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

WRIT PETITION NO. 13389 OF 2012

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Miah Mohammad Abdul Nayem
.....Petitioner

-Versus-

The Review Panel represented by its Chairman, Mr. Md. Nuruzzaman Bhuiyan, Central Procurement Technical Unit (CPTU), IMED, Ministry of Planning, Government of the People's Republic of Bangladesh, Sher-E-Bangla Nagar, Dhaka and others

..... Respondents

Mr. Rokanuddin Mahmud with
Mr. Mizan Sayeed, Advocates
.....For the petitioner.

Mr. A. M. Aminuddin with
Mr. Sakib Rezwan Kabir, Advocates
…..For the respondent no. 2.

Mr. S. M. Zahurul Islam, Advocate
….For the respondent no. 4.

Heard on 05.04.2015, 06.04.2015, 15.04.2015, 17.06.2015, 02.08.2015, 13.08.2015, 16.11.2015, 23.11.2015, 25.11.2015 & 26.11.2015.
Judgment on 30.11.2015.

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

MOYEENUL ISLAM CHOWDHURY, J:

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the order dated 24.09.2012 passed by the respondent no. 1 arising out of the appeal lodged by the respondent no. 2 in connection with the Contract Package No. DZ/13/2011-2012/Toll-01 should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is the proprietor of M/S. Best Eastern, a Bangladeshi business concern. The respondent no. 5 (Procuring Entity) floated Tender Notice No. DZ-13/2011-2012 by advertising the same in various national dailies. When the advertisement came to the notice of the petitioner, he took the initiative to form a Joint Venture with Hopetech under the name and style "Hopetech SDN BHD-M/S. Best Eastern Joint Venture". Accordingly, a Joint Venture agreement dated 21.06.2012 was executed between the petitioner and the Hopetech. Anyway, both the petitioner and the respondent no. 2 and others submitted their bids to the Procuring Entity. Out of 7(seven) bids submitted by the bidders, 6(six) bids were found eligible by the Procuring Entity after preliminary examination/scrutiny. Thereafter the Tender Evaluation Committee (TEC)

evaluated the 6(six) bids in accordance with the terms of the tender document and the relevant provisions of the Public Procurement Act, 2006 and the Public Procurement Rules, 2008. Upon extensive evaluation of the bids, the TEC submitted its evaluation report on 19.07.2012 adjudging Hopetech SDN BHD-M/S. Best Eastern JV as the lowest responsive bidder and recommended to award the contract in its favour. The Procuring Entity (respondent no. 5) duly forwarded the lowest bid of the petitioner along with the evaluation report to the head of the Procuring Entity (respondent no. 4) for approval of the higher authority vide Memo No. 4738-DZ dated 01.08.2012 and the respondent no. 4 in his turn vide Memo No. 171 dated 13.08.2012 forwarded the same with necessary recommendation to the respondent no. 3. Afterwards the respondent no. 3 vide Memo No. 35.030.006.00.00.024.2012-359 dated 03.09.2012 accorded approval to award the contract in favour of Hopetech SDN BHD-M/S. Best Eastern JV. The Notification of Award was issued in favour of the petitioner on 03.09.2012. He accepted the Notification of Award on 09.09.2012. As the authorized person on behalf of the Hopetech SDN BHD-M/S. Best Eastern JV, he submitted necessary Bank Guarantee to the respondent no. 5 on the same date. Accordingly, upon completion of all formalities, the contract agreement in Form PW3-8 was executed between the Procuring Entity (respondent no. 5) and the Hopetech SDN BHD-M/S. Best Eastern JV on 10.09.2012. After signing the contract agreement in the prescribed form, the respondent no. 5 issued the Notice to Commence work vide Memo No. 5279-DZ dated 10.09.2012 to the Hopetech SDN BHD-M/S. Best Eastern JV incorporating the deadline to complete the works within 60(sixty) calendar months with effect from 14.09.2012. In due course, the Sub-Divisional

