**IN THE SUPREME COURT OF BANGLADESH**

**APPELLATE DIVISION**

PRESENT:

**Mr. Justice Hasan Foez Siddique**
**-Chief Justice**
**Mr. Justice Md. Nuruzzaman**
**Mr. Justice Borhanuddin**
**Mr. Justice M. Enayetur Rahim**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.2310 of 2018.**

(From the judgment and order dated 23.11.2017 passed by the High Court Division in Writ Petition No.8932 of 2011).

The Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Land, Bangladesh Secretariat, Ramna, Dhaka. : .....Petitioner.

-Versus-

Md. Abdul Hye and others. : .....Respondents.

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| For the Petitioner. | : Mr. Md. Manzil Murshid, Advocate instructed by Mr. Haridas Paul, Advocate-on-Record. |
| For Respondent No.1. | : Mr. Mohammad Imtiaz Farooq, Advocate instructed by Mr. Md. Nurul Islam Chowdhury, Advocate-on-Record. |
| For Respondent No.6. | : Mr. Subratha Chowdhury, Senior Advocate instructed by Ms. Sufia Khatun, Advocate-on-Record. |
| For Respondent Nos.2-5. | : Not represented. |
| Date of Hearing. | : **The 2nd June, 2022.** |
| Date of Judgment. | : **The 2nd June, 2022.** |

**J U D G M E N T**

**Borhanuddin,J:** This civil petition for leave to appeal is directed against the judgment and order dated 23.11.2017 passed by the High Court Division in Writ Petition

No.8932 of 2011 disposing of the Rules (main rule and supplementary rule) with observations and directions.

Facts, in a nutshell, are that:

The petitioner, a citizen of Bangladesh, invoke the writ jurisdiction challenging promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) (Amendment) Ordinance, 1976 (Ordinance No. XCIII of 1976) and all actions taken pursuant to the said Ordinance and also challenged inclusion of the properties in the list of 'Enemy Property' after enactment of 1974 Act, the petitioner also challenged section-6 of the অর্পিত সম্পত্তি প্রত্যর্পণ আইন, ২০০১ (hereinafter stated as 'the 2001 Act') being violative of the Constitution of the People's Republic of Bangladesh contending interalia that on the backdrop of armed conflict between India and Pakistan in September 1965, a state of Emergency was proclaimed by the Government of Pakistan by Defence of Pakistan Ordinance, 1965 (Ordinance No. XXIII of 1965) whereunder Defence of Pakistan Rules 1965 (1965 Rules) was promulgated.

In the pretext of powers under the 1965 Rules, the Government of Pakistan indiscriminately took over the

properties of Hindu minorities as being enemies or enemy subjects or [anyone who] appear to the Pakistan Government to be associated with enemies in the then East Pakistan, present Bangladesh.

East Pakistan Government also made an order in 1966 under Rule 161 titled 'The East Pakistan Enemy Property (Lands and Building) Administration and Disposal Order, 1966'.

In 1968, the Supreme Court of Pakistan asked the Government of Pakistan to explain its view point on the said Act as the Supreme Court considered it as a political question to be answered by the Government of Pakistan (*M. M. Monsur Ali vs. Arodbendu Shekhar Chatterjee and others,* 21 DLR (SC) Page-20). However, the Government of Pakistan did not formulate its view point on this question till the independence of Bangladesh.

Although the armed conflict between India and Pakistan ended in 1965, the state of Emergency continued up until 16$^{th}$ February, 1969, on which date the Government of Pakistan promulgated the Enemy Property (Continuance

of Emergency Provisions) Ordinance, 1969 by operation of which the provisions relating to vesting of 'Enemy Property' contained in the 1965 Rules continued to be in force until the glorious liberation war of 1971, the arbitrary and discriminate confiscation of properties belonging to the Hindus of the then East Pakistan continued by the Government of Pakistan.

The liberation war of 1971 was fought on the basis of denial of the two nation theory by the Bengali nation and thus the fundamental ethos of the liberation war of 1971 was compatible with the notion of equal rights of every citizen irrespective of religion, caste or creed by the proclamation of independence declared at Mujibnagar on 10th April, 1971 by the elected representatives of the People's Republic of Bangladesh "*in order to ensure for the people of Bangladesh equality, human dignity and social justice*" and thus proclaimed Bangladesh as a sovereign Republic.

