Contract and judicial review in Bangladesh: From Sharping to present

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Abstract

The government is the biggest procurer in Bangladesh. It continues to enter into numerous contracts daily. When such contracts are entered into by the government in performance of their statutory duty as sovereign, they are actions of public nature and amenable to constitutional challenge before the Supreme Court of Bangladesh under judicial review. In other words, a citizen, who is a party to these special kinds of contracts are able to claim enforcement of these contracts in constitutional courts in addition to being enforced by civil courts only. In this article, the practice of these contracts in Bangladesh are looked into. We have tried to cover the recent case laws on the subject from the first case of it's kind. The rationales adopted by the courts are self explanatory and does not require interpretation. We have endeavored to put up a map of development on this area of law. There is no other specific research question in this article other than the mapping of the progress of the availability of judicial review in government related contracts. While the courts recognize all the other ingredients of the law of contracts to be present in these special contracts, the extraordinary remedy of judicial review and its availability in certain cases make all the difference.

Maintainability

The first case to have raised an issue of maintainability of a judicial review challenge in a contract issue was in *Sharping Matshajibi Somobaya Samity v Bangladesh*[1] where the High Court Division of the Supreme Court of Bangladesh held citing *Chittagong Pourasava v. Md. Ajmal Khan*,[2] and quoting Hossain, C.J. that:

> *"In annexure A to the Writ Petition which is the impugned order shows that the Pourashava forfeited the aforesaid money in terms of the tender notice which is a part of the contract. The question therefore is one of Jurisdiction of the High Court in Writ matters. Can the High Court pass an order to refund earnest money or security deposit made as one of the stipulations of the contract? The facts stated earlier and the clause just quoted indicate that the forfeiture of the earnest money on the basis of which the first respondent made a bid and on his failure to pay the bid money, the action of the forfeiture of earnest money was taken……. the question whether forfeiture, made in terms of the contract or not by the Chittagong Pourashava was not a matter justifiable in writ jurisdiction and so it could not be agitated before the High Court exercising its jurisdiction*

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1 (1987) 39 DLR 78

2 4 BSCR page 54 K

under Article 102 of the Constitution, commonly known as writ jurisdiction. It is well settled that disputes which arise essentially from contract are not cognizable under Writ jurisdiction."

We are in respectful agreement with the observation as above. It had settled the law in this regard by spelling out that all executive actions which are arbitrary having travelled beyond the contract by assumption of a power which they possessed neither under the contract nor under the tenor of the law, the said would be arbitrary and cannot succeed by taking refuge under the plea that is being matters of contract cannot be agitated in writ. But in case of rights and duties which are referable to contract simpliciter in the absence of any arbitrary or malafide allegation, substantiated on facts cannot be agitated in writ jurisdiction."

It appears therefore that the court did leave a window to interfere where the government action was acting arbitrarily and *malafide*. However, reversing the above decision of the High Court Division the Appellate Division settled the issue of maintainability of a writ petition or a petitioner in judicial review in contractual matters under specific circumstances. The court stated that present day governmental functions include multifarious activities. Some functions are Government functions while exercising sovereign power and again some of some functions can be described are trading functions. When the Government accepts a tender and places an order for supplying, a contract is entered into. The Government function in this case is that of a a trader. '*If there is a breach of such contract the aggrieved party can sue for damages or any other appropriate remedy. But not by way of invoking the writ Jurisdiction.' However, when the government grants lease, privilege, settlement etc., the government is "performing function in connection with affairs of the republic or the local authority."* The Government is such cases act pursuant to some statutory powers and any such contract when rooted in statute, is the sovereign function of the state. When the government is acting in its sovereign capacity if there is a breach of any statute or rule the same can be remedied by invoking writ jurisdiction. *'Even if any discretion is left in statute such discretion must be exercised in accordance with settled principles and not arbitrarily.'*

In the courts own language: "*Judicial thinking has crystallized on this subject in two clear cut ways, namely, (i) if it is a pure and simple contract, which is entered into by the Government in its trading capacity for any breach of such contract writ will not be available as remedial measure, (ii) on the other hand, the contract is entered into by Government in the capacity as sovereign then writ jurisdiction can be invoked for breach of such contract, inasmuch as, Constitution gives the power directing a person performing any function in connection with the affairs of the republic or making an order that any acts,*

done or proceeding taken by a person performing function in connection with the affairs of the republic then he can invoke the jurisdiction. (31)"[3]