Engineer, RHD, Shibpur, Narsingdi made over the possession of the project site to the Hopetech SDN BHD-M/S. Best Eastern JV with a view to starting the project works. The petitioner, on behalf of the Hopetech SDN BHD-M/S. Best Eastern JV, took over the project site by complying with necessary formalities. When the petitioner started operation and maintenance works at the project site, all on a sudden, he came to learn that in view of an appeal lodged by the respondent no. 2, the respondent no. 1 fixed 17.09.2012 for hearing the same. Then the petitioner rushed to the Central Procurement Technical Unit (CPTU) on 17.09.2012 and filed an application for being added as a party to the appeal. But unfortunately the respondent no. 1 refused to entertain the application. As a result, the petitioner failed to get any opportunity of being heard before the respondent no. 1 vis-à-vis the appeal preferred by the respondent no. 2. Having failed to get any access to justice, the petitioner collected necessary documents and came to know that the respondent no. 2 had filed the appeal before the respondent no. 1 vide Reference No. MBEL-ATT JV/Tender/Bhairab/04 dated 02.09.2012. The petitioner was deliberately kept in the dark about the presentation of the appeal to and the pendency thereof before the respondent no. 1 by the respondent no. 2. However, the respondent no. 1 issued notices upon the respondent nos. 3-5 with a request to appear before the Review Panel for hearing along with necessary documents on 17.09.2012 in the Conference Room of CPTU, Implementation, Monitoring and Evaluation Division (IMED) of the Ministry of Planning, Sher-E-Bangla Nagar, Dhaka. Without affording the petitioner any opportunity of being heard, the respondent no. 1 (Review Panel) arbitrarily and capriciously passed the impugned order vide Memo No. IMED/CPTU/RP/973 dated 24.09.2012 cancelling the work order and directing

holding of a fresh technical evaluation by forming a new TEC to be completed within 1(one) month.

The TEC selected the Hopetech SDN BHD-M/S. Best Eastern JV as the lowest responsive bidder upon a rigorous evaluation process following the Public Procurement Act, 2006 and the Public Procurement Rules, 2008 as well as by strictly adhering to the requirements under the Tender Document. It appears from the appeal lodged by the respondent no. 2 that they have basically raised two-fold allegations against the Hopetech SDN BHD-M/S. Best Eastern JV, namely, (1) both Hopetech SDN BHD and M/S. Best Eastern do not have the required previous business experience about Toll Collection, Operation and Bridge Maintenance and (2) the submitted documents, such as, CVs, Turnover Certificate, Experience Certificate and required documentary authentication of M/S. Hopetech are absolutely dozy and suspicious. The allegations raised by the respondent no. 2 about the petitioner in the appeal are all fictitious, frivolous and unfounded. The petitioner's principal, that is to say, Hopetech SDN BHD is a highly reputed Malaysian Company which has extensive experiences in Toll Collection, Operation and Maintenance of Toll Collection Systems in various projects in different parts of the world. After taking over the possession of the project site on 14.09.2012, the petitioner went into commercial operation and appointed a substantial number of employees and invested a prodigious amount of money. The respondent no. 1 committed a serious illegality in not allowing the petitioner's application for addition of party to the appeal. As the impugned order dated 24.09.2012 was passed in flagrant violation of the principle of natural justice, the same is clearly without lawful authority and of no legal effect. Furthermore, the impugned order is a perverse one inasmuch as the

Review Panel failed to appreciate that the Notification of Award was issued on 03.09.2012 and the agreement between the Procuring Entity and the petitioner was entered into and signed on 10.09.2012. When the notices of filing of the appeal before the Review Panel were issued upon the respondent nos. 3-5 on 11.09.2012 and were served upon them on 16.09.2012, the appeal became virtually infructuous.