On the same day, i.e. 10th April, 1971 Laws of Continuance Enforcement Order, 1971 was promulgated purporting to keep in force all the Pakistani laws which

were in force in the then East Pakistan on or before 25th March, 1971, which were not in conflict with the proclamation of Independence. Thus, Ordinance No. I of 1969, which did not fit with the spirit of proclamation of independence of Bangladesh, automatically remained ineffective in the new state.

Bangladesh was not a successor state of Pakistan rather established itself by waging a war of liberation against Pakistan.

Immediately after liberation, the Government of Bangladesh enforced on 26th March, 1972, the Bangladesh (Vesting of Property and Assets) Order, 1972 (P.O. No.29 of 1972). By this order, all properties situated in East Pakistan that belonged to Pakistan Government became vested in the People's Republic of Bangladesh. Thus all Government properties, including but not limited to Khas land, river, Enemy Properties listed under the 1965 and 1969 Ordinance etc. became vested in Bangladesh. However, each category of land continued to be governed by specific laws relating to each category.

Although by the operation of the Proclamation of Independence and the Laws of Continuance Enforcement Order, 1971, the 1969 Ordinance lost its applicability in the People's Republic of Bangladesh, in 1974 the Government of Bangladesh, for ensuring further equality of all the citizens promulgated the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (Act XLV of 1974), expressly repealing Ordinance I of 1969. However, the 1974 Act stopped short of return of the 'enemy property' to the original owners or their heirs who became citizens of Bangladesh and in fact the 1974 Act left all 'enemy properties' and firms which were vested with the custodian of 'enemy property' in the then East Pakistan, vested in the Government of Bangladesh. Pursuant to section-3 of the 1974 Act, such properties remained as vested on the Government of Bangladesh, however, the Act did not give any wide power of managing or disposing of such properties by the Government.

On 20th January, 1975, the Ministry of Law by its Circular No.51 issued an order to immediately de-list any property included in the 'enemy property' list after

enactment of the 1974 Act. Subsequently on 26th July, 1975, the Ministry of Law by its Circular No.VNR 29/75 issued a direction to stop any listing of property as 'enemy property' and also to submit a detailed report on any such listing.

After the assassination of the Father of the Nation, Bangabondhu Sheikh Mujibur Rahman, the then President Khandakar Mushtaq Ahmed promulgated the Enemy Property (Continuance of Emergency provisions) (Repeal) (Amendment) Ordinance, 1976 (Ordinance No. XCIII of 1976) by which section-3 of the 1974 Act was amended to give further power to the Government with regard to the 'enemy properties'. Section-2 of the Ordinance, added the following sentence to section-3 of the 1974 Act,

> *"And shall be administered, controlled, managed and disposed of by transfer or otherwise by the Government or by such office or authority as the Government may direct."*

By the aforesaid amendment through the 1976 Ordinance, the Government with ill motive following discriminatory practice continued to include new properties belonging to the Hindus in the 'enemy

property’ list and also started to dispose of such properties in favour of interested quarters, often anti-liberation forces.

The practice of inclusion of new properties purported to belong to enemies of State of Pakistan continued up until 21 June 1984, and by notification dated 23 November 1984, the Ministry of Land ordered that any decision to list a property after 21 June 1984 shall be null and void.

Until 11th anniversary of War of Liberation, the Government of Bangladesh continued to include properties belonging to Hindu minorities on the pretext of being ‘enemies of Pakistan’ which is not only a violation of fundamental rights guaranteed under the Constitution of the People’s Republic of Bangladesh but also against the Proclamation of Independence, the Preamble of the 1972 Constitution and the ethos of the struggle for liberation by the Bengali Nation.