Facts of *Sharping* was in a nutshell are as follows: The appellant Sharping Matshajibi Samabaya Samity was granted the lease of the fishery in question for a term of six years for 389 B.S. at 50% enhanced rate over the existing rent and the lease deed was executed on payment of rent for 1389 B.S. on 22.8.81. Suddenly after three weeks, the Director of Fishery cancelled the lease whereupon the petitioner challenged the order by way of writ, namely, Writ Petition No.19 of 1982. The rule was made absolute and the High Court Division declared the cancellation order as void, whereupon the appellant was inducted into possession in September, 1982. As per stipulation that the appellant should show some development work in April, 1984, the District Fishery authorities reported that the appellant satisfactorily completed the stipulated development work of the fishery. In the meantime it was detected that in calculating rent of the fishery an error had crept in, inasmuch as the previous rent was Tk. 72,000/00 and calculating enhanced rent of 50% the total would come to Tk.1,08,000/00 and not Tk. 1,20,000/00 as was worked out. This position was accepted by the Government and the appellant was allowed to pay rent at Tk. 1, 08,000/00 per year. The government in the impugned letter informed the appellant that the balance money paid by the appellant would be adjusted for the next year's rent and the appellant was requested to pay the rest Tk 96,000/- "being the rent of 1390 B.S. immediately". This rent was paid on 25th Baisak 1390 B.S, corresponding to 9.5.83. The government later contended that as per the lease agreement the rent was due on 15th Falgoon 1389 b S. They argued that the appellant deposited the rent in Baisak, therefore, they have defaulted in payment of rent in time and that was a delay of two months. The High Court Division, however, while dealing with this aspect came to the conclusion that it was a delay of one year two months. The government initiated to cancel the lease of Chatla Beel Group Fishery granted by the Fishery Department in favour of Sharping F.C.S. for the period of 1392 to 1394 B.S. on ground of their default of rent and for not undertaking any development scheme. It had also been decided to lease out the above mentioned fishery to another Towhid F.C.S- for 3 years from 1392 B.S. to 1394 B.S. at 25% enhanced rate over that of 1391 B.S. for the 1st over of 1392 B. S. and for 1393 & 1394 B.S. the lease money shall be 10% higher than that of each proceeding year. The High Court Division while dealing with the case ultimately came to the conclusion that a contractual right could not be enforced by invoking the writ jurisdiction under Article 102 of the Constitution and in this view of the matter the rule was discharged. However, as seen above, the Appellate Division reversed the judgment of the High Court Division.

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3 *Sharping Matshajibi Somobaya Samity v Bangladesh & others* 39 DLR (AD) 85

The Indian Supreme Court had the same view and held that

> *We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of the public authority he must resort to a suit and not to a petition by way of writ. In view of the judgment of this Court in K.N. Guruswamy's case[2] there can he no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract where the action challenged was of a public authority invested with statutory authority.*[4]

Types of contracts amenable to writ

Sharping stated that when the power of the government to enter a contract accrues from *statutory* power, it is *rooted* in the sovereign authority of the government and it amenable to writ jurisdiction. the In *Lutfu Mia v. Government of Bangladesh & Others*[5] the government leased out a fishery to the appellant for three years, but later approved the lease for one year. The appellant unsuccessfully moved the High Court Division in the writ jurisdiction. The Appellate Division found the action of the government to be arbitrary and without lawful authority. Ruhul Islam J held that " *If the fishery was advertised to be leased out for a period of three years and auction was held accordingly, and the successful bidder paid the requisite premium duly and he submitted his duly executed lease deed and the possession of the fishery was delivered to him, undoubtedly, some valuable rights of the successful bidder accrued in the fishery. It is true that until lease deed gets approval of the authority concerned and execution of the lease deed was not completed lessee's full right as such did not accrue, but the action of the approving authority cannot be sustained if it is found arbitrary and without application of mind".*

In *Sharping* the court specifically identified *matters of' settlement of hat, bazar, fisheres, khas lands. etc.* as matters wherein the government acts in pursuance of some statutory power and any such contract to exercise sovereign function of the government when rooted in statute. Thus, a contract arising out of a statute has an element of public law which makes it a suspect class to be scrutinized by the court. In *NAKM Samabaya Samity v Ministry of Land*[6] it was held by the High Court Division that when an agreement with respect to a fishery was duly executed by the government on behalf of the President by a government servant, its cancellation on the plea of a right to confirmation of the agreement on behalf of the government by a superior officer, was held to be arbitrary and illegal.

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4 *D.F.O. South Kheri v. Ram Sanehi* AIR 1973 SC 205
5 1981 BDL (AD) 105
6 45 DLR (1993) 1

These kinds of contracts are distinct from other contracts of procurements of the government or government's commercial contracts. In *ARK Associates Ltd & Ors v The Chairman, Dhaka Water Supply*[7] K M Hasan J held that "*..the latest position laid down by our Supreme Court is that a dispute raised in an ordinary commercial contract, even though a statutory body is a party to the contract and an inchoate right is violated by executive exercise is not amenable to the writ jurisdiction under article 102 of the constitution."* Therefore, a contract would not automatically be a statutory one simply because it has been signed by or awarded by a statutory body.

In *Kerala State Electricity Board and another, v. Kurien E. Kalathil and others*[8], Y.K Sabharwal, J held that: "*A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such active ties may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil Court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies."*

In *Chairman, BTRC v Nooruddin & others*[9] 'admittedly the writ petitioners voluntarily accepted the offer of the corporation for voluntary retirement from service and accordingly they received the major portion of their retirement benefits/entitlements. Only a minor portion of their dues on account of leave salary was not paid to them. For such dues the Corporation have written to the concerned ministry for necessary instructions and guidelines which is under consideration of the government. The appellant Corporation did never refuse to pay such benefits to the writ petitioners and they are still willing to pay such minor portion of the benefits to the writ petitioners as soon as they will receive the necessary direction from the ministry of communication, and as such, the High Court Division ought not to have declared the orders of voluntary retirement of the writ petitioners unlawful Md. Abdur Rouf J declared that "*In the facts and circumstances of the case at best*