In the Supplementary Affidavit dated 02.08.2015 filed on behalf of the petitioner, it has been stated that the respondent no. 5 (Procuring Entity) floated the Tender for Upgradation of Computerized Toll Collection, Operation and Maintenance of Toll Collection Systems of Syed Nazrul Islam Bridge at 88th of Dhaka (Katchpur)-Bhairab-Jagadishpur-Saishtaganj-Sylhet-Tamabil-Jaflong Road (N-02) for 5(five) years under Narsingdi Road Division during the years 2011-2012. The entire works can be divided into 3(three) components, namely, (1) Upgradation of Computerized Toll Collection, (2) Operation and (3) Maintenance of Toll Collection System. The major portion of the works involved Upgradation of Computerized Toll Collection. After taking over the charge of the project, Hopetech SDN BHD-M/S. Best Eastern JV discharged its duties and responsibilities with utmost sincerity, efficiency and due diligence. In fact, all works relating to Upgradation of Computerized Toll Collection were completed in May, 2014 to the satisfaction of the Procuring Entity.

The respondent no. 2 has opposed the Rule by filing an Affidavit-in-Opposition. The case of the respondent no. 2, in brief, runs as follows:

The respondent no. 2 became unsuccessful in the tender process because of wrongful consideration of the experience certificate of the petitioner's Joint Venture in Computerized Toll Collection and non-observance of ITT Clause

14.1(b)(iii) of the Tender Document. Only on the score of the petitioner's being the lowest bidder, the Tender Evaluation Committee (TEC) recommended to award the work order in favour of the petitioner. Neither the Public Procurement Act, 2006 nor the Public Procurement Rules, 2008 authorizes the Review Panel to give an opportunity to the petitioner to explain away his case. Moreover, the respondent no. 2 is not under any legal obligation to apprise the petitioner of the filing of the appeal before the Review Panel. The Review Panel followed the relevant provisions of the Public Procurement Act and the Public Procurement Rules meticulously, considered both the factual and legal aspects of the case and made the impugned order validly on 24.09.2012. The respondent no. 2 lodged the appeal before the Review Panel on 02.09.2012. The Notification of Award in favour of the petitioner, furnishing of Bank Guarantee by the petitioner, execution of the contract agreement between the petitioner and the Procuring Entity and Notice to Commence work were all effected in contravention of Rule 59 of the Public Procurement Rules. There is no specific provision either in the Public Procurement Act or in the Public Procurement Rules to entertain the application of the petitioner as a party to the appeal before the Review Panel. The respondent no. 2 filed the appeal before the Review Panel within the specified time-limit as stipulated in Rule 57 read with Schedule 2 of the Public Procurement Rules. However, the impugned order of the Review Panel dated 24.09.2012 is well-reasoned and sustainable in law and that being so, no exception can be taken thereto.

The respondent no. 4 (Head of the Procuring Entity) has filed an Affidavit supporting the case of the petitioner.

At the outset, Mr. Mizan Sayeed, learned Advocate appearing on behalf of the petitioner, submits that the petitioner was initially in the dark about the pendency of the appeal before the Review Panel preferred by the respondent no. 2, but when he came to know thereabout, he came up with an application for addition of party thereto; but unfortunately the Review Panel did not entertain the application for addition of party and that being so, the petitioner could not explain his stance with reference to the legal and factual aspects of the matter before the Review Panel.

Mr. Mizan Sayeed also submits that the impugned order was passed on 24.09.2012 by not adhering to the principle of "Audi Alteram Partem" and as the petitioner was condemned unheard by the Review Panel, the impugned order is palpably without lawful authority and of no legal effect. In this connection, Mr. Mizan Sayeed has referred to a good number of decisions including the decisions in the cases of The University of Dacca through its Vice-Chancellor and the Registrar, University of Dacca…Vs…Zakir Ahmed, 16 DLR (SC) 722; Abdur Saboor Khan…Vs…Karachi University & Controller of Examinations, Karachi University, 18 DLR (SC) 422; Patimas International Sdn Berhad, Malaysia…Vs…Review Panel represented by its Chairman Abdul Matin & others, 13 BLC (HCD) 474; Unique Hotel and Resorts Ltd. and others…Vs…The Government of the People's Republic of Bangladesh and others, 30 BLD (HCD) 324. Besides, he has also relied upon a recent unreported decision dated 02.11.2015 passed by Madhya Pradesh High Court of India in Writ Petition No. 4631 of 2015 which was downloaded from the internet.