In 1999, the Parliamentary Standing Committee prepared a draft law with a view to return of possession

of the properties listed as 'enemy property' since 1969 to their original owners who were a citizen of Bangladesh or their heirs under applicable personal law. The title of the draft law was Vested Property (Return of Possession) Bill, 1999. Pursuant to the draft law, it was expected that upon enactment, subject to the provision of determination claim provided in the draft Act, any property which was not listed prior to 16th February, 1969 would cease to be treated as vested on the Government as 'enemy property' and the title and possession of the original owner who is a citizen of Bangladesh or his lawful heirs would be restored. In the said draft of 1999, it was expressly provided upon enactment of the draft Act, any lease created by the Government on such properties would be deemed to be cancelled.

Subsequently, to the utter surprise, in the name of examining the draft in the Ministry of Land, for further improvement it has been transformed into অর্পিত সম্পত্তি প্রত্যর্পণ বিল (2000 Bill) the main features of the draft proposed by the Parliamentary Committee, has been abruptly changed by the Bureaucratic process, headed by the Secretary of the

Ministry of Land. The word ‘‘প্রত্যর্পণ” does not commensurate with the Indo-Pak subcontinent Land Laws and equity from Nababi amal to present time ‘‘প্রত্যর্পণ” is used for moveable property.

Thereafter, the Parliament enacted the 2001 Act clearly deviating from the initial scheme of reinstating title and possession of the original owners of the properties listed as enemy property, the 2001 Act, excluded a large number of properties from the list by operation of section-6 of the 2001 Act, which reads as follows:

> ‘‘৬। প্রত্যর্পণযোগ্য সম্পত্তির তালিকায় নিম্নবর্ণিত সম্পত্তি অন্তর্ভুক্ত করা যাইবে না, যথা:-
>
> (ক) কোন সম্পত্তি অর্পিত সম্পত্তি নহে মর্মে এই আইন প্রবর্তনের পূর্বে যথাযথ আদালত চূড়ান্ত সিদ্ধান্ত প্রদান করিয়া থাকিলে সেই সম্পত্তি;
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> (খ) এই আইন প্রবর্তনের পূর্বে যে কোন সময় তত্ত্বাবধায়ক কর্তৃক অর্পিত সম্পত্তির তালিকা হইতে অবমুক্ত করা হইয়াছে এইরূপ কোন সম্পত্তি;
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> (গ) সরকার কর্তৃক সংবিধিবদ্ধ সংস্থা বা অন্য কোন সংগঠন বা কোন ব্যক্তির নিকট স্থায়ীভাবে হস্তান্তরিত বা স্থায়ী ইজারা প্রদত্ত অর্পিত সম্পত্তি;
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> (ঘ) কোন সংবিধিবদ্ধ সংস্থার নিকট ন্যস্ত এমন অর্পিত সম্পত্তি যাহা শিল্প বা বাণিজ্যিক প্রতিষ্ঠান এবং উহার আওতাধীন সকল সম্পদ এবং এইরূপ সংবিধিবদ্ধ সংস্থা কর্তৃক উক্ত প্রতিষ্ঠান বা উহার আওতাধীন সম্পদ বা উহার কোন অংশবিশেষ হস্তান্তর করিয়া থাকিলে সেই হস্তান্তরিত সম্পদ;
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> (ঙ) এমন অর্পিত সম্পত্তি যাহা কোন কোম্পানীর শেয়ার বা অন্য কোন প্রকারের সিকিউরিটি;
>
> (চ) জনস্বার্থে অধিগ্রহণ করা হইয়াছে এইরূপ কোন অর্পিত সম্পত্তি।”

The Government has presented a new Bill ‘Vested Property Return (Amendment) Bill, 2011’ before the

parliament to amend certain provisions of the 2001 Act. However, the 2011 Bill does not either exclude the properties listed as 'Enemy Property' after enactment of 1974 Act or reverse the actions taken under the 1976 Ordinance or amend section-6 of the 2001 Act.

The petitioner served a demand of justice notice on 06.10.2011 upon the respondents but did not get any response and as such invoke the writ jurisdiction under Article 102 of the Constitution of the People's Republic of Bangladesh.