7 19 BLD (HCD) 1999 349
8 AIR 2000 SC 2573
9 3 BLC (AD) (1998) 225

there may [be] a case of violation of contract for which proper remedy may be sought in the civil court and not under the extraordinary writ jurisdiction". In other words, a statute creating a body cooperate may confer power on a statutory body to enter contracts to enable it to discharge its functions. Issues or disputes with a citizen arising out of the terms of' these contracts are to be settled by the ordinary principles of' law of contract. Private law may involve a State, a statutory authority or a public body in contractual or tort actions. But they cannot be siphoned off into the is not jurisdiction. In *Managing Director, WASA v Mohammad Ali*[10] the court held that "*As it appears in the instant case even if for argument's sake it is conceded that there was a contract and more so, the same was not merely to supply the generators but also for installation a maintenance of the generators even then, the contract being not entered into by the appellant with the respondent in terms of any statutory provision or in exercise of statutory power of the appellant but the contract being an ordinary commercial contract it comes to that the relief granted by the High Court Division in the writ petition is not legally available to the respondent in respect of the contract allegedly entered into between the appellant and the respondent.*"

In *Meghna Vegtable oil Industries Ltd. v Pertobangla & others*[11] AM Mahmudur Rahman J citing *Radha Krishna Agarwal v State of Bihar*[12] stated that the Indian Supreme Court "*..nagatived the contention that when the state or its official purport to operate within the contractual field the grievance of the citizen could be remedied by way of writ petition under article 226 of the Indian constitution. In the instant case before us the gas line was disconnected on the unpaid bill which the petitioner states to be false and the disconnection is in terms of the agreement. Thus, when for the breach of a term and condition of an agreement an action is taken by the party the remedy lies in a properly constituted suit and not in writ jurisdiction."* It appears that the courts have been very cautious to sift through a contract and distinguish between a statutory obligation of a statutory body where there is a violation of a statutory provision and a commercial term of a contract even if entered into by a statutory body.

In that light in *Abu Mohammad v Bangladesh*[13] a division bench presided over by JR Modassir Hosain J and judgment delivered by Md. Awlad Ali J held that "*if the petitioner being one of the contracting parties can establish before a competent court of law that there had been a mutual mistake the petitioner can seek remedy for rectification of the contract or particular terms of the contract. This court in exercising jurisdiction under article 102 of the constitution cannot direct the respondents to rectify or alter the particular clause of the contract in order to make it equal to the contracts entered into with the other purchasers in respect of other tanneries."* It is submitted that this view may create a problem for a petitioner or a citizen. The civil courts while can rectify a mistake of the parties may be bound by

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10 59 DLR (AD) (2007) 185
11 50 DLR (1998) 474
12 AIR 1977 (SC) 1496
13 52 DLR (2000) 352

the parol evidence rule. Further, on the point of discrimination it would be difficult for the civil courts to direct a government authority to follow the same form of contracts (meaning same terms of contract) as it has done with others since the civil courts simply lacks jurisdiction in this regard. If the fact of jurisdiction is clear to the court in any given case, it is submitted that the writ jurisdiction ought to be attracted. Otherwise, a citizen may be left with no remedy at all.

In *Fazlur Rahman & Co. (Pvt) Limited v Agrani Bank & others*[14] the court poses the question that if there is an agreement between the bank and its customer to waive interest, it is possible to enforce this agreement by a writ of mandamus? The court finds that the banks are allowed to transact banking business under the President's Order 26 of 1972. And banking business is like any other business the aim of which is to earn profit. The business of Agrani Bank owned by the government (and respondent no. 1) is not performed under any statutory power and is done in the capacity of an ordinary business organization and, as such, writ of mandamus does not lie to enforce and ordinary contract. However, when the defense savings certificates were purchased by the petitioner from the bank who was held to have acted as an agent on behalf of the government, it was found that the bank is under legal obligation to make payment according to the terms mentioned in the said certificates on presentation before the bank after those were matured.[15]

The Indian Supreme Court has devised a way of determining what is a statutory contract. In *India Thermal Power Ltd. v MP*[16] the Indian apex court held that "*Merely because a contract is entered into in exercise of power conferred by a statute, that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory*".

Therefore, it appears that for a claim in under contract to be successful in a writ jurisdiction the (i) contract has to be entered into by a statutory authority (ii) pursuant to a statutory provision and (iii) it has to be established that there was a violation of a statutory provision. In *Bangladesh Telecom (Pvt) Ltd v Bangladesh Telegraph and Telephone Board and another*[17] the Supreme Court of Bangladesh per Mustafa Kamal J (as his Lordship was then) held that the agreement dated 26.7.89 between BTL and BTTB was only a Memorandum of Understanding, executory in nature. This agreement merged with the licence dated 25.3.90, because BTTB, being empowered by section 3 of the Bangladesh Telegraph and Telephone Board Ordinance, 1979 (Ordinance No. XII of 1979), granted a licence to BTL under section 4 of the Telegraph Act. As a result the terms and conditions of the

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14 51 DLR (1999) 350

15 *Abdus Salam v Manager, Agrani Bank and others*, 47 DLR (1995) 175

16 AIR 2000 SC 1005

17 48 DLR (AD) 20

agreement dated 26.7.89 became the terms and conditions of the licence itself. BTTB is now able to cancel only the licence and not the agreement as the agreement has already merged into the licence. Therefore, when the agreement was sought to be cancelled by the BTTB, it was in fact the licence which stood cancelled by the impugned order dated 31.3.92. Hence it was not a cancellation of a contract, far less a commercial contract. The impugned order was meant to be a cancellation of BTL's licence. As the licence was granted to BTL in exercise of a statutory power and as the cancellation thereof was also made in exercise of a statutory power, it was no longer a case of cancellation of a commercial contract and could attract the writ jurisdiction of the High Court Division. By merging the agreement into the licence, its terms and conditions no longer remained the terms and conditions of a commercial contract. It became the terms and conditions of the licence itself. Therefore, writ was maintainable.