Mr. Mizan Sayeed further submits that by the impugned order dated 24.09.2012, the Review Panel cancelled the work order and directed formation

of a new Technical Evaluation Committee (TEC) which is not in consonance with Rule 60(3) of the Public Procurement Rules, 2008 and as per Rule 60(3), the Review Panel may make necessary recommendations only to the authority, but it can not take any definitive decision with regard to the cancellation of the work order and as the impugned order was rendered by the Review Panel in contravention of the provisions of Rule 60(3) of the Public Procurement Rules, 2008, it is not tenable in law.

Mr. Mizan Sayeed next submits that indisputably the date of hearing of the appeal by the Review Panel was not notified to the petitioner and the Review Panel rendered the impugned order dated 24.09.2012 without hearing the petitioner thus affecting his right and this violation of the principle of natural justice by the Review Panel amounts to a jurisdictional error and as such the impugned order is 'non est' in the eye of law.

Mr. Mizan Sayeed also submits that the Review Panel stepped out of its jurisdiction by cancelling the work order and directing formation of a new Technical Evaluation Committee (TEC), regard being had to the provisions of Rule 60(3) of the Public Procurement Rules.

Mr. Mizan Sayeed further submits that the respondent no. 2 preferred the appeal before the Review Panel on 02.09.2012 and the Notification of Award was issued in favour of the petitioner on 03.09.2012 and the contract agreement between the petitioner and the Procuring Entity was executed on 10.09.2012 and the Notice to Commence work was issued on 10.09.2012 and the project site was handed over to the petitioner by the Procuring Entity on 14.09.2012 for immediate operation and the Review Panel issued notices of filing of the appeal therebefore upon the respondent nos. 3-5 on 11.09.2012 and the same were

received by them on 16.09.2012 and the impugned order was rendered by the Review Panel on 24.09.2012 and given this scenario, it is ex-facie clear that prior to receipt of the notices of filing of the appeal before the Review Panel by the respondent nos. 3-5 on 16.09.2012, all formalities regarding the contract agreement between the petitioner and the Procuring Entity were duly completed and in such a posture of things, it can not be said that the Procuring Entity acted in violation of the provisions of Rule 60(3) of the Public Procurement Rules.

Mr. Rokanuddin Mahmud, another learned Advocate appearing on behalf of the petitioner, submits that the petitioner has been executing the work as per the terms of the contract deed and by this time, more than 3(three) years have already elapsed and by efflux of time, the Rule has become infructuous to a great extent.

On the contrary, Mr. Sakib Rezwan Kabir, learned Advocate appearing on behalf of the respondent no. 2, submits that there is no provision within the four corners of the Public Procurement Act, 2006 or the Public Procurement Rules, 2008 to notify the petitioner of the filing of the appeal before the Review Panel by the respondent no. 2 and in this perspective, the respondent no. 2 did not do so and as there is no provision therein to afford the petitioner an opportunity of being heard in the matter of disposal of the appeal by the Review Panel, the same did not hear the petitioner; but on proper consideration of the materials on record, it made the impugned order dated 24.09.2012 in compliance with the relevant provisions of the Public Procurement Act and the Public Procurement Rules and by that reason, the impugned order can not be assailed at all.

Mr. Sakib Rezwan Kabir also submits that the so-called application for addition of party filed by the petitioner before the Review Panel (Annexure-‘I’

to the Writ Petition) is admittedly undated and it is not clear as to whether the Review Panel received it, let alone the question of refusing it.

Mr. Sakib Rezwan Kabir next submits that as per Rule 60(3)(gha), "ক্রয় সংক্রান্ত চুক্তি কার্যকরণে গৃহীত ব্যবস্থা বা সিদ্ধান্ত ব্যতীত", the Review Panel may make recommendations for invalidating any action or decision either in whole or in part which is not in keeping with the provisions of the law; but as the contract agreement had already been acted upon, the Review Panel was within its right to cancel the work order and direct formation of a new Technical Evaluation Committee instead of making mere recommendations to the authority concerned and considered from this standpoint and in view of the saving clause in Rule 60(3)(gha), the impugned order of the Review Panel is fully and wholly maintainable.

