3 SCOB [2015] HCD 150

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION N0. 10011 of 2013 &
WRIT PETITION N0. 10023 of 2013.

Dhaka South City Corporation, represented by its Administrator, Nagar Bhaban, Fulbaria, Dhaka.

.... Petitioners in both the Writ Petitions.
-Versus-

District Judge and Arbitration Appellate Tribunal, Dhaka and others.
..... Respondents in both the Writ Petitions.

Mrs. Sufia Ahmed, Advocate
..... for the petitioners in both the Writ Petitions.
Mr. Probir Neogi, Advocate
Mr. Probir Halder, Advocate
&
Mr. Abdul Haque Khan, Advocate
.....for the Respondent Nos. 3 & 4 of Writ Petition No. 10011 of 2013 and for the respondent No. 3 of Writ Petition No. 10023 of 2013.

Heard on 15.02.2015, 22.02.2015, 03.03.2015
& 01.09.2015 and Judgment on: 01.09.2015.

Present:
Ms. Justice Zinat Ara
And
Mr. Justice J.N. Deb Choudhury

In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court. ...(Para 28)

Certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari. ...(Para 30)

Judgment

J.N. Deb Choudhury, J :

1. Similar facts and identical questions of law are involved in Writ Petition No. 10011 of 2013 and Writ Petition No. 10023 of 2013 and as such, have been heard together and are being disposed of by this common judgment.

2. In Writ Petition No. 10011 of 2013, Rule Nisi was issued calling upon the respondents to show cause as to why the impugned judgment and order dated 23.10.2008, passed by the respondent No. 1, in Arbitration Appeal No. 42 of 2003(Annexure-B), affirming the judgment and award dated 02.03.2003 passed by the respondent No. 2 in Arbitration Case No. 202 of 1991 shall not be declared to have been issued without lawful authority and of no legal effect.

3. In Writ Petition No. 10023 of 2013, Rule Nisi was issued calling upon the respondents to show cause as to why the impugned judgment and order dated 13.10.2008, passed by the respondent No. 1 in Arbitration Appeal No. 25 of 2003(Annexure-B), affirming the judgment and award dated 02.03.2003 passed by the respondent No. 2 in Arbitration Case No. 193 of 1991 shall not be declared to have been issued without lawful authority and of no legal effect.

4. Relevant facts of the Writ Petition No. 10011 of 2013, are as under:

The Government acquired 0.0330 acres of land from the respondent Nos. 3 and 4 of C.S dag No. 20 of Mouja Dhaka vide LA Case No. 42/89-90 and paid Tk. 1,11,758.62 as award of compensation to the respondent Nos. 3 and 4 of the Writ Petition which according to them was inadequate and accordingly, they filed Arbitration Revision Case No. 202 of 1991, before the learned Joint District Judge and Arbitration Court, Dhaka (shortly, stated as the Arbitration Court) constituted under Section 18 of the সম্পত্তি জরুরী অধিগ্রহণ আইন, 1989 (hereinafter referred to as the Act IX of 1989) for revision of the award. The said arbitration case was contested by the Government of Bangladesh by filing written objection contending inter alia, that, the amount as paid was correct and in accordance with law.

5. The petitioner stated in paragraph No. 5 of the writ petition that the writ petitioner being opposite party of the Arbitration Revision Case No. 202 of 1991, filed written objection, denying material allegations of the application and contending inter alia, that the Deputy Commissioner assessed the value of the land in accordance with the provision of section 12 of the Act IX of 1989 and as such, compensation determined by the Deputy Commissioner was correct and accordingly, prayed for dismissal of the Arbitration Revision No. 202 of 1991.

6. The learned Judge of the Arbitration Court, Dhaka after considering the materials on record, and on hearing the respective parties allowed the said Arbitration Revision Case No. 202 of 1991 in part, by his judgment and order dated 02.03.2003 and directed the Government to pay Tk. 5,84,988.71 within 30(sixty) days in addition to the amount of Tk. 1,11,758.62 as already paid, with statutory compensation. The Arbitration Court, Dhaka also directed to pay an interest at the rate of 10% per annum from the date of taking over possession till payment of the amount of the revised award to the respondent Nos. 3 and 4.