Looking into the development in this area of law, the Appellate Division decided to frame a guideline for easier reference and held in *Power Development Board v, Asaduzzaman Sikdar*[18] that writ jurisdiction can be invoked in case of breach of contract when —

"*(a) the contract is entered into by the government in the capacity as sovereign:*

(b) Where the contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority:

(c) where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, but "if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporate certain terms and conditions in it which are statutory then the said contract to that extent is statutory":

(d) where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and the contract so entered by the statutory body is not an exercise of statutory power then merely because one of the parties to the contract is a statutory or public body such contract is not a statutory contract;

(e) when the contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with statutory power:

(f) where the contract has been entered into in exercise of statutory power by a public authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke the writ jurisdiction because the relief is against breach of statutory obligation."

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[18] (2004) 9 BLC (AD) 1

In *Ananda Builders Ltd. v BIWTA*[19] Mohamad Fazlul Karim J (as his lordship was then) held that a "*contract does not become a statutory contract simply because a public functionary entered into the contract unless a statute stipulates terms which have been incorporated into the contract."*

In *Superintendent Engineer RHR, Sylhet & Others v Ohiduzzaman Chowdhury*[20] Appellate Division per Mohammad Fazlul Karim J discussed two Indian cases. In *Kulchhinder Singh and others-vs Hardayal Singh Brar and others*[21] it has been held that the remedy of Article 226 of writ under the Indian constitution is unavailable to enforce a contract qua contract. What is immediately relevant is not whether the respondent is State or Public Authority but whether what is '*enforced is a statutory duty or sovereign obligation or public function of a public authority*.' Private law may involve a State, a statutory body, or a public body in contractual or tortuous actions. But they cannot be siphoned off into the writ jurisdiction. And in *Verigamto Naveen-vs-Govt of AP and others*[22] it has been held that; in cases where the decision making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order the Court has interceded even after the contract was entered into between the parties and the Government and its agencies where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings if within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field.

After referring these cases the court also referred to the case of *Assaduzzaman Sikder* mentioned above and determined that unless a case falls within one the categories fixed by the court in that case, no claim of contract is in generally to be entertained in writ jurisdiction.

Discrimination, malafide and arbitrariness

It must be noted that *Ramana Shetty v. Airport Authority* referred to in Sharping is a case where the equality clause was invoked. When discrimination is alleged and enforcement of fundamental right is sought, the distinction between contracts having root in statutes and trading contracts is of no consequence as art.102(l) will be available even in case of an ordinary trading contract.

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19 57 DLR (AD)(2005) 31
20 VI ADC (2009) 736
21 AIR 1976 SC 2216
22 (2001) 8 SCC 344

In a separate judgment S. Ahmed J observed in Sharping. in case of breach of any obligation under a contract between government and a private party, proper remedy lies in a civil suit and not in a writ petition under the extra-ordinary jurisdiction given by the Constitution. But this principle will not apply when the government violates the terms of the contract with a mala fide intention or acts arbitrarily or in a discriminatory manner.

Mala fide as a concept is applicable when an exercise of statutory power is in question and not in respect of contract performance generally, but the observation of S. Ahmed J is right inasmuch as when the government acts malafide the action in respect of a contract, whether entered in the exercise of statutory power or not, is, at the minimum, arbitrary and is, therefore, violative of art.27.

However, mere allegation of malafide is not enough. It has to be proved before the court. In *Managing Director, WASA v Mohammad Ali*[23] the court held that "*The question of malafide, being a question of fact, has to be alleged specifically. As it appears the respondent merely stated that he has come to learn that some interested quarters in order to frustrate the work and the contract at the instance of some corrupt party with malafide intention and without any committee evaluation or recommendation and without any reasonable cause or ground arbitrarily withdrawn the letter of intent which is interference with respondent's freedom of trade or business and the said letter disclosing no reason is malafide, arbitrary and against the principle of fair plav*." These allegations without substance was not enough for the court to accede to a claim of malafide.

In *Shahadat Hossain v Executive Engineer, City PWD Dhaka & others*[24] the High Court division considered the question of *malafiide* in the cancellation of a lease[25]. In this case after accepting the bid and royalty from the petitioner, the respondents had negotiated with Bangladesh Parjatan Corporation, which had in previous instances after taking such lease from the government had sub-leased to others. The petitioner also alleged grudge and spite. There was not formal denial of these allegations by the respondent. The long delay in making the transaction in question and also sudden cancellation of the lease was enough in this case to substantiate the petitioner's allegation of *malafide.*

In *Breen v Amalgamated Engineering Union*[26] Lord Denning observed that "*it is now well settled that a statutory body, which is entrusted by statute with discretion*

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23 59 DLR(AD)(2007) 185

24 44 DLR (1992) 420

25 This was a well discussed case of time involving the Ramna Cafeteria in Dhaka. The court found that the lease of the café was akin to a lease of a fishery or other government owned properties.