Mr. S. M. Zahurul Islam, learned Advocate appearing on behalf of the respondent no. 4, submits that the Procuring Entity completed all formalities and recommended to award the work order in favour of the petitioner to the higher authority and accordingly the work order was issued in his favour and he has been discharging his functions to the best of his ability and sincerity and the Head of the Procuring Entity (respondent no. 4) is quite happy at the pace of his work.

We have heard the submissions of the learned Advocates, namely, Mr. Mizan Sayeed, Mr. Rokanuddin Mahmud, Mr. Sakib Rezwan Kabir and Mr. S. M. Zahurul Islam and perused the Writ Petition, Supplementary Affidavit, Affidavit-in-Opposition submitted by the respondent no. 2 and Affidavit submitted by the respondent no. 4 and other relevant materials on record.

It is an indubitable fact that the principle of "Audi Alteram Partem" was not adhered to prior to rendition of the impugned order dated 24.09.2012. Now a pertinent question arises: what will be the consequence of violation of the principle of natural justice? It is also to be seen whether the right of the petitioner was adversely affected by the impugned order of the Review Panel. This is a very vital question. As a matter of fact, the fate of the Rule hinges upon the answer to this question.

The principles of natural justice are applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of these principles results in jurisdictional errors. Thus in a sense, violation of these principles constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of these principles as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. These principles are classified into two categories-(i) a man can not be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of these principles vary with the varying circumstances and those can not be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying these principles, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. These principles were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject

to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application.

Lord Atkin in R. v. Electricity Commissioners ([1924] 1 KB 171) observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having the duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the landmark case of Ridge v. Baldwin ([1964] AC 40). But even before this decision, the rules of natural justice were being applied in our country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. In all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned. In this connection, reliance may be placed on the cases of The University of Dacca and another…Vs…Zakir Ahmed, 16 DLR (SC) 722; Sk. Ali Ahmed…Vs… The Secretary, Ministry of Home Affairs and others, 40 DLR (AD) 170; Habibullah Khan…Vs…Shah Azharuddin Ahmed and others, 35 DLR (AD) 72; Hamidul Huq Chowdhury and others…Vs…Bangladesh and others, 33 DLR 381 and Farzana Haque….Vs…The University of Dhaka and others, 42 DLR 262.

In England, the application of the principles of natural justice has been expanded by introducing the concept of 'fairness'. In Re Infant H(K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act 'fairly'. It is sometimes thought that the

concept of ‘acting fairly’ and ‘natural justice’ are different things, but this is wrong as Lord Scarman correctly observes that the Courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act (Council of Civil Service Union V. Minister for the Civil Service[1984] 3 All E.R. 935). Speaking about the concept, the ‘acting fairly’ doctrine has at least proved useful as a device for evading some of the previous confusions. The Courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and Ridge V. Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. The Indian Supreme Court has adopted this principle holding “….this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands” (Swadeshi Cotton Mills V. India, AIR 1981 SC 818). The English Courts have further expanded the horizon of natural justice by importing the concept of ‘legitimate expectation’ and holding that from promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of ‘fairness’ and ‘legitimate expectation’ have expanded the applicability of natural justice beyond the sphere of right. To cite a few examples, not only in the case of cancellation of licence which involves denial of a right, but also in the case of first-time grant of licence and renewal of licence, the principle of natural justice is attracted in a limited way in consideration of legitimate expectation. An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity

to controvert any allegation levelled against him. An alien seeking a visa has no entitlement to one, but once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the Government should not have the power to exclude him summarily.

In the case of Chingleput Bottlers V. Majestic Bottlers reported in AIR 1984 SC 1030, the Indian Supreme Court has made certain observations which create an impression that the rules of natural justice are not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice are no longer tied to the dichotomy of right-privilege. It has been stated in "Administrative Law" by H.W.R. Wade, 5th edition at page-465: "For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair …" In the American jurisdiction, the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with Gonzalez V. Freeman (334 F. 2d 570), the Courts gradually shifted in favour of the privilege cases and in the words of Professor Schwartz, "The privilege-right dichotomy is in the process of being completely eroded" ("Administrative Law", 1976, Page-230). Article 31 of our Constitution incorporating the concept of procedural due process, the English decisions expanding the frontiers of natural justice are fully applicable in Bangladesh.