Upon hearing the petitioner, a Division Bench of the High Court Division issued a *Rule Nisi* upon the respondents to show cause as to why promulgation of the Enemy Property (Continuance of Emergency Provisions) (Repeal) (Amendment) Ordinance, 1976 (Ordinance No. XCIII of 1976), and all actions taken pursuant to the said Ordinance; and actions taken pursuant to the 1976 Ordinance; and inclusion of new properties as enemy property subsequent to enactment of 1974 Act; and section 6(Ga) and (Gha) of the 2001 Act should not be declared to have been enacted without lawful authority and is of no

legal effect, and or why such other or further order or orders as to this Court may deem fit and proper should not be passed.

The writ-respondent no.1 contested the Rule by filing an affidavit-in-opposition denying material allegations brought against the respondent no.1 and stating inter-alia that the Bangladesh (Vesting of Property and Assets) Order, 1972 (P.O. No.29 of 1972) has been included in the list of First Schedule of the Constitution of the People's Republic of Bangladesh and the said order is protected by the Article 47(2) of the Constitution. As per Article 47(1)(a) of the Constitution, the matter of control or management of any property shall not be deemed to be void on the ground that it is inconsistent with, takes way or abridges any right granted by the Part III of the Constitution.

It also stated that section-6 of the 2001 Act is not violative of the Constitution of the People's Republic of Bangladesh. Rather section-6(Ga) and 6(Gha) of the 2001 Act inserted to protect the greater public interest. It is also stated that since there is no reasonable grievance

of the writ-petitioner inasmuch as neither the petitioner is aggrieved nor any of his property has been listed in the vested property as such the writ petition is not maintainable.

By filing a supplementary affidavit-in-opposition the respondent no.1 further stated that the Laws Continuance Enforcement Order, 1971 dated 10$^{th}$ April, 1971 having retrospective effect from 26$^{th}$ March, 1971 has legalized the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance No-I of 1969) alongwith other laws of Pakistan as the law of Bangladesh. The P.O. No.29 of 1972 was promulgated on 26$^{th}$ March, 1972 as an ancillary to the enemy property law. The P.O. No.29 of 1972 has also been expressly protected by Article 47(2) of the Constitution and included unhindered in the First Schedule to the Constitution of Bangladesh.

Hence, if right to property of any citizen is affected in this regard, that cannot be challenged in any way for the reasons and constitutional provisions cited above. Right to property as enshrined in Article 42 of the Constitution is a qualified right subject to any

restrictions. Article 2(1) of the P.O. NO.29 of 1972 authorizes the People's Republic of Bangladesh to pass order of vesting in the custodian of enemy property or Assistant Custodian of enemy property as appointed by the then Government of Pakistan which means all 'enemy property' as identified by the then Government of Pakistan got vested in the custodians of 'enemy property'. Those custodians were allowed to manage the 'Enemy Properties' under the laws made during Pakistan. No new property can be included as 'enemy property' in the 'enemy property' list as per the judgment of the apex court after enactment of 1974 Act i.e. the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 (Act No.XLV of 1974) by which the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 (Ordinance No. I of 1969) was repealed as on 23rd March, 1974.

The added respondent no.6 Bangladesh Hindu, Buddhist, Christian Unity Council filed a separate affidavit-in-opposition stating background of the enemy property (Vested Property Law) and its effect thereafter

discriminating the minorities of the country. It is also stated regarding Vested Property Return Act, 2001 and amendment made by Act No.23 of 2011.

The respondent no.1 replied to the affidavit-in-opposition of added respondent no.6 reiterating its statements made in earlier affidavit-in-opposition.

The High Court Division appointed 5 (five) learned Senior Advocates namely Mr. Abdul Wadud Bhuiyan, Mr. Fida M. Kamal, Mr. Qumrul Haque Siddique, Mr. Probir Neogi and Mr. A.M. Amin Uddin as Amicus Curiae to assist the Court.