7. Against the said judgment and order of the Arbitration Court, Dhaka, the Government of Bangladesh preferred Arbitration Appeal No. 42 of 2003, before the learned District Judge

and Arbitration Appellate Tribunal, Dhaka, (shortly, stated as Appellate Tribunal) who by his judgment and order dated 23.10.2008, dismissed the Arbitration Appeal and affirmed the findings and decision of the Arbitration Court, Dhaka.

8. The South City Corporation, Dhaka represented by its Administrator, the requiring body, filed the present writ petition in this Court and obtained the instant Rule Nisi along with an ad-interim order of stay.

9. Relevant facts of the Writ Petition No. 10023 of 2013, are as under:

The Government acquired 0.3135 acres of land from the respondent No. 3 of C.S. Dag No.1 of Mouja Dhaka vide LA Case No. 42/89-90 and paid Tk. 10,61,706.93 as award of compensation to the respondent no. 3 of the case which according to him was inadequate and accordingly, he filed Arbitration Revision Case No. 193 of 1991 before the learned Joint District Judge and Arbitration Court, Dhaka, (shortly, stated as the Arbitration Court) constituted under Section 18 of the সম্পত্তি জরুরী অধিগ্রহণ আইন, ১৯৮৯ (hereinafter referred to as the Act IX of 1989) for revision of the award. The said arbitration case was contested by the Government of Bangladesh by filing written objection contending inter alia, that, the amount as paid was correct and in accordance with law.

10. The petitioner stated in paragraph No. 5 of the writ petition that the writ petitioner being opposite party of the Arbitration Revision Case No. 193 of 1991, filed written objection denying material allegations of the application and contending inter alia, that the Deputy Commissioner assessed the valuation of the land in accordance with the provision of section 12 of the Act 9 of 1989 and as such compensation determined by the Deputy Commissioner was correct and accordingly, prayed for dismissal of the Arbitration Revision No. 193 of 1991.

11. The learned Judge of the Arbitration Court, Dhaka after considering the materials on record and hearing the respective parties allowed the said Arbitration Revision Case No. 193 of 1991 in part, by his judgment and order dated 18.02.2003 and directed the Government to pay Tk. 55,56632.71 in addition to the amount of Tk. 10,61,706.93 as already paid with statutory compensation and also directed to pay an interest at the rate of 10% per annum from the date of taking over possession from the respondent no. 3, till payment of the amount of the revised award to the respondent No. 3.

12. Against the said judgment and order of the Arbitration Court, Dhaka, the Government of Bangladesh preferred Arbitration Appeal being No. 25 of 2003, before the learned District Judge and Arbitration Appellate Tribunal, Dhaka, (shortly, stated as Appellate Tribunal) who by his judgment and order dated 13.10.2008 dismissed the Arbitration Appeal on affirming the findings and decision of the Arbitration Court, Dhaka.

13. The South City Corporation, Dhaka represented by its Administrator, the requiring body filed the present writ petition in this Court and obtained the instant Rule Nisi along with an ad-interim order of stay.

14. In both the writ petitions the petitioners mainly taken the ground that the Arbitrator while allowing the case did not consider the matter in the light of the provisions of sections 12 and 13 of Act IX of 1989.

15. The respondent Nos. 3 and 4 of the Writ Petition No. 10011 of 2013 and respondent No. 3 of Writ Petition No. 10023 of 2013 contested the Rule by filing, affidavits-in-opposition and supplementary affidavits-in-opposition and stated inter alia, that the Arbitration Court rightly considered the case of the contesting respondents upon proper consideration of the materials on record and rightly found the price of the acquired land upon considering the market value of that relevant time and passed the order though not as prayed for by the petitioners of those Arbitration cases; but, being satisfied, did not file any appeal. The Government of Bangladesh preferred Arbitration Appeals; but, the same were dismissed on affirming the award as passed by the Arbitration Court and being satisfied Government of Bangladesh, did not move further and accordingly, prayed for discharging the Rule.

16. Mrs. Sufia Ahmed, the learned Advocate appearing for the petitioners in both the writ petitions submits that while passing the award, the arbitrator failed to consider the mandatory provisions of sections 12 and 13 of the Act IX of 1989 and also submits that by passing the award the arbitrator considered the market price of the acquired land with reference to another arbitration case and thereby committed illegality and accordingly, prays for making the Rules absolute.

