12 SCOB [2020] HCD

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9535 of 2018
With
WRIT PETITION NO. 10000 of 2018

AHN. HONG, SIK. HPCC-SEL JV
..…. Petitioner

(In writ petition No.9535 of 2018)
Versus-
Central Procurement Technical Unit (CPTU) and others
..... Respondents

(In writ petition No.9535 of 2018)

Bangladesh Bridge Authority and others
..….. Petitioner

(In writ petition No.10000 of 2018)
-Versus-
Central Procurement Technical Unit (CPTU) and others
..... Respondents

(In writ petition No.10000 of 2018)

Mr. Rokonuddin Mahmud, Senior Advocate with
Mr. Rais Uddin Ahmed

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Mohammad Ali

Mr. Md. Bodruddoza
Mr. Mohammad Shahidul Islam,
Advocates.
……For the petitioner
(In writ petition No.9535 of 2018)

Mr. Md. AbdunNur, with
Mr. Abdul Jabbar Joel,
Advocates
….. For the petitioner
(In writ petition No.10000 of 2018)
and
….. For the respondent No. 5, 6 & 8.
(In writ petition No.9535 of 2018)

Mr. M. Qumrul Hoque Siddique, with
Mrs. Towfika Karim
Mr. Md. Shaharia Kabir, Advocates
…….. For respondent No.6

(In writ petition No.9535 of 2018 and
Writ petition No. 10000 of 2018)

Heard on 11.10.2018,
24.10.2018,31.10.2018,
5.11.2018, 08.11.2018, 14.11.2018 &

Judgment on 28.11.2018

If we now exercise our common sense it can be perceived when the Review Panel can 'dismiss' an Appeal if the same is not well founded either in fact or law then why it can not 'allow' the same if a decision appealed against is otherwise wrong ? In other words, when CPTU is competent to dismiss an Appeal it can also allow an Appeal if it is otherwise found to be competent. (Para-32)

JUDGMENT

Md. Ashfaqul Islam, J:

1. Both the writ petitions are taken up together and heard and disposed of by this single judgment as there involved a common question of fact and law.

2. In writ petition No. 9535 of 2018 Rule was issued at the instance of AHN. HONG, SIK. HPCC-SEL JV. In Writ Petition No. 10,000 of 2018 Rule was issued at the instance of Bangladesh Bridge Authority represented by it's Executive Director and others.

3. In Writ Petition No. 9535 of 2018, the petitioner of Writ Petition No. 10000 of 2018 Bangladesh Bridge Authority featured as Respondent No. 7 and 8.

4. Terms of the Rule of Writ Petition No. 9535 of 2018 issued on 23.07.2018, was in the following:-

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why judgment and order dated 17.07.2018 passed by the respondent Nos.2-4, the Review Panel-3 in Review Appeal No.43-03 of 2018 (Annexure-E) declaring the petitioner as "Technically Non Responsive" should not be declared to have been passed without lawful authority and of no legal effect "*

5. By an ad-interim order operation of the said judgment was stayed.

6. In Writ Petition 10000 of 2018 Rule issued on 30.07.2018, under the following terms:-

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why judgment and order dated 17.07.2018 passed by the Review Panel-3, Central Procurement Technical Unit (CPTU); implementation Monitoring & Evaluation Division, Sher-E-Bangla Nagar, Dhaka-1207 in Review Petition No.43-03 of 2018 (Annexure-A) should not be declared to have been passed without lawful authority and of no legal effect. "*

7. As we have found/seen that almost both the Rules were issued almost in a common terms challenging the Judgment and Order dated 17.07.2018 passed by the Review Panel 3 in Review Appeal No. 43-03/2018 (Annexure-"E").