In the midst of hearing, the writ-petitioner filed an application praying for issuance of supplementary Rule challenging section-3 of the Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974. The High Court Division on 12.04.2017 issued a supplementary Rule in the following term:

> *"Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why section-3 of the* 'Enemy Property' *(Continuance of Emergency Provisions) (Repeal) Act, 1974 in its present form should not be declared to have been enacted without lawful authority and is of no legal*

> *effect and or such other or further order or orders passed as to this court may seem fit and proper."*

Upon hearing the learned Advocate for the petitioner, respondent nos.1 and 6, the then learned Attorney General Mr. Mahbubey Alam, learned Senior Advocates appointed as Amicus Curiae and perusing relevant laws alongwith papers/documents appended with the writ petition, affidavits-in-opposition alongwith cited decisions a Division Bench of the High Court Division disposed of the Rules (main rule and supplementary rule) with some observations and directions vide judgment and order dated 23.11.2017 holding that:

> *"137. We have discussed how Pakistan dealt with the enemy property so declared in 1965. They sold all the properties in 1971. On the other hand India has already enacted a law in 2017 to dispose of the enemy properties by selling all. In such a situation existing in the sub-continent we find that the attempt taken by the Bangladesh Government and our legislature is friendlier to the stake holders. This initiative on part of the Bangladesh Government indubitably will help in establishing peace among the people of the sub-continent. Thus, we are not inclined to declare section-6(Ga)(Gha) ultra-vires to the Constitution at this*

*stage and under circumstances as discussed above.*

*138. However, in view of our discussions made above and considering the provision of Act of 2001 as a whole and the scenario existing in the Tribunals and also considering other material aspects we are inclined to pass the following observations and directions.*

*Observations*

(a) *1962 Constitution of Pakistan was not a Constitution in the eye of law at all, because the same was not given to the nation by the people's representatives of Pakistan, rather the same was given by an usurper dictator abrogating the 1956 Constitution which was duly framed and adopted by the Constituent Assembly of Pakistan. Thus, the Enemy Property Act [EPA] which was promulgated under a void Constitution of 1962 given by an usurper, the Pakistan Defence Rules, 1965 and the Ordinance I of 1969 and its continuance under the grab of Act XLV of 1974 was a misnomer. Enactment of Enemy Property (Continuance of Emergency Provisions) (Repeal) Act, 1974 was a historical mistake.*

(b) *In view of our observations regarding 1974 Act and 1976 Ordinance, we hold that measures are likely to be needed to give proper effect of the objective of the Act, 2001 (amended in 2013) and these are the matter to be dealt with by the legislature and executive.*

*139. In the light of the decisions in the cases of **Laxmi Kanta Roy vs. UNO,** reported in 46 DLR (HCD) 1994, Page-136, **Aroti Rani Paul vs. Shudarshan Kumar Paul and others,** reported in 56 DLR (AD) 73, **Saju Hosein and others vs. Bangladesh and another,** reported in 58 DLR (AD) 177 and **Dulichand Omraolal vs. Bangladesh, through the Secretary, Ministry of Industries and others,** reported in 33 DLR (AD) 30, we believe and further observed that:*

*(c) all actions, decisions regarding listing any property within the territory of Bangladesh as enemy property or vested property after 23.03.1974 are illegal;*

*(d) the persons engaged with the task of listing the property as vested property after 23.03.1974 are liable to be held responsible for doing illegal works; and*

*(e) the above decisions were given by the Supreme Court of Bangladesh during 1980-2004. Not a single judgment has yet been pronounced in contrary to the principles enunciated by our apex court in the above mentioned cases. Thus, the persons who were/are engaged in listing properties as vested property subsequent to 18.06.1980 are liable to be proceeded with for contempt of Court.*

*140. Now, in view of above observations based on deliberation made hereinabove we are convinced to make directives as below:*

*Directions*

a. *All the government officials are hereby directed not to take any attempt in future to enlist any property in the official gazette as the vested property;*

b. *Government may set up an exclusive Tribunal having no other jurisdiction, but only to dispose of the applications under section-10 of the Act No.16 of 2001 in each District and where huge number of petitions are pending more than one Tribunal may be set up;*

c. *The Tribunals already set up under the Act No.16 of 2001 are directed to dispose of the applications maintaining the time frame strictly as provided in the Act No.16 of 2001;*

d. *The Limitation Act should be made applicable in filing application under section-10(1) of the Act;*

e. *The concerned authorities are directed to implement/execute the decision of the Appellate Tribunal or in the case of Tribunal where no appeal has been preferred within the time of limitation and the Government officials are directed not to make any delay in executing the decree of the Tribunal on the plea of filling writ petition or any other plea in any way or in any other form as the Government by enacting this Act has decided to return back the property to the owner or*