26 (1971) 1 All ER 1148

must act fairly. It does not matter whether its functions are described a s judicial or quasi-judicial on the one hand or as administrative on the other hand."

Tender issues

In *M/S Hossain Ahmed v M/S HD Hossain and Brothers*[27] The Appellate Division held that "*The upshot of the discussions show that by submitting a tender the tenderer is not invested with any legal right not the quotation by the lowest bidder entitled him to the right of a contract because such contract is always subject to acceptance and approval of the authority concerned and invariably the tender form contains stipulations that the authority reserves the right to reject any bid without assigning any reason and is not bound to accept the lowest bid. Had it been the case that the tender was accepted in violation of a condition which had been mentioned in the tender form, then an argument could be advanced for seeking the protection of the inchoate right of the tenderer…"*

Following this line in *Shafiq Ahmed v Chairman, BCIC*[28] Anwarul Hoque Chowdhury J in robust language held that "*No provision for acting fairly and justly should be super added to any instrument, rules, laws or by-laws empowering an executive authority exercising a power whether giving a right or taking away a privilege as enjoined by law and any act or exercise of power even if it arises out of a contract, executed by the government executive authorities, must be presumed to be exercised fairly and not arbitrarily."* It is submitted that the author is not in complete agreement with the observation of his Lordship in that when it comes to the question of scrutinizing the government machinery vis a vis a citizen's right, the government action must be always seen to be a suspect rather than the opposite. It appears that the court may have been influence by the English court's judgments in *Tamside Case*[29] wherein it was observed that "*No one can be properly labeled as being unreasonable unless he is not only wrong but so unreasonably wrong that no reasonable person could sensibly take that view."* And in *Notinghamshire County Council v Secretary of State*[30] where it was observed by the Court of Appeal that "*unreasonableness must prima facie show that the official behaved absurdly or must have taken leave of his senses."* His lordship however softened and continued to refer to the Appellate Division judgment in *M/S Hossain Ahmed* and further added that *"..though a tender would not create a right immediately to be protected by a court of law, it would be subject matter of protection if it can be proved that there was a refusal of acceptance of a tender arbitrarily and in violation of a condition of the tender."*

In contrast to the above judgment, *Sumikin Busan Corporation v Chittagong Port Authority & others*[31] can be considered where Kazi AT Monowaruddin J held that as

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27 32 DLR (AD) 223
28 45 DLR (1993) 95
29 1976(3) All ER 665
30 1986(1) All ER 199
31 6 MLR (HC) (2001) 251

soon as the tenders are submitted pursuant to notice inviting the same, both the bidders and purchasers become under the obligation of the terms and conditions of the tender documents. Since the rights of the parties accrue under the tender documents mutually agreed upon, the violation of such terms and conditions renders the action illegal. Writ jurisdiction can well be invoked in order to prevent the colorable exercise of the power and authority of the purchaser and protect the valuable rights of the parties so accrued thereunder. *"It cannot be said that the Board has no power to review or revise its own decision. But they cannot take a decision violating the terms and conditions of the tender document."*

In *Shri Harminder Singh Arora v. Union of India and others*[32], the Indian Supreme Court held that the Government may enter into a contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. It is open to the State to adopt a policy different from the one in question, but once the authority or the State Government chooses to invite tenders then it must abide by the result of the tender. The High Court was not justified in dismissing the writ petition in *limine* by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or arbitrary. There was no question of any policy decision in the instant case. The notification dated August 13, 1985 laying down the policy came in after July 16, 1985 when respondent No. 2 issued tender notice. The instrumentalities of the State having invited tenders for the supply of fresh buffalo and cow milk, these were to be adjudged on their intrinsic merits in accordance with the terms and conditions of the tender notice. The contract for the supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder, it should have been granted to him. The authority acted capriciously in accepting a bid which was much higher and to the detriment of the State. Where the tender form submitted by any party is not in conformity with the conditions of the tender notice the same should not be accepted. So also, where the original terms of the tender notice are changed the parties should be given an opportunity to submit their tenders in conformity with the changed terms. The authority acted arbitrarily in allowing 10 per cent price preference to respondent No. 4. The terms and conditions of the tender had been incorporated in the tender notice itself and that did not indicate any such price preference to government undertakings. The only concession available to Central/State Government or to the purely government concerns was under para 13 of the notice, that is, that they need not pay tender form fee and earnest money. No other concession or benefit was contemplated under the terms of the tender notice.

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32 AIR 1986 SC 1527

In contrast in *Ataur Rahman v Bangladesh*[33] the High Court Division decided that "*In this case there is hardly any scope to apply the principles of equity when terms and conditions of the tender documents are there to provide for legal and proper dispensation. Propensity to go by discretion in such a case should be carefully avoided particularly when there are specific terms and conditions spelt out in the bilateral documents like the tender documents"* Thus, from a strict contractual point of view, the parties to the contract will be held responsible for the bargain they make. While the writ jurisdiction may be attracted for improper action or inaction or omission of the government or a public authority that may be termed as malafide or arbitrary or unreasonable in the wednesbury sense, a party cannot hold a public authority responsible for a bad bargain that it makes. In other words, the parties must make every effort to make a contract viable for them when entering into it.[34]

