

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

CIVIL PETITION FOR LEAVE TO APPEAL
NO. 568 of 2011.

(From The judgment and order dated 10.10.2010 passed by the High Court Division in Writ Petition No. 1802 of 2009.)

Hazi Md. Abul Hashem:

.....Petitioner.

-VERSUS-

Bangladesh Represented by the Secretary,
Ministry of Cultural Affairs, Bangladesh
Secretariat, Ramna, Dhaka and others

..... Respondents.

Mr. Mahmudul Islam, Senior Advocate
(with MR. Swapan Dutta, Advocate),
instructed by Mr. Md Nawab Ali, Advocate-
on-Record.

.....for the petitioner.

Mr. Manzill Murshid, Advocate, instructed
by Mr. Nurul Islam Chowdhury, Advocate-on-
Record.

.....for the Respondent. 7

Respondents No. 1-6: Not Respondent

Present:

Mr. Justice Md. Muzammel Hossain,
Chief Justice

Mr. Justice Surendra kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Hasan Foez Siddique

Mr. Justice A.H.M. Shamsuddin Choudhury

Date of hearing: 8th June, 2014

Judgment

Surendra kumar Sinha , J:- Delay Condoned.

This petition at the instance of the writ petitioner is directed from a judgment of the High Court Division declining to interfere with the purported actions of the writ respondent No. 2, the Director, Archaeology Directorate and that of the writ respondent No. 3, the Chairman, Rajdhani Unnayan Kartipakha (RAJUK).

A small piece of land situated at Pusparaj Saha Lane under Police Station, Lalbagh and an old building standing thereon is the subject matter in dispute. Writ petitioner claimed that he along with wife purchased the said property from the recorded owner by a registered deed dated 11th September, 2008, on being satisfied that the C.S. record and the subsequent records have been prepared in the name of their predecessors who were in possession of the said property before such transfer. After such purchase, the writ petitioner found the building unfit for residential purpose with a view to renovate and/ or reconstruct it, undertook works and at that stage the local police obstructed him on the plea that unless he took permission from the writ respondent No. 2 no construction could be allowed to continue thereon, Thereafter, he approached the writ respondent No. 2 for according permission but the latter did not accede to his request on the plea that no construction would be allowed to make thereon in order to destroy, remove, alter or deface to any building on or near the site of Lalbagh Fort.

Writ Respondent No. 2 in his affidavit-in-opposition stated that Lalbagh Fort was declared a protected monument by notification dated 17th August, 1909 and Assam Gazette dated 23rd September 1909; that the Mosque and the Hamman were also included within the Lalbagh Fort and declared protected monuments by notification dated 1st October, 1909; that nobody can encroach upon the area of protected zone and that the writ petitioner by encroaching upon the land of Lalbagh Fort was undertaking unauthorized constructions. Writ respondent No. 7 made similar statements supporting the claim of writ respondent No. 2. This respondent has sought a direction from the High Court Division for the preservation and the protection

of the territory of Lalbagh Fort after conducting a proper survey and demarcation of the area.

The High Court Division upon hearing the parties by the impugned judgment gave six directives for protecting the remarkable archaeological site of the country as under:

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 Respondents 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 *XivKv gnvbMi Bgvi Z (ibgv® Dbqab, msiŸY I Acmvib) wevqij v, 2008* Shall apply to the people living within 250 meter radius of Lalbagh Fort.
6. The Respondent should construct a minimum five meter 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 of necessity may take recourse to the provision of clause (C) of Sub-section (3) of Section 12 of the Antiquities Act, 1968."

Mr. Mahmudul Islam, learned counsel appearing for the petitioner argues that High Court Division erred in law in holding that the disputed property is located within the territory of Lalbagh Fort in failing to consider that the petitioner has acquired title on the strength of four successive deeds of transfer from the recorded owners right from 27th May, 1919 to 11th August, 2008 and that these deeds have been acted upon, inasmuch as, the purchasers have mutated their names, paid rent and taxes to the authorities. It is further contended that unless the petitioner's title on the strength of registered deed from the recorded owner is declared void, it

cannot be said that the dispute property is located within the territory of Lalbagh Fort. In this connection the learned counsel has drawn our attention to the C.S. Khatian, the C.S map and other old documents and submits that in presence of these old documents of title, the observations made by the High Court Division that the property is located within the 'territory" of Lalbagh Fort is not only inconsistent but also based on no legal evidence on record, and thus, the observations which are contrary to the materials on record are required to be expunged. Learned counsel finally contends that although there are inconsistent findings of the High Court Division, he does not intend to press this petition for granting leave to examine the propriety of the judgment rather, the matter may be disposed of by expunging those inconsistent observations made in the body of the impugned judgment otherwise the petitioner will be prejudiced.