8. The averments figured in both the petitions, leading to the Rules are that Bangladesh Bridge Authority, the petitioner of Writ Petition No. 10,000 of 2018 invited Expression of Interest (EOI) on 16.03.2016 for appointment for selection of Firm/Service Provider for Supply, Customize Installation and Maintenance of a proven Modern Real-Time Web Based On-Line Centralized Toll Collection System with the Web Based Monitoring and Related Services Including Collection of Toll for 5 (Five) years for Toll Plaza of Bangabandhu Bridge. Nine Firms submitted Expression of Interest (EOI). The petitioner of Writ Petition No. 10000 of 2018 Bangladesh Bridge Authority who is the Procuring Entity evaluated the expression and made a short list of 6 (six) Firms. They were requested to submit technical offer and financial offer simultaneously (two envelope system) Out of them 5 Firms submitted technical offer and financial offer. The Proposal Evaluation Committee (PEC) consisting of 9 (Nine) members evaluated the proposal that included a Senior Professor from BUET and another Additional Chief Engineer of LGED and Every individual member gave marks individually. Head of Procuring Entity (HOPE) examined the evaluation sheet and

approved 3 (three) offers as responsive and gave letter to them to participate in the opening of financial offer. Be it mentioned that one of the successful bidders Computer Network System Ltd. featured as Respondent No. 6 in Writ Petition No. 9535 of 2018 and also Respondent No. 5 in Writ Petition No. 10000 of 2018. It is also mentioned that the petitioner of the said Writ Petition No. 9535 of 2018 i.e. HPCC-SEL JV the KEC-S TRAFFIC-TECH –VALLY JV and Computer Network System (hereinafter referred to as HPCC, KEC and CNS) were declared responsive by the Technical Evaluation Committee and those were communicated to all of them mentioning that the financial proposal would be opened in the Evaluation Committee meeting on 3 June, 2018 at 11.00 am.

9. Computer Network System Respondent No. 6 thereafter filed an application before the CPTU and simultaneously they also moved the High Court Division in Writ Petition No. 7677 of 2018 and obtained Rule and ad-interim direction. Against which the government i.e. the Procuring Entity and the HPCC filed two separate Writ Petitions and during pendency of the said Writ Petition at the instance of the CNS the review which was filed was allowed by the CPTU in Review Appeal No. 43-03 of 2018 against which both the Writ Petitions were filed respectively by HPCC as petitioner in Writ Petition No. 9535 of 2018 and by the Procuring Entity (Bridge Authority) in Writ Petition No. 10000 of 2018.

10. Mr. Rokonuddin Mahmud the learned Senior Advocate appearing with Mr. Md. Bodruddoza, Mr. Rais Uddin Ahmad, Mr. Mohammad Shahidul Islam the learned Counsels appearing for the petitioner in Writ Petition No. 9535 of 2018 after placing the petition and drawing our attention on the materials on record advanced the following arguments:-

Firstly, it was argued that the Review Panel acted malafide and in gross violation of Rule 60(3) (ক) (খ) (গ) (ঘ) (ঙ) and (চ) of the Public Procurement Rules, 2008 in declaring the bids of the petitioner HPCC together with other responsive bidder KEC as "technically non-responsive" as the Review panel under the said Rule was only empowered to "Advise" or "Recommend" the concerned authority and therefore, the Judgment and Order passed by the Review Panel is liable to be declared to have been passed without lawful authority having no legal effect. In support of this argument he has placed reliance in the decision of Softesule Private Ltd. vs Bangladesh 12 ALR, 8, this Judgment was delivered by a bench presided over by her Lordship Justice Naima Haider on 04.01.2018.

11. Second, important argument which was advanced by the petitioner was that the decision of the CPTU was given in gross violation of principle of natural Justice. It has been substantiated that the Review Appeal admittedly was allowed without hearing the present petitioner HPCC as well as KEC and they were not served with any notice and were not given any opportunity of being heard and therefore, the ex parte Judgment and order passed by the Review Panel simply on that score should be declared to have been passed without any lawful authority having no legal effect. Several decisions were cited on this point. M.M Abdul Nayem vs CPTU (21 BLC, 422), Patimas International vs. Review Panel (13 BLC, 474) which was affirmed by the Hon'ble Appellate Division in St. Electronics Private Ltd. vs Patimas International Sdn Berhad and others (12 MLR (AD) (2007) 325). And plethoras of decisions on this point could also be found in the Case of M.M Abdul Nayem vs CPTU as referred to above.