Licenses do not create absolute rights

In ***Sekendar Ali v. Chairman B.I.W.T.A***[35] the Appellate Division per M H Rahman J (as his Lordship was then) held that "*Contractual right, based on the Licence, is not amenable to the writ jurisdiction of the High Court. The appellants have failed to point out any violation of any statutory rule or breach of any statutory obligation. They could not also point out any ill motive on the part of the licencing authority in cancelling the licences*." In this case a licence granted to operate launch ghats for a limited period was cancelled to grant it to Muktijoddha Sangsad. In terms of the licence no notice or compensation for cancellation was given to the licensees. There is a contractual element in the grant of the licence, but the authority granted the licence in terms of authority contained under s. 15(l)(iv) of the Inland Water Transport Authority Ordinance 1958 and as such the case has similarity with Sharping and it cannot be said to be an ordinary commercial contract. Mr. Mahmudul Islam[36] questions this decision and concludes that "even though no statutory or contractual provision was violated, the question remains whether a State authority under obligation to act reasonably and not arbitrarily as mandated by art.31 in dealing with a monopoly can secure by contract a power to cancel the contract without notice and without compensation (after receiving money from the licensee on the basis highest bid in auction) when Parliament cannot in view of the protection of art.31 exclude the requirement of notice and hearing. Furthermore, there is also the question of arbitrariness when a licence for a very limited period is sought to be cancelled for no other reason than to grant it to another, may be more deserving, and

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33 47 DLR (1997) 331

34 However, the question remains with regard to the standard form contracts issued by the government or public bodies where there is no scope of negotiation and the parties are given a choice of take it or leave it – will the writ court intervene in such cases?

35 40 DLR (AD) 262

36 Islam, Mahmudul, The Constitution of Bangladesh, Third edition, p 811

that too without paying any compensation. Has not the power been exercised for improper purpose? Is not the right to operate the launch ghats, being a franchise or a right under a contract, a property within the meaning ofart.31 or 42?" However, it appears that M H Rahman J based his decision on the license term 12 wherein it was stated that 'the licensor shall not pay any compensation whatsoever, for cancellation of the license, removal of property and vacation of premises as mentioned in para 11 above. He further continued to state that "*knowing fully the import of the aforementioned terms the appellants entered into the agreement for license."* It appears that his lordship was looking into the issue more in terms of contract theories and the doctrine of freedom of contract and holding the appellants responsible for the bargain they have entered into rather than considering it a matter of public law.

Legitimate expectation and contracts

In ***M.D. WASA v. Superior Builders & Engrs Ltd a*** commercial contract was involved. WASA illegally terminated the contract. The High Court Division held the writ petition maintainable to give relief. The doctrine of fairness was introduced to give aggrieved persons a right to a hearing. "*Basically the principle is that, a writ petition cannot be founded merely on contract, but when a contract is concluded the contractor has a legitimate expectation a that he will be dealt with fairly, The petitioner could have asked the respondent to supply the water tanks and generator according to specification and could have given him an opportunity to complete the work according to specification taking the anomaly during reexamination to be correct; but to cancel the contract unilaterally without regard to subsequent developments is a high feat of arbitrariness which rightly attracts the writ jurisdiction."*

In ***Director General BWDB v BJ Geo Textiles Ltd***.[37] the court followed the WASA case above and after quoting from the *WASA* further added the following observations and held *"In Hyundai Corporation vs Sumikin Bussan Corporation and others, reported in 54 DLR (AD) 88, where a bid was found not responsive, but later found responsive, the Appellate Division held that transparency in the decision making as well as in the functioning of the public bodies is desired and it is most important when the financial interest of the State is involved and a writ petition was filed challenging the tender evaluation process to check the unbridled executive functioning. The Appellate Division quoted with approval the observation of the Indian Supreme Court in Tata Cellular vs Union of India, AIR (1996) SC 11, "It cannot be denied that the principles of judicial review would apply to the exercise of*

[37] 57 DLR(AD)(2005)1

contractual powers by Government bodies in order to prevent arbitrariness or favoritism."

Mohammad Fazlul Karim J (as his Lordship was then) continued further citing *Ekushey Television Ltd vs Dr Chowdhurv Mahmood Hasan*[38], wherein it was held that: "*The Court under constitutional mandate is duty bound to preserve and protect the rule of law and that the cutting edge of law is remedial and the art of justice has to respond so that transparency wins over opaqueness but the writ petitioner must show lack of transparency in the activities of the executive authority or other public functionaries which was held to be a ground for interference in writ jurisdiction. Thus a writ petition will lie when there has been violation of the tender terms or the tender evaluation process lacks transparency*." In the end, the court found that there has not been any decision contrary to the tender terms, nor the evaluation of the Tender Committee on the basis of which contract in respect of all the four lots has been awarded in favor of writ respondent No.4 lacked transparency or any ground was set forth establishing any malafide detailing any material to that effect and, as such, apart from the merit as discussed above, the writ petition was also not maintainable.

It appears that the court is continuing to bring home the point that while the government has a duty to be fair, when one party wants the courts to intervene in the extraordinary judicial review jurisdiction of the courts and claims malafide as a ground, such claims have to be substantiated.

The doctrine of legitimate expectation is a further extension of the fairness doctrine to give a right to hearing. The doctrine of legitimate expectation is not meant to confer additional remedy where the law has already provided a remedy. For a breach of contract the remedy in law is an action for damages. If legitimate expectation can give a person a right to maintain a writ petition in contractual matter, the distinction between commercial contract and statutory contract made in *Sharping* will be obliterated inasmuch as in every case of breach of contract the contractor can press in aid the doctrine of legitimate expectation to maintain his petition under art.102 of the Constitution.[39]

In terms of legitimate expectation the Indian decision of *Indian Aluminium Co Ltd. v Karnataka Electricity Bd.*[40] may be referred to. In this case the Indian Supreme Court per GN Ray J stated that the issue of legitimate expectation is absent in a dispute arising out of contract *qua* contract.

