9 SCOB [2017] HCD 11

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO.4396 OF 2011

Mainul Hossain and another
Vs.
Bangladesh and others

Dr. A. K. M. Ali with
Ms.Nigar Sultana, Advocates
.....For the petitioners.

Mr. Md. MotaherHossain (Sazu), DAG
with
Ms. Purabi Rani Sharma, AAG and
Mr. A.B.M. Mahbub, AAG
.....For the respondent no. 1.

Heard on
09.04.2015,22.04.2015&23.04.2015.
Judgment on 30.04.2015.

Present:
Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Md. Ashraful Kamal

The principles of natural justice:
The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man cannot be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application. ... (Para 12)

In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. ... (Para 13)

An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially,

in accordance with the classic authorities and Ridge…V... Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. ... (Para 14)

The principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute. ... (Para 17)

The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party. ... (Para 18)

The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. ... (Para 21)

The authority cancelled the lease of the petitioners and in the same breath called upon them to appear before the authority on 12.04.2011 with necessary valid papers, if any. What we are driving at boils down to this: the authority ought to have afforded the petitioners an opportunity of being heard first and thereafter on perusal of the inquiry report and other materials, the authority could have cancelled the lease of the petitioners with reference to the case land; but the authority chose to cancel the lease of the petitioners by keeping them in the dark and thereafter asked them to appear before the authority on a certain future date with their valid papers, if any. To be precise, there is no point in affording the petitioners an opportunity of being heard after cancellation of the lease. Generally speaking, the hearing of the petitioners by the authority should have been a pre-decisional phenomenon; it should not be a post-decisional phenomenon. ... (Para 24)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioners, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned Memo No. 29(22) dated 06.04.2011 issued by the respondent no. 4 as evidenced by Annexure-'D' to the writ petition should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioners, as set out in the Writ Petition, in short, is as follows:

The petitioners being landless husband and wife applied for lease of the Government khas land and accordingly, a Settlement Case being No. 104 of 1991-1992 was initiated and after inquiry, the Government decided to give settlement of the case land in favour of the petitioners. Thereafter the petitioners duly deposited the necessary salami and other dues. At a subsequent stage, the authority executed a registered deed

of kabuliyat in favour of the petitioners on 03.07.1996 for 99(ninety-nine) years in respect of the case land under certain terms and conditions. The petitioners got delivery of possession of the case land in due course, constructed a house in one portion and planted trees in the other portion thereof. However, a separate Khatain being No. 1958 of Mouza Devidwar was opened in the name of the petitioners pertaining to the case land. While the petitioners have been in possession of the case land pursuant to the registered deed of kabuliyat dated 03.07.1996, they received the impugned notice bearing Memo No. 29(22) dated 06.04.2011 under the signature of the respondent no. 4 issued at the instance of the respondent no. 3 showing cancellation of its settlement. Hence the Rule.

3. The respondent no. 1 has contested the Rule by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in short, runs as follows:

The case land is a river. Unfortunately a vested quarter of the local Land Administration provided wrong information about the nature of the case land and recommended to lease out the same to the petitioners. Thereafter the District Krishi Khas Land Management and Settlement Committee of Comilla approved the proposal for leasing out the case land in favour of the petitioners. But subsequently it transpired that the case land is actually a river and by that reason, the District Krishi Khas Land Management and Settlement Committee headed by the Deputy Commissioner, Comilla cancelled the lease of the petitioners and others lawfully and in the interest of the Government. As such, the Rule is liable to be discharged.

4. In the Supplementary Affidavit-in-Opposition filed on behalf of the respondent no. 1, it has been stated that the lease of the case land was cancelled by the Deputy Commissioner of Comilla on 29.06.2004 on the basis of a resolution of the District Krishi Khas Land Management and Settlement Committee, Comilla.

5. At the outset, Ms. Nigar Sultana, learned Advocate appearing on behalf of the learned Advocate Dr. A. K. M. Ali for the petitioners, submits that admittedly the authority granted lease of the case land in favour of the petitioners on 03.07.1996 for a period of 99(ninety-nine) years; but regrettably the lease was cancelled without affording them an opportunity of being heard and that being so, the impugned Memo dated 06.04.2011 cancelling the lease of the petitioners is without lawful authority and of no legal effect.