12. Third important point that has been advanced by the petitioner HPCC was that the Technical Proposals were opened at the office of the Respondent No. 7, Chief Engineer, Bangladesh Bridge Authority on 12.09.2017 and the Proposal Evaluation Committee (PEC) after evaluation declared KEC, CNS and HPCC as technically responsive and accordingly

CNS (Respondent No. 6 of Writ Petition No. 9535 of 2018) was notified on 24.05.2018 (Annexure-"D") with regard to opening of Financial Proposal on 03.06.2018 but the Respondent No. 6 CNS having been dissatisfied with the said decision of the Procuring Entity with regard to declaring petitioner and another bidder as technically responsive lodged 2 (two) complaints on 21.05.2018 (as it could be found in Annexure-"B" in Writ Petition No. 10000 of 2018) to the Procuring Entity and on 27.05.2018 Annexure-"B-1 in Writ Petition No. 10000 of 2018 which was lodged admittedly in violation of Rule 57(1) read with schedule (2) of PPR-2008 as it had been lodged after the alleged cause of action and the Review Panel while passing the said Judgment totally ignored this aspect of law. Hence, the Judgment and Order on that score should be declared illegal. Reliance have been placed in the decision of VA-TECH WABAG Ltd. vs Secretary, Ministry of Industries and others 17 BLC 568 on the point.

13. Besides, learned Counsel Mr. Bodruddoza has also drawn our notice to the additional grounds those have been categorized in the supplementary affidavit filed by the petitioner HPCC in Writ Petition No. 9535 of 2018. The grounds are mentioned in Paragraph 5 of the said supplementary affidavit. Those are as follows:-

> Since the petitioner in strict compliance of the requirements of sub-clause 4 submitted work experience/Testimonials and Agreements of collecting Toll amount of Tk. 18,119,900,000.00 (Eighteen Hundred Eleven Crore Ninty Nine) which is more than the value as required under sub-clause 4 but the Review panel on misconstruing the Toll Collection amount of Tk. 14,44,78,829.00 (Revised Tk. 14,54,91644.00) as value of the contract declared the petitioner's bid as non responsive despite the fact that the said amount of Tk. 14,44,78,829.00 was the amount paid to the Service Provider and not Toll Collection and as such the Judgment and Order of the Review panel is liable to be set aside.

14. Next he submits that in the RFP under clause 21.1(C) all the documents asked for are related with the bidders' experience only and only 10 points are allocated for the same and since the petitioner already obtained 81.29 point/marks, the 10 points allocated for experience shall not affect the responsiveness of the petitioner's bid as the minimum qualifying marks for being responsive is 70 points/marks and as such the decision of Review Panel being based only on 10 points/marks regarding experience is liable to be declared to have been posed without lawful authority and is of no legal effect.

15. Lastly , he contends though the respondent No. 6 was short listed on 16.07.2017 along with 5 (Five) other including the petitioner but the respondent No. 6 neither filed any complaint at that EOI stage, rather as an unauthorized person lodged the complaint on 21.05.2018 and respondent No. 6 lodged the complaint on 30.05.2018 when Schedule-2 Rule 57 of PPR provides provisions for lodging complaint within 7 calendar days and as such the complaint lodged beyond 7 calendar days is not a complaint in the eye of law but the Review Panel without discussing this legal requirements declared the bid of the respondent No.6 as responsive and as such the decision of the Review Panel is liable to be set aside by this Hon'ble Court.

16. It seems all these submissions are related with the decision of the CPTU touching upon the merit of the case which I will address later stage of the Judgment.

17. Mr. Abdun Nur the learned Counsel appearing for the petitioner Bangladesh Bridge Authority and others in Writ Petition No. 10000 of 2018 adopted the same argument as it has

been advanced in Writ Petition No. 9535 of 2018. In addition, by filing Supplementary Affidavit dated 14.11.2018 he has argued that section 30 of the Public Procurement Act, 2006 provides for qualification of members of Review Panel. Section 30(3) runs as under:-

> *" (৩) ধারা ৩০ (২) এর অধীন সরকার, দায়েরকৃত কোন আপীল পর্যালোচনা ও সিদ্ধান্ত প্রদানের জন্য আইন, সংশ্লিষ্ট পন্য বা কার্য বুাদ্ধিবৃত্তিক ও পেশাগত সেবা ক্রয়ে কারিগরি জ্ঞানসম্পন্ন, ব্যবস্থাপনা বিষয়ে এবং ক্রয় কার্যে সুবিদিত বিশেষজ্ঞ ব্যক্তিবর্গের সমন্বয়ে এক বা একাধিক রিভি্উ প্যানেল গঠন করিতে পারিবে: তবে শর্ত থাকে যে, প্রজাতন্ত্রের চাকুরীরত কোন সদস্য রিভিউ প্যানেলে অন্তর্ভূক্ত হইবে না।"*