*successors-in-interest in the property within shortest period of time;*

f. *Since the law provides to set up a Special Appellate Tribunal to decide the appeal against the verdict of the Tribunal there should be a Special Appellate Tribunal in each district;*

g. *The property which has been lying with the Government as vested property having no legal claimant should be utilized by the Government for the purpose of human development only;*

h. *The Government may take necessary measures by enacting law in respect of properties which were vested to the Government and where institution have already been developed for the purpose of the development of the country may be named after the name of the original and lawful owner;*

i. *The legislature may enact law to give sufficient and just compensation to a lawful claimant in lieu of returning the property to him whose property has already been made non-returnable under the provision of section-6."*

Feeling aggrieved, the writ-respondent no.1 as petitioners preferred instant civil petition for leave to appeal impleading the writ petitioner as respondent no.1 and other writ-respondents as proforma-respondent nos.2-6.

In support of the civil petition for leave to appeal, the stands taken before the High Court Division are reiterated by the learned counsel for the petitioner and the respondents. Mr. Md. Manzil Murshid, learned Advocate for the petitioner further submits that the High Court Division has committed an error of law in passing the impugned judgment and order dated 23.11.2017 having failed to consider that the observations and directions as enunciated in the said judgment and order is against the law i.e. Act, 2001, since there is a forum in the Act, 2001 for getting appropriate remedies as such the impugned judgment and order is required to be interfered by this Division.

We have gone through the impugned judgment and order passed by the High Court Division as well as relevant papers/documents contained in the paper book.

The petitioner, a citizen of Bangladesh, invoked the writ jurisdiction under Article 102 of the Constitution.

Upon hearing the petitioner, a Division Bench of the High Court Division issued 1st Rule Nisi upon the respondents to show cause.

In the midst of hearing, on the prayer of the writ-petitioner, a supplementary *Rule Nisi* (2nd Rule) was issued upon the respondents to show cause.

Having gone through the impugned judgment and order passed by the High Court Division, it appears that the High Court Division thoroughly endured historical background of the laws relating to enemy property and its effects as well as enemy property laws of the sub-continent.

Learned Advocate for the petitioner raised the question of locus-Standi of the writ-petitioner in filing the writ application in the nature of mandamus contending interalia that the petitioner is not personally affected by the law enacted as such he has no legal right to invoke the writ jurisdiction under Article 102 of the Constitution.

In the English and Indian jurisdictions there was a definite emphasis on the existence of a specific legal right of the applicant to insist upon performance by a public official of a definite legal duty. The Indian Supreme Court applied the *Lewisham Union* principle and observed in the case of *M.S. Jain vs. Haryana*, reported in AIR 1977 SC 276, that:

> *"No one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering legal grievance can ask for a mandamus."*

In England the requirement of 'specific legal right' of the applicant has been given up and settled that the courts may issue mandamus even though the applicant has no specific legal right. In the case of *I.R.C. vs. Federation of Self-Employed*, reported in [1981] 2 All E.R. 93, the House of Lords discarded the *Lewisham Union* principle.

Regarding locus-Standi of the writ-petitioner in the nature of mandamus, Mr. Mahmudul Islam in his much acclaimed book 'Constitutional Law of Bangladesh' narrated the development from *Lewisham Union* principle to

the findings of this Division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh*, in the following manner:

> *"In England the **Lewisham Union** principle was given up as it would have the effect of allowing the public functionaries a free hand in ignoring their public duties. In countries like ours it will have a far more serious effect as many instances of non-performance of legal duty by Government and public functionaries will remain without remedy, thereby eroding the concept of rule of law and constitutionalism. This principle originated in England and when it has been discarded there, there is no rationale for insisting on the application of this principle in our country. It is submitted that the language of Article 102(2) leaves no scope for application of the **Lewisham Union** principle in our jurisdiction. Article 102(2) does not require that the applicant for mandamus must have a 'specific legal right'; the only requirement is that he must be an 'aggrieved party'. It is important to note that Article 31 provides a guarantee that no person in Bangladesh can be adversely affected except in accordance with law. Thus if a person is going to be affected by the failure of a public functionary to do what he is required by law to do, he can claim performance of the legal duty of the public functionary whether or not he has a specific legal right to claim*

