

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 1802 of 2009

An application under Article 102 of the
Constitution of the Peoples Republic of
Bangladesh.

AND

IN THE MATTER OF:

Hazi Md. Abdul Hashem

.....Petitioner.

-VERSUS-

Government of Bangladesh and others

..... Respondents.

**Mr. Shamsul Haque with
Mr. S.M. Zafar Sadeque**

.....for the petitioner.

Mr. Mahbubey Alam, Attorney General

.....for the Respondent.2

Mr. Md. Abdul Malek

.....for the Respondents No.3

Mr. Manzill Murshid

.....for the Respondent No.7

Hearing on 28.4.2010, 2.5.2010, 18.8.2010 &
6.10.2010

Judgment on 10.10.2010

Present:
Mr. Justice Syed Mahmud Hossain
And
Mr. Justice Gobinda Chandra Tagore

Syed Mahmud Hossain, J

In this application under Article 102 of the Constitution of the peoples Republic of Bangladesh a Rule Nisi was issued calling upon the respondents to shown cause as to why (i) the illegal and ambary of respondent No. 2 restricting the petitioner from constructing building on his land at. 3 Pushparaj shaha Lane. P.S. Lalbagh, Dhaka more specifically detailed in the registered sale deed (Annexure-A) and also restricting other Government functionaries being respondent Nos. 3-6 from according approval for construction of building on this land should not be declared to be without lawful authority and (ii) why respondent No.2 should not be directed to furnish intimation to the rest of the respondents as to his affirmation that there is tangibly no legal impediment for the petitioner for building new construction upon his land at 3-pushparaj Shaha Lane, P.S. Lalbagh, Dhaka.

The facts leading to the issuance of the Rule, in brief, are ;

The petitioner and his wife Most. Mahmuda Akter are successive owners in possession by purchase from the C.S. recorded tenant of a piece of land along with a very old building being House No. 3, Pushparaj Shaha Lane, Police Station Lalbagh for a consideration of Tk. 21,00,000/- by a registered deed of sale. After purchase, the petitioner found that the building was unfit for residential purpose without repair and some new construction when he started doing so, the police of Lalbagh police Station forbade him to continue with the Construction work referring to a letter of respondent no. 2 under memo No. Protno: /RAJUK/ 3Kha/4/06/122/1 dated 22.1.2009. The petitioner went to the office of respondent No.2 who furnished the petitioner with a photo copy of letter dated 22.1.2009 along with its enclosures addressed to respondent Nos. 4 and 5. The gist of the letter is that the predecessor of the petitioner Mrs. Firoza Khatun applied for approval for construction on the disputed land but was refused. Respondent No.3 told the petitioner that no such approval would be given near or adjacent to the area of Lalbagh Fort. An archaeological relie. Respondent No.2 also referred to violation of section 12(3) (C) of the Antiquities Act, 1968.

From the annexures submitted by the petitioner it appears that neither the property is neither an antiquity nor it is a subject matter of any agreement as contemplated under section 12(1) of the Antiquities Act, 1968. Consequently the petitioner was compelled to send a notice upon the respondents demanding justice but to no avail. After that the petitioner obtained this Rule Nisi.

Respondent No. 2 filed an affidavit-in-opposition denying all the material allegations made in the Writ petition. The case of respondent No. 2, in short, is that the protection of antiquities is recognized under the Antiquities Act, 1968 (Act No. XIV of 1968). Violation of and disobedience to the terms and condition laid down in section 12(3) (e) of the Antiquities Act, 1968 and disobedience to the Gazette Notification and the Rules framed under the Act are not permissible. Violation of the provision of the Antiquities Act, 1968 is a penal offence. Lalbagh Fort was declared a protected monument by notification No. 22796E dated 17.8.1909 published in the First Bengal and Assam Gazette dated 23.9.1909. The Mosque and the Hammam were also included within the Lalbagh Fort and declared protected Monuments by notification No. 27009 dated 1.10.1909 published in the First Bengal and Assam Gazette dated 1.10.1909. Nobody can encroach upon the area of protected Zone and the petitioner encroached upon the land of Lalbagh Fort and as such he can not acquire any interest in the disputed land.

Respondent No. 3 also centered appearance by filing power and submitting an affidavit-in-opposition supporting the case of respondent No.2.

Added Respondent No.7 filed an affidavit-in-opposition stating that the protection of Lalbagh Fort has been given in Article 24 of the Constitution and that the Government is duty bound to protect all archaeological sites of Bangladesh. Though the petitioner has been claiming the property on the basis of deed of sale, the property in fact belongs to Lalbagh Fort. In order to maintain and preserve the Lalbagh Fort. The following directions should be given by this court.