18. And quoting the said law the learned Counsel contends that one Mr. M. Shamsul Haque, Chairperson of the Review Panel-3 was a former Secretary, another member Mr. Md. Aulad Hossain was a former District Judge and Mr. Abu Alam Chowdhury another member of the panel was a former Director of FBCCI, a businessman and none of them possesses technical knowledge and fulfill requisite qualifications for which the constitution of Review Panel-3 was illegal as opposed to Section 30(3) of the Act.

19. On the other hand, Mr. M. Qumrul Hoque Siddique the learned Counsel appearing with Mr. Md. Shahriar Kabir for the Respondent No. 6, CNS vehemently opposes the Rule refuting and rebutting all the arguments pressed into service on behalf of the petitioner HPCC and the Procuring Entity respectively in both the Writ Petitions. He made following written submissions:-

> Review Panel on examination of materials before them rightly came to a conclusion that two of the three proposal were non-responsive as they did not have any required qualifications and experience. Secondly, he submits that the decision of Technical Evaluation Committee was impugned before the Review Panel and Review Panel was under legal obligation to examine and give a full fledged decision whether the decision of the Technical Evaluation Committee was correct or not. Since law has empowered the Review Panel to decide legality or otherwise of the decision of the Technical Evaluation Committee, the Review Panel has acted Intra-vires in arriving at a decision that two of the three bidders were non-responsive.

20. Next he submits since in Request for Proposal (RFP) it was clearly mentioned that the bidders have to submit their Technical Proposal in one sealed envelope and it's financial offer in another sealed envelope specifying which one is technical offer and which one is financial offer, but the Procuring Entity had opened the technical offer first keeping the sealed financial offer intact and this fact clearly imply that the two envelope offer rule has been meant for not opening the financial offer unless the technical offer is found to be responsive.

21. He further submits that under PPA, 2006 and PPR, 2008 no provisions have been made for making anyone a party in an Appeal taken before the Review Panel under CPTU. Neither in the Act or Rule provisions have been made for any oral submissions or written submissions from the part of adversary to submit any documents together with technical proposal. So, the technical question of defect of party is not applicable in the present Case.

22. In respect of submissions on the ground of limitation by the petitioner, Mr. Siddique has tried to impress upon us that the complaint lodged by Respondent No 6, CNS on 21.05.2018 was not an objection rather it was against the apprehended conspiracy in terms of Rule 56(গ)(5) which enjoins:

> *৫৬। অভিযোগ করার অধিকার।- নিম্নবর্ণিত ক্ষেত্রে বা পরিস্থিতিতে কোন ক্রয়কারীর বিরুদ্ধে আনুষ্ঠানিক অভিযোগ দায়ের করা যাইবে, যথাঃ-*

(গ) প্রস্তাব দাখিলের অনুরোধ জ্ঞাপনের ক্ষেত্রে-
(১) .....
(২) .....
(৩) .....
(৪) .....
(৫) দুর্নীতি বা চক্রান্তমূলক কার্যকলাপ সম্পর্কে সন্দেহ হইলে;

23. Therefore, 21.05.2018 cannot be treated as the starting point for the purpose of calculating limitation in the manner as it has been alleged.

24. Objection dated 27.05.2018 (Annexure-"B-1") was lodged against the decision dated 24.05.2018 which was well within time. Submissions otherwise are not only misconceived but also deliberate deviation from the relevant Rules and procedure particularly Rule 57 of the PPR 2008 read with schedule 2.

25. Lastly, on the point of violation of Principle of natural justice, Mr. Siddiky contends that the decisions placed by the petitioner are not applicable in the present Case. He further submits that the decision of CPTU is always open to wide jurisdiction of judicial Review under Article 102 of the Constitution as it could be found in the decision as referred to above in 13 BLC affirmed by the Appellate Division in 12 MLR.

26. That being the position, and on the diverse submissions made by the parties in both the petitions, the only question that faces this Division is whether under the facts and circumstances of the present Case conjunct with the relevant laws and Rules the decision given by the CPTU would sustain.