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38 54 DLR (AD) 130

39 Islam, Mahmudul, The Constitution of Bangladesh, Third edition, p 812

40 AIR (1992) SC 2169

International obligations of the government

Mr. Mahmudul Islam[41] observes quoting two unreported cases that "an international obligation is a matter between a State and another State or an international agency with which the individual seeking the award of the contract has no concern. It is submitted that there is no public law element present in the instant case and the contract may not be put outside the category of pure and simple contract. The court further observed[42] when there is a concluded contract in exercise of an international obligation of the Government and the contract is partly performed the principle of fairness in Government action comes into play and the government cannot be allowed to play the role of a private litigant driving the aggrieved party to sue for compensation. If the principle of fairness is the determining factor then every ordinary commercial transaction with the governmental authority evincing unfairness would attract the writ jurisdiction.' The Appellate Division has extended the boundary of contracts amenable to the writ jurisdiction by adding contracts to fulfill international obligation to the former category.

Dispossession of a citizen by government

In *Bangladesh and another Petitioners v M/S A.T.J Industries Ltd. And Others Respondents*[43] the Supreme Court of Bangladesh[44] held that even if a lease deed is terminated, a lessee cannot be forcibly evicted from the premises. The court observed that the reasoning of the High Court on the question whether the respondent company, was an unauthorized occupant or not was evident from record. "It is manifest that the original lessee which was a proprietorship concern, converted itself into a private limited company, and from 1959 till dispossession, the company made many constructions, ran the factory and held various correspondences with the Government and paid many dues, including those of the land. The dispute, if at all, is a fine question of law, as to whether the conversion of a proprietorship concern into a private limited company, is a case of succession or a transfer of the title. No doubt this is a question of title, and the High Court rightly did not decide it. The real issue before the High Court was whether the Respondent in the aforesaid circumstances could be held to be an unauthorized occupant. and the Court was justified in holding that the Company cannot be termed an unauthorized occupant."

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41 Ibid 37

42 *Purhcichal Drillers Ltd. v Mesbahuddin* W.P. No.111 of 1993 and (P.1 A. No.230 of 1993 (Unreported) *Birds Bangladesh Agencies Ltd. and three others v Secy. Ministry of Food W.P.* Nos.405-408 and 431 of 1994 (Unreported)

43 29 DLR (SC) (1977) 181

44 At that time the Appellate Division was known as the Supreme Court and the High Court Division was known as the High Court

"On the question of the cancellation of the lease deed in terms of clauses 16(1), we find that the High Court has held it invalid as no notice was served on the Respondent company. We should in this regard like to emphasize, that mere cancellation of the lease deed on the breach of a covenant for re-entry, does not authorize the lessor to take forcible possession of the property from the lessee without recourse to a Court of law, if the lessee does not voluntarily surrender possession. Except for the power contained in clause 16(l) of the lease deed, which is insufficient to authorize forceful dispossession, the Government has failed to show any lawful authority to dispossess the Respondent by force."

Thus, an occupier of a government property who entered possession legally cannot be ousted even after termination of lease without following due process of law.

In *Mrs. Hasna Mansur and others v secretary, Ministry of Public works and urban development public works division govt. of Bangladesh and others*[45] the Supreme Court of Bangladesh held that the Government does not poses any power under the lease deed in question to enter in the premises and demolish the construction made by the lessee when the lessee does not voluntarily vacate the land. It is evident that the entry of the Government was unauthorized and no authority originated in the lease deed or to any statute. In that view of the mater, the act of Government so far as the entry into the land goes was by a public authority without any statutory and so the writ was maintainable. The court referred to the contention of the writ petitioner that the learned judges at the High Court Division were not well founded in holding that there is no provision for the Government to enter into the land on the termination or determination of the lease. Rather section 3 of the East Pakistan Government and Local Authority Lands and Buildings (recovery of possession) Ordinance 1970, stipulates that the Deputy Commissioner has been given authority to take possession on such determination of the lease and by demolishing structures, if any, and the Deputy Commissioner before taking any step is to issue in the prescribed manner a notice on the lessee calling upon him within the period of 30 days from the date of notice to comply and then to take further steps. The Government had power under this statutory provision to take possession of the property on the determination of the lease, if the determination was lawful and the provisions of Section 3 of the Ordinance were fully complied with. The court found that none of these were satisfied and as such the writ was maintainable. Further, the court held that "*it has already been observed that the learned judges of the high Court Division have found that the allotment was made of the new lessee prior to the cancellation of the lease and that the allegation of malafide in the cancellation of the lease was justified.*

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45 34 DLR (AD) (1982) 34

Thus, it appears that even in cases where the lease period ends, the government cannot enter possession without following proper course of law. In the Indian decision *State of UP v Maharaj Dharmender Prasad Singh* and *Lucknow Dev. Authority v Maharani Rajlaxmi Kumari Devi and othes*[46] it was held per Venkatachaliah J that a "*lessor, with best of title has no right to resume possession extra judicially by use of force, from a lessee even after the expiry or earlier termination of the lease by forfeiture or otherwise."* The use of the expression 're-entry' in the lease deed does not allow extrajudicial methods to resume possession. Due process must be followed to disposes a lessee. In the present case, the fact that the lessor is the State does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a legal pedigree. Possession can be resumed by government only in a manner known to or recognized by law.