- (1) To direct respondent Nos. 1-4 to conduct a survey with the assistance of the officer of Director General (Land Survey) within three months to identify and demarcate the land of late Shayesta Khan in Lalbagh where Lalbagh Fort is situated.
- (2) To direct the respondents to demolish/evict all privet constructions within the territory of Lalbagh Fort after concluding the survey and demarcation.

- (3) To direct the respondents to maintain and preserve the boundary wall of Lalbagh Fort in its original position.
- (4) To direct the respondents and other concerned authorities to follow the provisions of the Antiquities Act, 1968, Building Constructions Rules, 2008 in the case of any construction near the Lalbagh Fort.
- (5) To direct the respondents to take steps for constructing a minimum 5 meter wide walkway outside side the boundary wall of Lalbagh Fort area.

Mr. Shamsul Haque along with Mr. S.M Zafor Sadeque, learned Advocate appearing for the petitioner. Submits that admittedly, the petitioner is the owner of disputed land and that the land was not a part of any antiquity and as such. The petitioner should not be deprived of enjoyment of his purchased land. He further submits that the respondents should be directed to allow the petitioner to make construction on the disputed land.

Mr. Mahbubey Alam, learned Attorney General appearing on behalf respondent No.2. on the other hand, submits that according to Article 24 of the Constitution it is the sacred duty of the Government to protect all monuments of the country including Lalbagh Fort. He further submits that the court should formulate guidelines so that this archeological site of great national importance can be protected for out posterity.

Mr. Md. Abdul Malek Learned Advocate appearing on behalf on respondent No. 3 adopted the submission of the learned Attorney General.

Mr. Manzill Murshid Learned Advocate appearing on behalf on respondent No. 7 submits that within the radius of 250 meter of Lalbagh Fort. No one should be allowed to make any construction without approval of the concerned authorities including the archeological Department of the Government. He further submits that the Lalbagh Fort is in great danger of losing its importance and heritage because of unauthorized construction within its territory and in the adjoining area of the Lalbagh Fort and that direction should be issued to preserve that great heritage of the country.

We have considered the writ petition and its annexures and the three affidavits-in-opposition filed by respondent Nos.2,3 and 7.

Kella Lalbagh is a fort. It was founded during the second half of the 17th Century A.D and was called Aurangabad which means the

locality of Aurangzeb. He was the last powerful emperor of the Great Mughal lineages. The history of the construction of the fort, however, is associated with Muhammad Azam and Shayesta Khan. The former was a prince as well as a provincial administrator of Mughal Empire posted in Bengal from July 1678 to October 1679AD. While Shyesta Khan was a lieutenant for the province of Bengal from 1688 AD excepting the intervention of Muhammad Azams tenure in between. The fort is rectangular in plan. It measures 327 in(east-west)×234m (north-south) and was enclosed on all sides by high wall made of brick and brick-dust. On its south flows a river Buriganga by name there are three lofty gates and some watching towers at different points of its southern fortification wall. The watching towers at the south western corner is more impressive and bigger than its fellows. In the same way, the present day south eastern gate is the biggest and impressive one than the other two of its kind. One of the smaller gates is situate near the eastern end of the northern wing. The third and the smallest one occupies a portion near the western end of the northern wing. At present the latter is providing access into the fort. Inside the fort there are four monuments. They are Hummam (Rurkish both), paribbi Mazar (Tomb of Bibipari), Azam shaher Masjid (Mosque of Mauhmmad) and Surang (Secret narrow passage). There of them are still standing in an east-west longitudinal line and thus has divided the fort into two equal halves.

Audience hall eum-Hammam: It is a two-storied building used as a bathing hall-eum-resting apartment by the Mughal provincial administrators. It accommodates a bathing complex along with three waiting-cum-reception rooms in its ground floor. The upper storey also has three rooms. They might have been in use for refreshing. The architecture of the building is impressive because of its roof that represents the four segmented traditional Bengali shed called chinchilla in brick masonry. It is supposed to have been built by Shayest Khan. It is also supposed to be the building where the famous Christian representative, William Hedges, met the local administrator in 1887-89. it is now being used for the museum display. There is a tank on the east of the Hammam. Paribibi Mazar. It occupies the central portion of the fort. It is a single domed multi-chambered tomb structure. It has a central hall encircled by eight smaller chambers on its four sides. The central hall contains the moral remains of Bibipari who was the daughter of Shayestra Khan. The south eastern chamber the tomb of another princess. The rest of

the chambers are lying still vacant. The building combining in itself the Muslim and Hindu style of architecture in a very refined mode. Azam Shaher Masjid: It stands on the western part of the fort, It is a three domed typical Mughal Mosque Built by Muhammad Azam. But it is the only example of its kind in Bangladesh in view of its artistic embellishment.