> *performance of the duty. In* ***Hazerullah v. Assistant Commissioner, Board of Management of Abandoned Property****, relying on* ***Lewisham Union****, the Appellate Division held that a person can avail writ jurisdiction by way of mandamus only for enforcement of his legal right or for redress violation of such right. It is submitted that the Appellate Division was wrong in relying on* ***Lewisham Union*** *when it was discarded by the House of Lords in* ***IRC vs. Federation of Self-Employed;*** *furthermore the finding is neither in conformity with the language of Article 102, nor comports with the finding of the court in* ***Dr. Mohiuddin Farooque vs. Bangladesh.*** *Mandamus may issue where there is a violation of a legal right or violation of a legal duty."*

In view of the above, the submissions made by learned Advocate for the petitioner that the writ-petitioner had no legal right to file the writ-petition under Article 102(2)(a)(i) hold no water.

Learned Advocate for the petitioner further raised his objection regarding observations made and directions issued by the High Court Division in the impugned judgment and order.

We have meticulously gone through the observations and directions of the High Court Division made/issued in

the impugned judgment and order. Observations made by the High Court Division, in our opinion, are not warranted in the context of the issue before court. The High Court Division ought to have kept in mind that it was the legislative decision of the State which was the subject matter of dispute before it, while the High Court Division undoubtedly has the jurisdiction to determine the constitutionality of the 'law', the motives behind the law and the wisdom of the legislative body are not amenable to the judicial review.

Now, we turned to the directions of the High Court Division passed in the impugned judgment and order. The High Court Division issued the directions under Article 102(2)(a)(i) of the Constitution.

The High Court Division exercising its jurisdiction under Article 102 has power to issue a writ of mandamus or in the nature of mandamus where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant

consideration. In all such cases, the High Court Division can issue writ of mandamus and give directions to compel performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority. In appropriate cases, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the Government or the public authority should have passed, had it properly and lawfully exercised its jurisdiction.

The object of mandamus is to prevent disorder from a failure of justice and is required to be granted in all cases where law has established no specific remedy and whether justice despite demanded has not been granted. However, ordinarily the court will not exercise the power of the statutory authorities. It will at the first instance allow the statutory authorities to perform their own functions and would not usher the said jurisdiction itself.

In the case of *Guruvayoor Devaswom Managing Committee and another vs. C.K. Rajan and others,* reported in (2003) 7 SCC 546, the Supreme Court of India held that:

> *"The Court steps in by mandamus when the State fails to perform its duty. It shall also step in when the discretion is exercised but the same has not been done legally and validly."*

The High Court Division observed at the time of passing of the impugned judgment and order that the Government has a fair intention to return back the vested properties to the actual and lawful claimants of the property by enacting the 2001 Act and for avoiding any further complications section-6(Ga) and (Gha) have been inserted in the said Act as a transitory measure and thus the High Court Division did not declare section-6(Ga) and (Gha) ultra-vires to the Constitution as prayed by the writ-petitioner.

The High Court Division issued:

Direction-(a), All the Government officials are hereby directed not to take any attempt in future to enlist any property in the official gazette as the vested property.

**Section-9 of the 2001 Act covered the issue of direction-(a) inasmuch as this section provides**

**preparation and publication of the list of properties mentioned in schedule 'Ka' under Act of 2001 (২০০১ সালের ১৬ নং আইন) within the time stipulated therein with the caption '*[প্রত্যর্পণযোগ্য] সম্পত্তির তালিকা প্রকাশ*'. As such, apprehension of any attempt in future to enlist any property as vested property is futile. Apart from that this Division declared all actions, decisions regarding listing any property as vested property after 23.03.1974 as illegal.**

Direction-(b),-Government to set up an exclusive Tribunal having no other jurisdiction, but only to dispose of the application under section-10 of the Act No.16 of 2001 in each District and where huge number of petitions are pending more than one Tribunal may set up.