6. Ms. Nigar Sultana also submits that the case land is a silted up portion of a river and as per law, the same was recorded in the Khas Khatian No. 1 as a dried-up river which was fit for cultivation and regard being had to its nature, it was leased out to the petitioners as landless cultivators and in the absence of any complaint by any quarter about the misuse of the case land by the petitioners, the impugned order cancelling the lease of the petitioners is malafide and of no legal effect.

7. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that the petitioners obtained lease of the case land on the basis of an erroneous report filed by the local Land Administration Authority and as the case land is a part of the river, the same should not have been granted lease in favour of the petitioners; but having resort to collusion and fraud, the lease of the case land in favour of the petitioners was brought into existence.

8. Mr. Md. Motaher Hossain (Sazu) also submits that when the authority came to know that the lease of the case land was granted in favour of the petitioners on the basis of misleading information and through collusion, the authority recalled the lease-granting order and cancelled the lease of the petitioners by the impugned Annexure-'D' to the writ petition and in such view of the matter, it cannot be said that the cancellation of the lease of the petitioners is not sustainable at all.

9. We have heard the submissions of the learned Advocate Ms. Nigar Sultana and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and perused the Writ Petition, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto.

10. The main grievance of the learned Advocate for the petitioners Ms. Nigar Sultana is that the petitioners were condemned unheard prior to issuance of the impugned order dated 06.04.2011 (Annexure-'D' to the writ petition) cancelling the lease of the petitioners and in this perspective, the impugned order dated 06.04.2011 is without lawful authority and of no legal effect.

11. Indisputably the principle of "Audi Alteram Partem" was not adhered to before cancellation of the lease of the petitioners in respect of the case land by the impugned order dated 06.04.2011 (Annexure-'D' to the writ petition). Now a pertinent question arises: what legal consequences will ensue for not following the principle of "Audi Alteram Partem" in this regard? This question must be answered for proper and effectual adjudication of the Rule.

12. The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man cannot be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those cannot be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application.

13. Lord Atkin in R. Vs. Electricity Commissioners ([1924] 1 KB 171) observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having the duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the landmark case of Ridge…Vs... Baldwin ([1964] AC 40). But even before this decision, the rules of natural justice were being applied in our

country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. In this context, reliance may be placed on the cases of The University of Dacca and another…Vs…Zakir Ahmed, 16 DLR (SC) 722; Sk. Ali Ahmed…Vs…The Secretary, Ministry of Home Affairs and others, 40 DLR (AD)170; Habibullah Khan…Vs…Shah Azharuddin Ahmed and others, 35 DLR(AD)72; Hamidul Huq Chowdhury and others…Vs…Bangladesh and others, 33 DLR 381 and Farzana Haque….Vs…The University of Dhaka and others, 42 DLR 262.

14. In England, the application of the principles of natural justice has been expanded by introducing the concept of 'fairness'. In Re Infant H (K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. It is sometimes thought that the concept of 'acting fairly' and 'natural justice' are different things, but this is wrong as Lord Scarman correctly observes that the Courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act (Council of Civil Service Union…Vs...Minister for the Civil Service [1984] 3 All E.R. 935). Speaking about the concept, the 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusions. The Courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and Ridge…V... Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. The Indian Supreme Court has adopted this principle holding "….this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…V... India, AIR 1981 SC 818).

15. The English Courts have further expanded the horizon of natural justice by importing the concept of 'legitimate expectation' and holding that from promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the sphere of right. To cite a few examples, not only in the case of cancellation of licence which involves denial of a right, but also in the case of first-time grant of licence and renewal of licence, the principle of natural justice is attracted in a limited way in consideration of legitimate expectation. An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity to controvert any allegation levelled against him. An alien seeking a visa has no entitlement to one, but once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the Government should not have the power to exclude him summarily.

16. In the case of Chingleput Bottlers…Vs...Majestic Bottlers reported in AIR 1984 SC 1030, the Indian Supreme Court has made certain observations which create an impression that the rules of natural justice are not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice is no longer tied to the dichotomy of right-privilege. It has been stated in "Administrative Law" by H.W.R. Wade, 5th edition at page-465: "For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being

exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair …" In the American jurisdiction, the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with Gonzalez…Vs...Freeman (334 F. 2d 570), the Courts gradually shifted in favour of the privilege cases and in the words of Professor Schwartz, "The privilege-right dichotomy is in the process of being completely eroded" ("Administrative Law", 1976, Page-230). Article 31 of our Constitution incorporating the concept of procedural due process, the English decisions expanding the frontiers of natural justice are fully applicable in Bangladesh.