Respondent No. 7 also annexed photographs of the disputed building and the 4-boundary wall Lalbagh Fort as Annexure-2 (series) which clearly show that a dilapidated building is within the boundary of Lalbagh Fort. Lalbagh Fort is surrounded by boundary wall except the portion in which the disputed is situated. This building has posed a great threat to proper preservation of this invaluable archeological site. The culture and heritage of a country are measured by the number of antiquities, both movable and immovable. With this end in view, the framers of the Constitution incorporated Article 24 in the constitution which is quoted as under.

"24 The State shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.

This Article finds place in Chapter-11 of the Constitution which deals with Fundamental Principles of State Policy. Though the provision of Article 24 can not be implemented by resorting to the writ jurisdiction of this Court even then a sacred duty is cast upon the Government to preserve and protect all monuments, objects or places of special artistic or historic importance or interest. Lalbagh Fort comes within the definition of national monument as embodied in Article 24 of the Constitution. Admittedly, the petitioner purchased the disputed property by a registered deed of sale only on 11.9.2008 knowing fully well that the property is located within the territory of Lalbagh Fort. Originally, Md. Matiar Rahman Chowdhury and Most. Mahmud Khatun purchased the disputed property on 21.6.1954 by two registered deeds of sale. On 30.8.1971 the vendor of the petitioner purchased the property by a registered deed of sale. There is nothing on record to show when an area more than .05 acrs of land of Lalbagh Fort was taken over. Record reveals that the vendor of the petitioner was also not accorded permission to make new construction on the disputed land. The Antiquities Act, 1968 in sub-section (3) (c) of section 12 states as under:

(C) The restrictions upon the right of the owner to alienate, destroy, remove or alter or deface the antiquity or to build on near the side of the antiquity⁹⁹ (emphasis is ours)

Therefore, it appears that even a lawful owner of an antiquity not to speak of the people living near an antiquity is not entitled to build on near the side of the antiquity. Therefore, the petitioner is not entitled to make any renovation or make new construction on the disputed land. Clause (g) of sub-section (3) of Section 12 runs as under.

(g) Compensation to be paid for any loss sustained by the owner or occupier or any other person as a result of the enforcement or observance of the agreement"

Having considered the *Xivki gnvbMi Bgvi Z vbgfob Dbqab msi qib I Acmvib (vbgfob Dbqab, msi qib I Acmvib) vevagvj v 2008* we find in Rule 61 as under.

61| Hivn" msi qib Conversation and preservation KZeq KZR. Zvij Kvf3 Hivn" evnx netkl feb I , iaZcb- vbmgnai h_vh_ msi qitbi Diti tk" vbtgac: E veavb mgn cthvR" nte, h_v-

K) KZeq Zvij Kvf3 Bgvi tzi GKul Zvij Kv msi qib Kwi te t

L) GBiæ Zvij Kv msi qitbi mgq KZeq miKviti cZzEj vefvM, evsj vt`k `cuz Bbiv- vJiUDU A_ev Zvnt`i mif_ cigk Kwi teb hvviv netkl biv`vbK, HivnvmK, %ÁvnbK, migvRK ev Ava`vZK , iaZj enbKvix Bgvi tzi e`vciti netkl Á t

M) GB vevagvj vi Rb" Zvij Kvf3 Bgvi Z evj tZ Bgvi Z I Bgvi Z msj Mæth tKvb Kvvtgvr Ges Bgvi tzi mxgvbvi wfZi Aew`Z mkj Ask eSvBte t

N) KZeq Zvij Kvf3 Bgvi tzi Zvij Kv c`ltei ci A_ev GBiæ Zvij Kv mstkvatbi ci hZ kvNk mæe H me Bgvi tzi gvij K Ges emevmKvix Mb tK Giæ Zvij Kvf3 i veÁvB Rvix Kwi te t

O) KZeq Zvij Kvf3 Bgvi tzi Zvij Kv Rbmvavi tbi cwi`kibi Rb" Db3 i vLte t

P) KZeq i vj vLZ AbgnZ e`Ziz Zvij Kvf3 Bgvi tzi tKvb cKvi cwieZb, cwieab, msthvRb ev asm mvatbi Rb" bMi Dbqab Kvgvli vj vLZ AbgnZi ctqvRb nBte t