17. On the other hand, Mr. Probir Neogi, the learned Advocate appearing with Mr. Probir Halder, the learned Advocate for the respondent Nos. 3 and 4 of Writ Petition No. 10011 of 2013 and respondent No. 3 of Writ Petition No. 10023 of 2013 and submits that the Arbitration Court on proper appreciation of the facts passed the order dated 02.03.2003 in Arbitration Revision Case No. 202 of 1991 and order dated 18.02.2003 in Arbitration Revision Case No. 193 of 1991. He further submits that the Arbitrators while passing the order dated 02.03.2003, did not violate the provision of sections 12 and 13 of the Act IX of 1989 and the Appellate Tribunals also rightly affirmed the same and accordingly, prays for discharging the Rule.

18. We have heard the learned advocates for both the parties, perused the writ petitions, judgments and orders of the Arbitration Court and Appellate Tribunal, affidavit-in-oppositions, supplementary affidavits and other materials on record.

19. The only point to be decided in both the writ petitions is that, whether the award passed by the Arbitrators were in accordance with law or not.

20. This Court by order dated 05.03.2015 directed the respondent No. 5 to submit copies of Gazette Notification dated 10.09.1990, Gazette Notification dated 03.01.1991 and order dated 22.02.1986 passed by the Ministry of Public Works and the valuation of the lands of Lalbagh area and the respondent No. 5 on 12.04.2015 filed an affidavit-in-compliance stating inter alia that, pursuant to the direction of the Hon'ble Court, the office of the respondent No. 5 wrote a letter being Memo No. 05.41.2600.045.18.001.13-19 (pw) dated 01.04.2015 to the Ministry of Public Works requesting to provide the copy of the Gazette Notifications. In response to the letter dated 01.04.2015 issued by the respondent No. 5, the Ministry of Public Works, Bangladesh Secretariat, Dhaka vide Memo No. 25.00.0000.020.31.001.2014-565 dated 05.04.2015 sent the copy of the Gazette Notification dated 03.01.1991 (published pursuant to a decision adopted on 10.09.1990) and the Gazette Notification dated 07.03.2011 in respect of the value of land, though any order or Gazette Notification dated 22.02.1986 of the concerned Ministry in relation to the value of land could not be found and annexed those in the affidavit. We have considered the statements and also perused the annexures.

21. In the present case the learned advocate for the petitioners mainly argued that the respective Arbitrators while passing the award failed to comply with the provisions laid down in sections 12 and 13 of the Act IX of 1989.

22. For better understanding we like to quote the relevant sections 12 and 13 of the aforesaid Act as under:

১২। চূড়ান্ত ক্ষতিপূরণ নির্ধারণের বিষয়- (১) এই আইনের অধীন অধিগ্রহনকৃত কোন সম্পত্তি চূড়ান্ত ক্ষতিপূরণের পরিমাণ নির্ধারণ করার সময় জেলা প্রশাসক নিম্নলিখিত বিষয়গুলি বিবেচনা করিবেন, যথাঃ

(ক) অধিগ্রহণ করার সময় সম্পত্তির বাজার দরঃ

তবে শর্ত থাকে যে, বাজার দর নির্ধারণের সময় জেলা প্রশাসক একই ধরনের এবং একই পারিপার্শ্বিক সুবিধাযুক্ত সম্পত্তির বিগত বার মাসের গড়পড়তা মূল্য বিবেচনা করিবেন,

(খ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় উহার উপর যে ফসল বা গাছপালা ছিল তাহা নষ্ট হওয়াজনিত কারণে ক্ষতি,

(গ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় উহাকে অন্য সম্পত্তি হইতে পৃথককরণজনিত কারনে ক্ষতি,

(ঘ) অধিগ্রহনকৃত সম্পত্তির দখল করার সময় সাধিত কোন স্থাবর অস্থাবর সম্পত্তি বা কোন উপার্জনের উপায়ের ক্ষতি,

(ঙ) সম্পত্তি অধিগ্রহনের ফলে বাধ্যতামূলকভাবে আবাসস্থল বা কর্মস্থল স্থানান্তরের জন্য যুক্তিসংগত খরচ,

(২) অধিগ্রহনকৃত সম্পত্তির জন্য জেলা প্রশাসক উপ-ধারা (১) (ক) এ উল্লিখিত বাজারদরের উপর অতিরিক্ত শতকরা ২৫ ভাগ ক্ষতিপূরণ প্রদান করিবেন।