27. We have heard the learned Counsel of both sides at length and considered their submissions with utmost care and also in our anxiety we have given meticulous adherence to the relevant laws and decisions governing the issue. As we have seen the first point which was taken by the petitioner, HPCC in Writ Petition No. 9535 of 2018 that in gross violation of Rule 60(3) of PPR-2008 (hereinafter referred to Rules, 2008) the Review Panel most illegally declared the petitioner HPCC as technically non-responsive placing reliance in the decision delivered on 04.01.2018 by Justice Naima Haider in 12 ALR 8 as referred to above. In the said decision in paragraph 20 it has been observed:

> "The Review Panel found the petitioner "non responsive" and found the respondent No. 9 responsive. This means that the Review Panel, in exercising its powers, substituted its judgment over the Selection Panel's finding. The powers of the Review Panel, as set out in Rule 60 of the PPR are clear. The Review Panel is not conferred with the power of "substitution of judgments"."

28. But I am surprised to note that in BTCL vs CPTU (18 BLC 98) Judgment delivered on 07.08.2012, exactly on the same point Justice Naima Haider gave contradictory decision. In BTCL decision in paragraph 15 & 16 it has been observed:

> " Now, let us deal with the Second argument of BTCL that the Review Panel does not have any power to issue any direction.

29. The learned Advocate for the petitioner has submitted that the Review Panel has no authority to pass any order or direction and that it can only advise or recommend the purchasing entity and, consequently, the decision of the Review Panel is liable to be set aside. This Court is not persuaded by the above argument inasmuch as the particular words used by

the Review Panel in delivering its decision is not material. What is important is the effect. Rule 60(5) says " (৫) রিভিউ প্যানেলের সিদ্ধান্ত চূড়ান্ত হইবে এবং সংশ্লিষ্ট সকল পক্ষ উক্ত সিদ্ধান্ত মোতাবেক ব্যবস্থা গ্রহণ করিবে ।'' Therfore, even if Review Panel No. 2 had used the words "Advice" or "recommendation", it would not have made any difference in the impugned decision because of the operation of Rule 60(5) of the PPR, 2008, which has been clarified by the competent authority vide "Annexure-11" to the affidavit-in-opposition of the writ petition No. 5073 of 2012. Thus, as per PPA, 2006 and PPR, 2008, once the Review Panel has entertained any complaint it has all the powers to pass any order as it deems fit and proper including any direction upon the petitioners to treat any bidder as Pre-qualified."

30. In that Case the Review Panel's decision allowing the Appeal was challenged before this Division which was discharged.

31. I want to quote from a pertinent portion of Rule 60 (3). It enjoins:-

৬০(৩) তুচ্ছ কারণে অভিযোগ দায়েরের কারণে উহা খারিজ এবং ক্ষেত্রমত, নিরাপত্তা জামানত বাজেয়াপ্ত করার ক্ষেত্র ব্যতীত, আপীল নিষ্পত্তির ক্ষেত্রে, রিভিউ প্যানেল নিম্নবর্ণিত যে কোন সিদ্ধান্ত স্বতন্ত্রভাবে বা সম্মিলিতভাবে প্রদান করিতে পারিবে, যথাঃ

(ক) কারণ উল্লেখপূর্বক আপীল আবেদন খারিজ করিয়া ক্রয়কারীকে ক্রয় কার্যক্রম পরিচালনা অব্যাহত রাখার পরামর্শ প্রদান;

(খ) আপীল আবেদনে উত্থাপিত অভিযোগের বিষয়বস্তু নিষ্পত্তির ক্ষেত্রে প্রযোজ্য বিধি-বিধান ও নীতি উল্লেখপূর্বক উহার আওতায় অভিযোগকৃত বিষয় নিষ্পত্তির জন্য যথাযথ ব্যবস্থা গ্রহণের জন্য পক্ষবৃন্দকে পরামর্শদান;

(গ) ক্রয়কারী কর্তৃক গৃহীত পদক্ষেপ এই বিধিমালার পরিপন্থী হইলে উহার প্রতিকারমূলক ব্যবস্থা গ্রহণের জন্য পক্ষবৃন্দকে পরামর্শদান;