Employment issues

Normally in a dispute of employment contract between the government and its employees Article 117 proving for the administrative tribunal to deal with such cases comes into play. In the cases where the administrative tribunals do not come into play (e.g. employees of public authorities) writ may lie under certain circumstances as decided by the Appellate Division.

In *Bangladesh Small Industries Corporation, Dacca v Mahbub Hossain Chowdhury*[47] Mahmud Hossain CJ has elaborated the various situation that may occur in case of a government employee. The judgment is exhaustive and self explanatory and no other clarification or interpretation is required and the judgment despite being in 1977, is still good law. It was held that "*review of all these decisions, as have been referred to above shows that preponderance of judicial authorities have helped the formulation of certain well-reasoned principles as to the law relating to the employees of a statutory corporation as administered by the Superior Courts their writ Jurisdiction as well as by the ordinary civil courts. The court held that the law governing the employees of government corporations may be briefly stated as follows:*

(a) If an employee is dismissed or his service is terminated in contravention of a mandatory statutory provision, the employee has a right of action either before the Supreme Court in its writ jurisdiction or in a Civil Court.
(b) If the service of its employee is terminated in violation of the principle of natural justice, the employee has a similar right of action as in (a).

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46 AIR 1989 SC 997, 1004
47 29 DLR (SC)(1977) 41

(c) If the office is a statutory one, the holder of the office has similar right of action as in (a) in case of termination of the said office not in accordance with the law, under the law the said office has been created.
(d) in spite of the office being a statutory one or of public character, terms and conditions of the office may be regulated by a contract, and termination of service in contravention of such contract, but otherwise than in the manner mentioned in (a) and (b) is not actionable for the purpose of reinstatement in the office.
(e) Terms and conditions of service prescribed by rules, regulations or any other form of delegated legislation made by a body under statutory powers are not contractual, but have statutory force and the dismissal or termination of service in substantial disregard of them will entitle the employee to a right of action as in (a).

An employee of a statutory corporation cannot claim the status of one in the service of the Republic (in which case one has to avail the remedies available before the administrative tribunals), but the public character of such an employee has been recognized in a number of legislative enactments where such an employee has been given—although for the purposes of the said enactments—the status of a 'Government Servant' or a 'Public Servant'. For example, certain categories of officers of statutory corporations are appointed on the recommendations of the Public Service Commission set up under the constitution. Furthermore, all statutory corporations are now local authorities. Such a definition' unmistakably underlines the public character of these corporations.

The Court continued, "To approach the question whether a dismissed employee of a statutory corporation is entitled to declaration of nullity from a court it is first to be seen what is the character of the corporation, secondly what is the statutory provision with regard to' the post the employee is holding, whether it is created by the statute or created under the statutory power. The holder of the former is a person holding a statutory post but not the latter. Thirdly, whether any statutory status has been conferred on the employee though the post held by him is created under a statuary power. Fourthly whether there is any statutory restriction on the corporation as to the kind of contract it can make or the grounds on which it can dismiss. Where therefore the post of an employee of a statutory corporation has some public character or he holds or enjoys a statutory post or status, he cannot be dismissed without a precedent hearing no matter whether there is any other statutory rule or regulation in the behalf."

Precedent hearing or compliance of the principles of the natural justice is implicit in the dismissal of employee enjoying some statutory status or holding a statutory post or a post of a public character. If there be any justice rule framed by the corporation

under statutory powers substantial compliance of justice rule is mandatory because that will supply the natural justice rule and dismissal of such an employee without precedent hearing will entitle him to declaration of nullity from a Court of law.

It was further found that an employee of a statutory corporation of public character, who does not hold any statutory post or status can nevertheless maintain an action in a Court of law, on a limited ground, that of violation of any mandatory statutory provision as to the kind of contract or the statutory ground of dismissal, or on the document of ultra vires or the violation of rule of natural justice.

Conclusion

From the above cases, it appears that to succeed in a claim of contract in the judicial remedy the following points are to be remembered:

Firstly: If a contract is a simple contract of commercial transaction between the government and a citizen, no writ will lie – unless it falls within any category of the *Sharping* exception i.e. the dealing of the government are malafide or unfair and the government was acting in its capacity as a sovereign;

Secondly: In cases of contracts in which statutory provision is breached and the contract was entered into on the basis of the statute, writ will lie.

Thirdly: Where the contracts are statutory meaning that the government has entered into the contract under statutory power and the violation is that of the terms of the contract and not of statute, judicial review will be accepted.

Fourthly: In cases of international contracts between Bangladesh and a private party, a writ will lie when the obligation of the government falls in the category of fulfilling it's international obligation.

Fifthly: In employment issues, in the corporation cases, we need to follow the decision discussed above of the BSCI.

Thus, it can be concluded that the *Sharping* guideline is still good law for judicial review of contract issues in Bangladesh. The later guidelines the Supreme Court of Bangladesh has provided are more narrow and specific. These guidelines have made public contracts more transparent. As a result, anyone entering into a contract with the government can know beforehand their remedy should there be any breach of contract.