১৩। ক্ষতিপূরণ নির্ধারণে বিবেচ্য বিষয় নয়- এই আইনের অধিগ্রহণকৃত কোন সম্পত্তির ক্ষতিপূরণের পরিমাণ নির্ধারণ করার সময় জেলা প্রশাসক নিম্নলিখিত বিষয়গুলি বিবেচনা করিবেন না, যথাঃ

(ক) অধিগ্রহণের প্রয়োজনীয়তার তারতম্য

(খ) অধিগ্রহণকৃত সম্পত্তিতে স্বার্থ রহিয়াছে এমন কোন ব্যক্তির সম্পত্তি হস্তান্তরে অনীহা

(গ) যে পরিমাণ ক্ষতির কারণে কোন বেসরকারী লোকের বিরুদ্ধে কোন মামলা করা যায় না

(ঘ) অধিগ্রহণের কারণে অধিগ্রহণকৃত সম্পত্তির মূল্য বৃদ্ধি

(ঙ) অধিগ্রহণের আদেশ জারির পর জেলা প্রশাসকের অনুমোদন ব্যতীত অধিগ্রহণকৃত সম্পত্তির কোন পরিবর্তন, উন্নয়ন, বা অন্য কোন বিলিবন্দেজ।

23. This is a writ of certiorari, where the scope of interference with the judgment and orders of the Subordinate Court or Tribunal is very limited.

24. In the Case of Government of the People's Republic of Bangladesh Vs. Abdul Wahed Talukder, 11 BLC (AD) 218, their Lordships held that,

> "*The law is now settled as to the extent of power of the High Court Division while exercising jurisdiction in certiorari in respect of the judgment of the Tribunal or a subordinate Court and that while the High Court Division exercising the jurisdiction in certiorari the same is not competent to act as a Court of appeal i.e. to reassess the evidence and the other materials on record and then to arrive at a decision which it feels ought to have arrived at by the Tribunal or the subordinate Court in making the judgment although while making the judgment the Tribunal or the subordinate Court did not leave the evidence out of consideration or that misread the evidence or misconstrued the document or misinterpreted the law and that had any one of those errors been not committed the judgment would have been otherwise*"

25. In the Case of Government of Bangladesh and another Vs. Mrs. Rawshan Ara Begum and another, 17 BLT (AD) 65, their Lordships held that,

> "*The High Court Division while exercising its jurisdiction under Article 102(2) of the Constitution in respect of the judgment of a tribunal or in other words exercises its jurisdiction in certiorari is certainly not acting as a Court of appeal and to re-assess the evidence and finally to arrive at a view different from the tribunal in the*

absence of arriving at a finding that the view taken by the tribunal in the background of the materials noticed by it is not legally tenable or logically not well founded e.g. the case as the instant one. The High Court Division while examining the correctness of the judgment of the subordinate tribunal does not act as the Court of appeal "

26. In the Case of Bangladesh, represented by the Secretary, Ministry of Works Vs. Md. Jalil and others, 48 DLR (AD) 10, their Lordships held that,

"*The High Court Division was not a Court of appeal required to make determination of facts on its own. It could interfere with the findings of a tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the tribunal had acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it had acted mala fide or in violation of any principle of natural justice. In the absence of any of these conditions the interference by the High Court Division will itself be an act of without jurisdiction.*"

27. Article 226 of the Constitution of India preserves to the High Court power to issue writ of certiorari amongst others. The principles on which the writ of certiorari is issued are well-settled. It would suffice for our purpose to quote from the 7-Judge Bench decision of that Court in Hari Vishnu Kamath Vs. Ahmad Ishaque and Ors. (1955) 1 SCR 1104. The four propositions laid down therein were summarized by the Supreme Court in The Custodian of Evacuee Property Bangalore Vs. Khan Saheb Abdul Shukoor etc. (1961) 3 SCR 855 as under :-

"the High Court was not justified in looking into the order of December 2, 1952, as an appellate court, though it would be justified in scrutinizing that order as if it was brought before it under Article 226 of the Constitution for issue of a writ of certiorari. The limit of the jurisdiction of the High Court in issuing writs of certiorari was considered by that Court in Hari Vishnu Kamath Vs. Ahmad Ishaque AIR 1955 SC 233 and the following four propositions were laid down :-

"(1) Certiorari will be issued for correcting errors of jurisdiction;

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice;

(3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision."

28. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject- matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an Appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior court.

29. In Nagendra Nath Bora & Anr. Vs. Commissioner of Hills Division and Appeals, Assam & Ors., (1958) SCR 1240, the parameters for the exercise of jurisdiction, calling upon the issuance of writ of certiorari where so set out by the Supreme Court of India;

> "The Common law writ, now called the order of certiorari, which has also been adopted by our Constitution, is not meant to take the place of an appeal where the Statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extra-ordinary jurisdiction. Where the errors cannot be said to be errors of law apparent on the face of the record, but they are merely errors in appreciation of documentary evidence or affidavits, errors in drawing inferences or omission to draw inference or in other words errors which a court sitting as a court of appeal only, could have examined and, if necessary, corrected and the appellate authority under a statute in question has unlimited jurisdiction to examine and appreciate the evidence in the exercise of its appellate or revisional jurisdiction and it has not been shown that in exercising its powers the appellate authority disregarded any mandatory provisions of the law but what can be said at the most was that it had disregarded certain executive instructions not having the force of law, there is not case for the exercise of the jurisdiction under Article 226."

30. Certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amenable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amenable to a writ of certiorari.

31. According to the provision of Act IX of 1989, any person aggrieved with the award given by concerned Deputy Commissioner may file an application under section 18 of the Act IX of 1989 before the Arbitrator and after disposal of the case, if dissatisfied may prefer appeal under section 23 of the Act IX of 1989, before the Arbitration Appellate Tribunal and the judgment and order passed therein shall be final. In the instant case the contesting respondents being aggrieved with the award moved before the Arbitrator under section 18 of the Act IX of 1989 and though the present petitioner was a party therein and filed written objection; but, ultimately did not contest the case nor filed any appeal therefrom. It is only the respondent No. 5 filed appeal and after dismissal of the appeal did not move further. In such circumstances it cannot be said that the writ petitioner is an aggrieved person.

32. It appears that the Arbitrator while passing the order dated 02.03.2003 in Arbitration Revision Case No. 202 of 1991 considered the depositions of the respective parties and also considered the exhibit-1 which is an order passed in Arbitration Revision Case No. 188 of 1991. The copy of the said order as passed in Arbitration Case No. 188 of 1991, placed before this Court by way of supplementary affidavit from which it appears that the value of the acquired land had been settled as Tk.1,68,88905.00 per acre upon considering the market value of the relevant time. Similarly, the Arbitration Revision Case No. 193 of 1991 also decided in the said manner.

33. Accordingly it appears that the Arbitrator while passing the order dated 02.03.2003 did not violate the provisions of sections 12 and 13 of the Act IX of 1989. Moreover, it appears that the petitioner before us though filed written objection in Arbitration Case No. 202 of 1991 and Arbitration Case No. 193 of 1991; but, did not participate in hearing nor prefer any appeal from the order dated 02.03.2003 before the Arbitration Appellate Tribunal and thereby, accepted the order passed on 02.03.2003 as passed by the Arbitrator. It is only the respondent No. 5 who preferred Arbitration Appeals before the Arbitration Appellate Tribunal, Dhaka and the same was dismissed on merit. The petitioners almost after 10 years from the date of decision of Arbitrators and 5 years from the decision of Appellate Tribunal filed the instant writ petitions without any explanation for such long delay.

34. This being so, we are of the view that the petitioner accepted the award as given by the Arbitrators in the Arbitration Case No. 202 of 1991 and Arbitration Case No. 193 of 1991 and as such, have no cause of action to file this instant writ petition, nor the judgments under challenge suffers from any lack of jurisdiction or any error of law.

35. Considering the above facts and circumstances of the case and considering the relevant law and decisions as stated above we found nothing to interfere with the judgment and orders under challenge in these writ petitions.

36. Accordingly, we do not find substance in the arguments of the learned advocate for the petitioners of both the writ petitions and find substance in the argument of the learned advocate for the contesting respondents.

37. In the result, the Rules issued in Writ Petition No. 10011 of 2013 and Writ Petition No. 10023 of 2013 are discharged without any order as to costs.

38. The order of stay granted at the time of issuance of the Rules are recalled and vacated.

39. Communicate the judgment and order to the respondent No. 5 at once.