R) KZeq ctqvRb gtb Kwi tZ Zvij Kvf3 Bgvi tzi cwieZb, cwieab, msthvRb ev asm mvatbi Avte` tbi m`ub`ev AvsukK AbgnZ w` tZ ev m`ub`emZj Kwi tZ cwi tet KZeq AbgnZ` v tbi mgq th tKvb hv3 m1/2Z kZ`Avtivc Kwi tZ cwi tet

S) KZeq KZR. c`vbKZ. AbgnZ vzb eQti i Rb" %a`vKte t

T) hv` tKvb e`v3 KZeq i AbgnZ e`vZ Zvij Kvf3 Bgvi tzi tKvb cKvi cwieZb, cwieab, msthvRb ev asm mvab Kti Zvni nBtj KZeq D`iæ Bgvi tzi gvij Kv ev `Lj`vi tK KvR eÜ Kwi evi vbt`R c`vb Kwi te t

- U) KZÉ¶ hñ` gtb Kti Zvij Kvf³ BgviþZi hv_vhq ZÉyeavb nBþZþQ bv, Zvrv nBþj KZÉ¶ GBiæ Bgvi Z eva`Zvgj-K AváMnb Kwi þZ cwi þe t
- V) KZÉ¶ Riáx gtb Kwi þj Zvij Kvf³ BgviþZi msi ¶þbi Rb` þh þKvb e`e`v Mnb Kwi þZ cwi þet
- W) KZÉ¶ mgþq mgþq ðeþkl bþ`þbK, HuznvmK, þevBÁvnbK, mvgvRK Ava`wZK ev cñKwZK %ænkó` cb`Gj vKvþK msi ¶þb Gj vKv (Kbmviþfkb umU) umvþe Zvij Kvf³ Kwi þZ cwi þe t
- X) KZÉ¶ mgþq mgþq msi ¶þb Ges Gj vKvmgþni msi ¶þb Ges Dbqþbi Rb` Dþ`vM MnY Kwi þe t
- b) Zvij Kvf³ Bgvi Z A_ev msi ¶þb Gj vKv A_ev wWþUBj W Gwi qv cab (wW G uc) G wþþ`¶ Z ðeþkl gþbvþZ Gj vKvi 250 wUvi e`mvtai gþa` þh þKvb Dbqþbj-K Kivkñm GB Aþki Dþj mZ wbgvejxi Ašf³ nBþe t
- Z) KZÉ¶ GBiæ Gj vKvmgþni GKw Zvij Kv msi ¶þY Kwi þe Ges Rbmvariþbi Avteab mvtç¶¶ mieivn Kwi þe t

From the above Rule we find that even the owners of the building cannot undertake any development work within 250 meter radius of an antiquity as the other clauses of the rule shall apply to clause (Nio).

Therefore, we find that as soon as the Rule came into operation even the owners of properties situated within 250 meter radius of Lalbagh Fort cannot undertake any construction without talking permission from the concerned authorities. The Rule 6 shall also apply to people living in the adjoining area of Lalbagh Fort.

Having considered all aspects of the case, we are of the opinion that the respondents may resolve the dispute by resorting to the provision of clause (g) of Sub-section (3) of Section 12 of the Antiquities Act. 1968 read with Rule 61 or by any other means as they deem necessary. But the fact remains that the petitioner can not make any renovation or construction of the disputed land. In order to protect one of the most remarkable archaeological sites of the country. We are inclined to dispose of the Rule with the following directions:

1. Respondent Nos. 1 and 2 shall conduct survey with the assistance of the office of Director-General, Land Survey and Reforms within three months to identify and demarcate the actual area of Lalbagh Fort.

2. The respondents shall demolish/evict all private constructions within the territory of Lalbagh Fort after concluding the survey and demarcation thereof.
3. The respondent shall restore boundary wall of Lalbagh Fort to its original position.
4. The respondents are directed to follow the provision of Antiquities Act. 1968 and the Building construction Rules, 2008 made under the Town Improvement Act, 1953 in the event of any construction on or near the Lalbagh Fort.
5. The Antiquities Act. 1968, Rule 61 of the *XiKv gnivMi Bgvi Z ubgfb Dbqab msi qb I Acvib (ubgfb Dbqab, msi qb I Acvib) weagij v 2008* Shall apply to the people living within 250 meter radius of Lalbagh Fort 6. The respondents should construct a minimum five meter Walkway outside the boundary wall of Lalbagh Fort. If necessary the concerned authority will acquire land adjoining the boundary wall in accordance with law for protecting Lalbagh Fort. The respondents, in case necessity may take recourse to the provision of clause (c) of sub-section (3) of Section 12 of the Antiquities Act. 1968.

There is no order as to costs.