In English law, the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction. Following the English decisions, the Courts of this sub-

continent have held that the principles of natural justice should be deemed to be incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.

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

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

To render an action mala fide, "There must be existing definite evidence of bias and action which can not be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would

depict a bad motive or intent on the part of the doer of the act"(Punjab…Vs… Khanna, AIR 2001 SC 343).

In the decision in the case of Patimas International Sdn Berhad, Malaysia…Vs…Review Panel represented by its Chairman Abdul Matin & others reported in 13 BLC (HCD) 474, it was stated in paragraphs 37 and 38:

> "37. Serious objections were raised on behalf of the petitioner in respect of the proceedings before the Review Panel on the grounds, inter alia, that the contract being awarded to the petitioner, it has the maximum and foremost interest in its decision but the complaint was heard behind its back without giving any opportunity to explain its side of the story. In this connection, Mr. Rokanuddin Mahmud, the learned Counsel appearing on behalf of the respondent no. 4, conceded that no notice was given to the petitioner but half-heartedly argued that since the Procuring Entity which recommended awarding of the contract in favour of the petitioner was present and argued the matter covering all aspects of objections including those on behalf of the petitioner, the requirements of the principles of natural justice have been satisfied, for all practical purposes.
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> 38. It is well-settled that the requirement of the principles of natural justice is deemed to be

> included in every proceedings unless it is expressly excluded by the Parliament, as such, this argument that since the matter had already been properly addressed by the representatives of the Bangladesh Bank, for its own and also on behalf of the petitioner, would not justify this lapse on the part of the Review Panel. Review Panel ought to have given adequate opportunity to the petitioner to place its case before it. Since this decision of the Review Panel was taken in the absence of the petitioner, this decision is liable to be set aside on this one ground alone."

In our opinion, the above observations made by the High Court Division aptly apply to the facts and circumstances of the present case.

In the decision in the case of Unique Hotel and Resorts Ltd. and others…Vs…The Government of the People's Republic of Bangladesh and others reported in 30 BLD (HCD) 324, to which one of us was a party, it was clearly held that the principle of natural justice can not be dispensed with in respect of a person whose right stands affected unless the statute expressly or impliedly excludes the application of the same.

In the decision in the case of Abdur Saboor Khan…Vs…Karachi University & Controller of Examinations, Karachi University reported in 18 DLR (SC) 422, it was held in paragraph 4:

> "4. The principle governing such cases was laid down by this Court in the case of The University

of Dacca and another…Vs…Zakir Ahmed (16 DLR (SC) 722). It was observed therein that "Whenever any person, or body of persons, is empowered to take decisions, after ex post facto investigation into facts which will result in consequences affecting the person, property or other right of another person, then, in the absence of any express words in the enactment giving such power, excluding the application of the principles of natural justice, the Courts of law are inclined generally to imply that the power so given is coupled with a duty to act in accordance with such principles of natural justice as may be applicable in the facts and circumstances of a given case". This is the principle embodied in the maxim 'audi alteram partem' and has been applied by this Court in other cases where orders passed by administrative tribunals or authorities, affecting the rights of citizens, in point of property, or other rights, had been passed, without giving an opportunity for defence to the person concerned. "No one can be condemned unheard" is one of the settled principles of law, and such a principle will be read into the relevant law, unless its application is excluded by express words. A duty is cast on

> every Administrative Tribunal to act with due regard to the principles of natural justice, unless specifically exempted from such a limitation. Mere omission from the relevant law of a provision for notice, would not affect this position. Reference in this connection may be made to the cases reported as Chief Commissioner, Karachi…Vs…Mrs. Dina Sohrab Katrak (11 DLR (SC) 113), Messrs. Faridsons Ltd….Vs... The Government of Pakistan and another (13 DLR (SC) 133) and Abdur Rahman…Vs...Collector and Deputy Commissioner, Bahawalnagar (16 DLR (SC) 470)."