Mr. Mahbybey Alam, learned Attorney General, on the other hand, submits that there is no dispute that the property is located within the boundary wall of Lalbagh Fort, but the petitioner's vendors constructed unauthorized building by encroaching upon the land of Lalbagh Fort, which will be evident from the photocopy of the map enclosed with the additional paper book dated 6th June, 2014. He further submits that the encroachment is apparent from the fact that the Lalbagh Fort was originally rectangular (Square) in shape, but in course of time, the Archaeological Department showed the disputed property along with two other property in the site plan inside the Lalbagh Fort, which sufficiently indicates that the petitioner's predecessors by encroaching upon the land of Lalbagh Fort illegally constructed the present structure thereon. He further submits that with a view to preserve and protect the historical mausoleum, the High Court Division has rightly gave directives upon the Archaeology Department to preserve and protect the said historical site and the Archaeology Department has already under taken steps to remove the unauthorized structures of the directions and if the process is stopped the encroached area cannot be recovered later on.

We had notice inconsistency in the directives given by the High Court Division, inasmuch as, it had directed the Writ respondent Nos. 1 and 2 to conduct a survey to identify and demarcate the actual area of Lalbagh Fort, and on the other breath, it had observed that the photographs of the disputed building and the boundary wall showed that a dilapidated building is (situated) within the boundary

wall except the portion in which the disputed (building) is situated and that the petitioner purchased the disputed property knowing fully well that the property is located within the territory of Lalbagh Fort. Mr. Islam submits that in presence of these observations if any survey is made, the surveyor will be left with no option but to express his opinion in the line of the above observations and therefore, these observation may be expunged for ends of justice. Since the learned counsel for the petitioner does not press the matter on merit, we are not inclined to examine the legality the judgment of the High Court Division.

Only grievance of the learned counsel is that the observation that the disputed building is situated within the Lalbagh Fort based on photographs is untenable in law and thus, this observation should be expunged. On perusal of the impugned judgment it cannot be said that this submission has no basis at all. However, we do not dispute the historical importance of Lalbagh Fort. Section 12(3) (C) of the Antiquities Act authorizes the Director of Archaeology, Government of Bangladesh to restrict the owner of any immovable antiquity or any protected antiquity to alienate, destroy, remove, alter or deface the antiquity or build on or near the site of the antiquity (Italics supplied). So, an immovable antiquity should not only be preserved, it should also be protected from being destroyed by pollution. Its original shape should not be defaced or mutilated. Law requires that to maintain its beautification, the owner of the surrounding buildings should not allowed make any alteration without prior permission of the Director. Therefore, the petitioner cannot make renovation of the disputed building even if it is assumed that it is located outside the Lalbagh Fort without prior permission. Therefore, we fully endorse to the views of the High Court Division that the historical monuments like the Lalbagh Fort and its surrounding area should be preserved and protected, it being one of the most remarkable historical monuments. However, the conclusion arrived at by the High Court Division that the disputed property is located within Lalbagh Fort basing upon the photographs, annexure-2 series, without ascertaining the dispute is not sound and acceptable.

The High Court Division has directed for ascertainment of that dispute, but before such ascertainment, it has directed to remove the unauthorized constructions of the petitioner. The High Court Division would have been justified has it been ascertained by a proper survey after relayment of the old documents, maps and the

Gazette? The findings of the High Court Division basing upon photographs is misconceived one. A photograph cannot be taken as foundation for deciding a disputed fact. So, those inconsistent observations should not allowed remain in the judgment for ends of justice. In view of what stated above, we expunge the observations made by the High Court Division as quoted above from the judgment. This petition is disputed of with the above observations and expunction.
