliance).

8. He further submits that on 20.05.2020 Ministry of Homes was added as the respondent No. 4 at the instance of the petitioner following which respondent No. 3 by its letter dated 25.07.2020 once again requested the Ministry of Homes to provide clearance within 15 days (as it could be seen from the affidavit of compliance dated 25.08.2020). In the said compliance, as he submits it could be seen that respondent No. 3 received a letter dated 23.08.2020 from the respondent No. 4, Ministry of Home Affairs which stated that the matter was under investigation and after completion of the investigation soon they would provide their opinion. Under the circumstances the learned Senior Advocate Mr. Ahmed submits that though respondent No. 3 with all its good intention gave several reminders to the Ministry of Home Affairs but Ministry of Home Affairs on different pretext did not comply with the same.

9. The learned Senior Advocate finally submits that in section 55 of the Bangladesh Telecommunication Act, 2001, allocation of frequency is under the exclusive authority of Bangladesh Telecommunication Regulatory Commission that is respondent No. 3 itself. In section 56(8) of the said Act of 2001, it has been clearly stated that there is a prescribed time limit within which the Commission shall dispose of an application for license or frequency or a technical acceptance certificate. But in the instant case 3 years have gone passed since the petitioner placed his application for allocation of frequency and till date respondent No. 3 has failed to allocate the frequency without any lawful reason. The learned Counsel relied in the case of *Ekushey Television Ltd and others vs. Dr. Chowdhury Mahmud Hasan and others* reported in 55 DLR AD 130. He has also cited 46 DLR AD 148 and 65 DLR AD 145 both on the ground of legitimate expectation that has been considered by our Hon'ble Appellate Division in support of his contention.

10. On the other hand Mr. A.K.M Alamgir Parvez Bhuiyan, the learned Advocate appearing for the respondent No. 3 by filing affidavit-in-opposition and affidavit of

compliance submits that the respondent No. 3 has done everything for providing permanent frequency to the petitioner. First of all on 20.09.2017 requested (a) Ministry of Home Affairs (b) the Director General, DGFI and (c) the Director General, NSI. Though the Director General, DGFI and the Director General, NSI accorded clearance in April 2018 and May 2018 respectively but Ministry of Home Affairs even after their repeated request did not give the clearance sought by the respondent No. 3. Under this situation he submits that respondent No. 3 is eagerly waiting for the clearance of the Ministry of Home Affairs who featured is the added respondent No. 4 in the writ petition.

11. We have heard the learned Senior Advocate Mr. Moudud Ahmed appearing for the petitioner and A.K.M Alamgir Parvez Bhuiyan, the learned Advocate appearing for the respondent No. 3 at length and considered their submissions carefully. We have also perused the petition, all the documents, Annexures, affidavit-in-opposition and affidavit of compliance and other materials on record meticulously.

12. The only question that faces this Division in this writ petition is whether under the facts and circumstances respondent No. 3 acted in accordance with law as mandated under the Constitution.

13. This is a writ in the nature of mandamus. A direction has been sought by the petitioner upon the respondent No. 3. Let us have a clear idea what constitution has mandated under Article 102(2)(a)(i) :- It says “on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do.” The writ of mandamus as enshrined in the Constitution enjoins how in a given situation authority should act in accordance with law. This is the elementary principle of writ mandamus.

14. What we have seen in the instant case that from the very beginning though the respondent No. 3 tried its best to do the needful for obtaining clearance from the three agencies, two of which had already given their clearance but the added respondent No. 4, Ministry of Home Affairs did not accord any clearance though there was repeated request by the respondent No. 3. There is no denying that respondent No. 3 had all along the good intention in this regard.

15. Relevantly let us now quote Section 55 of বাংলাদেশ টেলিযোগাযোগ নিয়ন্ত্রণ আইন, ২০০১ :-

৫৫। (১) কোন ব্যক্তি লাইসেন্স ব্যতিরেকে বাংলাদেশের ভূখণ্ডে বা আঞ্চলিক সমুদ্রসীমায় বা উহার উপরস্থ আকাশসীমায় বেতার যোগাযোগের উদ্দেশ্যে কোন বেতার যন্ত্রপাতি স্থাপন, পরিচালনা বা ব্যবহার করিবেন না বা কোন বেতার যন্ত্রপাতিতে কমিশন কর্তৃক বরাদ্দকৃত বেতার ফ্রিকোয়েন্সি ব্যতীত অন্য কোন ফ্রিকোয়েন্সি ব্যবহার করিবেন না।

(২) উপ-ধারা (১) এর অধীন প্রয়োজনীয় লাইসেন্স ইস্যুকরণ এবং বেতার ফ্রিকোয়েন্সি বরাদ্দের একক এখতিয়ার থাকিবে কমিশনের।

Further section 56(8) states :

(৮) বেতার যন্ত্রপাতির লাইসেন্স, বেতার ফ্রিকোয়েন্সি বরাদ্দ বা কারিগরী গ্রহণযোগ্যতা সনদ প্রাপ্তির জন্য কমিশনের নিকট আবেদন করিতে হইবে, এবং কমিশন, আবেদনটি প্রাপ্তির ৭ (সাত) দিনের মধ্যে উহার মন্তব্যসহ (যদি থাকে) উহা কমিটির নিকট প্রেরণ করিবে এবং ৩০ (ত্রিশ) দিনের মধ্যে প্রয়োজনীয় অনুসন্ধানের পর কমিটি ততসম্পর্কে উহার সুপারিশ ও মন্তব্যসহ কমিশনের নিকট পেশ করিবে।

16. On a plain reading of the laws we have found that respondent No. 3 was absolutely in a position to take a decision in the matter in question. In the reported decision of 55 DLR AD 26 as referred to above in paragraph 38, our Hon'ble Appellate Division has observed as under:

“The counsel for the Ekushey TV Ltd. has submitted that it has filed an application with regard to the TV Licence with Bangladesh Telecommunication Regulatory Commission established under the Bangladesh Telecommunication Act, 2001. Our judgment will have no bearing in considering the application by Ekushey for licence by the said Commission which is free to decide in accordance with law.”

17. Moreover, this particular case is also guided by the principle of reasonableness so far legitimate expectation is concerned. We unequivocally and respectfully agree with the decision of Dhaka City Corporation vs. Firoza Begum 65 DLR AD 145 where our Appellate Division set up 12 criteria to satisfy a claim of the legitimate expectation. In the case in hand, as we have found that out of those criteria, (iv) and (v) shall apply.

18. Criteria No. (iv) says: “ An expectation to be legitimate must be founded upon a promise or practice by the public authority that is said to be bound to fulfill the expectation and a Minister cannot found an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government.”

19. Criteria No. (v) says: “A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest.”

20. Therefore, considering the overall aspect it is our considered view that before the agog of wait ends in whimper on the part of the petitioner, the respondent No. 3 should immediately act in accordance with law in the manner as mentioned above by taking appropriate steps.

21. In the result, the Rule is made absolute. The respondent No. 3 is directed to do the needful in terms of the Rule in accordance with law at the earliest preferably within 2(two) months on receipt of this Judgment and order.

Communicate at once.