In the unreported decision in the case of Rohini…Vs…The State of Madhya Pradesh downloaded from the internet, it was observed:

> "In India there is no statute which prescribes the minimum procedure which administrative agencies or quasi-judicial bodies must follow while taking decisions which affect the rights of the individuals. None the less, they are bound by the principles of natural justice. The principles of natural justice signify the basic minimum fair procedure which must be followed while exercising decision-making powers. Natural justice forms the very backbone of a civilized society.

> The wheels regarding the application of principles of natural justice to administrative and quasi-judicial proceedings started turning from 1963 when the House of Lords in the United Kingdom delivered the landmark and oft-quoted judgment of Ridge v. Baldwin [1963] UKHL 2. An order for dismissal of a Constable was quashed because he was not provided any opportunity to defend his actions. Presently, in our country, the principles of natural justice are applicable in totality to administrative and quasi-judicial proceedings. This is consistent and in line with the rapidly increasing role, functions and jurisdiction of such bodies in a welfare state like ours."

In the said decision in the case of Rohini…Vs…The State of Madhya Pradesh, it was also observed:

> "The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well-settled. The first and foremost principle is what is commonly known as 'audi alteram partem' rule. It says that no one should be condemned unheard. Notice is

> the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play……"

It was further explained in the decision in the case of Rohini…Vs…The State of Madhya Pradesh:

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a

> judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

In the above-mentioned decision, it was also spelt out:

> "How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is 'nemo judex in causa sua' or 'nemo debet esse judex in propria causa sua' as stated in (1605) 12 Co. Rep. 114 that is, 'no man shall be a judge in his own cause'.

> Coke used the form 'aliquis non debet esse judex in propria causa quia non potest esse judex at pars' (Co. Litt. 1418), that is, 'no man ought to be a judge in his own case, because he can not act as Judge and at the same time be a party'. The form 'nemo potest esse simul actor et judex', that is, 'no one can be at once suitor and judge' is also at times used. The second rule is 'audi alteram partem', that is, 'hear the other side'. At times and particularly in continental countries, the form 'audietur at altera pars' is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely 'qui aliquid statuerit parte inaudita alteram actquam licet dixerit, haud acquum facerit' that is, 'he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right' (See Bosewell's case (1605) 6 Co. Rep. 48-b, 52-a) or in other words, as it is now expressed, 'justice should not only be done but should manifestly be seen to be done".

What we are driving at boils down to this: natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as

fundamental. The purpose of following the principle of natural justice is the prevention of miscarriage of justice.

Reverting to the case in hand, it is an admitted fact that the Review Panel did not hear the petitioner whose right was adversely affected by the impugned order dated 24.09.2012. However, it is true that there is no express provision either in the Public Procurement Act or in the Public Procurement Rules to hear the other side, that is to say, the petitioner in the instant case. As already observed, the principle of natural justice must be deemed to be incorporated in every statute unless it is expressly or impliedly excluded therefrom. As the Public Procurement Act or the Public Procurement Rules does not specifically or impliedly exclude the principle of natural justice, the same must be deemed to be included therein. This being the legal position, the petitioner ought not to have been condemned unheard. Consequently, the impugned order dated 24.09.2012 can not be sustained in law on that count alone and this is why, it is liable to be struck down as being without lawful authority and of no legal effect.

Both Mr. Mizan Sayeed and Mr. Sakib Rezwan Kabir have advanced various submissions touching upon the merit of the case. But since we have already found the impugned order dated 24.09.2012 unsustainable in law on the ground of non-hearing of the petitioner by the Review Panel before disposal of the appeal, we need not make any observation/finding on those submissions.

From the foregoing discussions and in the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

Accordingly, the Rule is made absolute without any order as to costs. It is hereby declared that the impugned order dated 24.09.2012 passed by the Review Panel (respondent no. 1) is without lawful authority and of no legal effect.

MD. ASHRAFUL KAMAL, J:

I agree.