17. In English law, the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction. Following the English decisions, the Courts of this sub-continent have held that the principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.

18. The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party.

19. It is often said that malafides or bad faith vitiates everything and a malafide act is a nullity. What is malafides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held, "It is commonplace to state that malafides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs…Secretary to the Government of W.B, AIR 1964 Cal 265)

20. To render an action malafide, "There must be existing definite evidence of bias and action which cannot be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act" (Punjab…Vs… Khanna, AIR 2001 SC 343).

21. The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs… Wednesbury Corporation [1948] 1 KB 223)

22. Reverting to the case in hand, it is an indubitable fact that the principle of "Audi Alteram Partem" was not adhered to prior to cancellation of the perpetual lease of the case land by issuing the impugned Annexure-'D' dated 06.04.2011. From our above discussions, it is manifestly clear that the petitioners were entitled to a fair hearing before cancellation of the lease by the authority. In other words, the authority did not act fairly by not affording the

petitioners an opportunity of being heard before issuance of the impugned Annexure-'D' dated 06.04.2011.

23. However, the impugned Annexure-'D' dated 06.04.2011 is quoted below verbatim:

"গণপ্রজাতন্ত্রী বাংলাদেশসরকার
দেবিদ্বার পৌর ভূমি অফিস
দেবিদ্বার, কুমিল্লা

p¡lLew 29(22) a¡¢lMx 06/04/2011

¢houx 104/91-৯২ নং বন্দোবস্ত মামলা প্রসঙ্গে।

HC মর্মে জানানো যাচ্ছে যে, ১৯৮ নং দেবিদ্বার মৌজা ১১২৬ দাগে ec£ ®nËl i¢j ®Sm¡ L¢o M¡p S¢j hÉhØq¡fe¡ J বন্দোhÙ L¢j¢Vl আদেশে বাতিল করা হয়েছে। কিন্তু আপনী/আপনারা সরকারি ভূমিতে যত্রতত্রভাবে মাটি ভরাট করে plL¡¢l i¢jl r¢a p¡dZ করিতেছেন। k¡q¡ f§ËmaE¢aj¡m¡l f¢lf¿z

AaHh, h¢Za ¢বষয়ে নোটিশ f§ËçÍl fl BN¡¢j 12/4/11 Cw a¡¢lM pL¡m 10 O¢VL¡l pju h¢Za দাগের ভূমির আলোকে k¢c ®L¡e ®hd L¡NSfœ থাকে তা নিয়ে নিম্নü¡r lL¡l£l অফিসে Ef¢Øqa b¡L¡l Se£ বলা হলো।

f§ËLx মাইনুল হোসেন
¢fw Se¡h Bm£
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ü¡/-
6/4/11
(মোঃ Bhm হাসেম)
CE¢eue i¢j pqL¡l£ LjLa¡
দেবিদ্বার পৌর ভূমি অফিস
দেবিদ্বার, কুমিল্লা।"

24. From a bare reading of Annexure-'D' dated 06.04.2011, it appears that the authority cancelled the lease of the petitioners and in the same breath called upon them to appear before the authority on 12.04.2011 with necessary valid papers, if any. What we are driving at boils down to this: the authority ought to have afforded the petitioners an opportunity of being heard first and thereafter on perusal of the inquiry report and other materials, the authority could have cancelled the lease of the petitioners with reference to the case land; but the authority chose to cancel the lease of the petitioners by keeping them in the dark and thereafter asked them to appear before the authority on a certain future date with their valid papers, if any. To be precise, there is no point in affording the petitioners an opportunity of being heard after cancellation of the lease. Generally speaking, the hearing of the petitioners by the authority should have been a pre-decisional phenomenon; it should not be a post-decisional phenomenon.

25. In view of the foregoing discussions, we are led to hold that because of violation of the principle of "Audi Alterm Partem", the impugned order cancelling the lease of the petitioners is malafide and in this perspective, it cannot be sustained in law. The Rule, therefore, succeeds.

26. Accordingly, the Rule is made absolute without any order as to costs. The impugned Memo No. 29(22) dated 06.04.2011 (Annexure-'D' to the writ petition) cancelling the lease of the petitioners in respect of the case land is declared to be without lawful authority and of no legal effect. Be that as it may, the authority may decide the matter afresh in accordance with law by affording the petitioners an opportunity of being heard, if it is so advised.