**Section-16 of the 2001 Act categorically provides establishment of necessary Tribunal in every district and its functions with the heading '*ট্রাইব্যুনাল স্থাপন ও উহার গঠন*'.**

Direction-(c), The Tribunals already set up under the Act No.16 of 2001 are directed to dispose of the applications maintaining the timeframe strictly as provided in the Act No.16 of 2001.

**Section-10(7) of the 2001 Act stipulated timeframe for delivering judgment and in case of failure sub-section-7(Ka) of section-10 provides necessary arrangement under the law with the heading** ***'[প্রত্যর্পণযোগ্য] সম্পত্তি প্রত্যর্পণ বা অবমুক্তির আবেদন, রেজিস্ট্রি, রায় ও রায়ের অনুলিপি'.***

Direction-(d), The Limitation Act should be made applicable in filing application under section-10(1) of the Act.

**Section-10(1) and 10(1ka) of the 2001 Act supplied necessary provisions regarding period of limitation in filing the application under the Act of 2001 with the heading** ***'[প্রত্যর্পণযোগ্য] সম্পত্তি প্রত্যর্পণ বা অবমুক্তির আবেদন, রেজিস্ট্রি, রায় ও রায়ের অনুলিপি'.***

Direction-(e), The concerned authorities are directed to implement/execute the decision of the Appellate Tribunal or in the case of Tribunal where no appeal has been preferred within the time of limitation and the Government officials are directed not to make any delay in executing the decree of the Tribunal on the plea of filing writ petition or any other plea in any other form as the Government by enacting this Act has decided to

return back the property to the owner or successor-in-interest in the property within shortest period of time.

**Section-11(1), 11(3), 11(4) and 11(6) of the 2001 Act furnished necessary provisions for execution of decree and delivering possession and formalities thereafter under the caption '*ডিক্রী বাস্তবায়ন*'.**

Direction-(f), Since the law provides to set up a Special Appellate Tribunal to decide the appeal against the verdict of the Tribunal there should be a Special Appellate Tribunal in each district.

**Section-19 of the 2001 Act covered this direction with the caption '*অর্পিত সম্পত্তি প্রত্যর্পণ আপীল ট্রাইব্যুনাল*'.**

Direction-(g), The property which has been lying with the Government as vested property having no legal claimant should be utilized by the government for the purpose of human development only.

**Section-26(2) of the Act of 2001 provides that:**

> ***"২৬ (২) উপ-ধারা (১) এ বর্ণিত সরকারি সম্পত্তি সরকার বিক্রয় বা অন্য কোনভাবে হস্তান্তর বা সরকারের বিবেচনা মতে যেকোনভাবে ব্যবহার বা নিষ্পত্তি করিতে পারিবে".***

**Government may utilize the unclaimed vested property for the purpose of human development i.e. for betterment of the common people.**

Direction-(h), The Government may take necessary measures by enacting law in respect of properties which were vested to the Government and where institution have already been developed for the purpose of the development of the country may be named after the name of the original and lawful owner.

**Regarding direction-(h)-our considered view is that a writ of mandamus cannot be issued to the legislature to enact a particular legislation. Same is true as regards the executive when it exercises the power to make Rules, which are in the nature of sub-ordinate legislation.**

**There is no statutory compulsion, on the part of the Government to enact a law in respect of properties which are vested to the Government and where institution have already been developed to be named after the name of the original owner.**

Direction-(i), The legislature may enact law to give sufficient and just compensation to a lawful claimant in lieu of returning the property to him whose property has already been made non-returnable under the provision of section-6.

**This Act i.e. Act of 2001 covered issue of compensation vide section-5(2) and proviso of section-6. The term 'sufficient and just' depends upon the criteria, location, etc. of the property which will be determined by the concern department of the Government. Relating to enactment of law, we already expressed our views while discussing direction-(h) of the High Court Division.**

From the above it appears that the Government enacted a law, Act of 2001 (Amended in 2013), to dealt with the vested properties fairly and reasonably in accordance with the law. As such, there is no necessity to issue directions upon the Government regarding the vested properties.

Accordingly, observations made and directions issued by the High Court Division are expunged.

With the above observations and expunction, the civil petition for leave to appeal is disposed of.

**C.J.**

**J.**

**J.**

**J.**

**The 2nd June,2022.**
Jamal/B.R./Words-*5942*