(ঘ) ক্রয় সংক্রান্ত চুক্তি কার্যকরণে গৃহীত ব্যবস্থা বা সিদ্ধান্ত ব্যতীত, ক্রয়কারী কর্তৃক বিধি-বিধানের সহিত সামঞ্জস্যপূর্ণ নহে এইরূপ কোন কার্য বা সিদ্ধান্ত, সম্পূর্ণ বা আংশিক, বাতিলের সুপারিশ প্রদান:

(ঙ) ক্রয়কারী, এই বিধিমালার অধীন উহার বাধ্যবাধকতা প্রতিপালনে ব্যর্থ হইয়া থাকিলে, রিভিউ প্যানেল আপীল আবেদন দাখিলকারী ব্যক্তিকে দরপত্র দলিল প্রস্তুত ও আইন সংক্রান্ত ব্যয় এবং অভিযোগ দাখিল সংক্রান্ত অন্যান্য ব্যয় বাবদ ক্ষতিপূরণসহ বিধি ৫৭(১২(গ) এর অধীন প্রদত্ত নিরাপত্তা জামানত ফেরত প্রদানের সুপারিশ প্রদান; এবং

(চ) ক্রয় কার্যক্রম সমাপ্তির জন্য সুপারিশ প্রদান।

32. If we now exercise our common sense it can be perceived when the Review Panel can 'dismiss' an Appeal if the same is not well founded either in fact or law then why it can not 'allow' the same if a decision appealed against is otherwise wrong ? In other words, when CPTU is competent to dismiss an Appeal it can also allow an Appeal if it is otherwise found to be competent.

33. In the Case of Techno Venture Ltd. vs. Bangladesh reported in 20 BLC 377 CPTU declared the petitioner of that case technically non-responsive allowing the Appeal filed by one Respondent No. 8 Confidence Electronics Ltd. , the petitioner Techno Venture filed Writ Petition and the High Court Division discharged the Rule upholding the decision of the Review Committee. I have only mentioned this pertinently.

34. Now comes the Second argument which is very important. The petitioner HPCC has contended that in the whole process of Appeal before Review Panel the petitioner HPCC was not a party and without hearing HPCC in gross violation of principle of natural justice the decision that has been given by the CPTU is absolutely without lawful authority simply for that reason. On this point several decisions have been cited. One thing I want to make clear in this context that the judicial review is wide open to interfere with the decision of CPTU as it has been found in the decision as reported 13 BLC case as referred to above which was also affirmed by the Appellate Division in 12 MLR as referred to above. High Court Division's

decision was given firstly addressing the point of violation of principle of natural Justice (paragraph 38 of 13 BLC's decision) and thereafter his Lordship Justice A.B.M Khairul Haque went on deliberating upon the merit of the Case starting from paragraph 39 onwards. Here I want to signify that this decision as a whole was upheld by the Appellate Division in 12 MLR case.

35. On the question of violation of principle of natural justice, the learned counsel for the petitioner has submitted that:

> *"It is well settled that requirements of the principles of natural justice is deemed to be included in every proceedings unless it is expressly excluded by the Parliament. (Parmits International vs- Review Penal 13 BLC 474)."*

36. This decision was affirmed by the Appellate Division in St. Electronics (Infor Soft ware System) Pvt. Ltd. vs. Pamitas International Sdn Berhad and others 12 MLR (AD) 325). The case of Abdul Al Moududi **vs.** West Pakistan 17 DLR (SC) 2009, Farid Khan Ltd. vs. Pakistan 13 DLR (SC) 273 and Swadeshi Cotton Mills vs. India AIR 1981 (SC) 818, and the decision of 13 BLC 474 upheld by the Appellate Division 12 MLR (AD) 325 are some authorities out of thousands. There is no denying that this age old principle of law has been grounded on a solid basis and no longer a resintegra.

37. The jurisprudence on this score has developed in a new dimension. Now there is an accepted phrase "Post hearing decision". The question of violation of principle of natural justice (***audi alterm partem)*** goes at the root. The principle of natural justice in this sub-continent has been consistently followed in the manner as quoted in 13 BLC Case. Mr. Justice ABM Khairul Hoque, in 13 BLC case has interfered with the decision of CPTU and delivered the judgment <u>on merit</u> and also held that the principle of natural of justice was also violated in that case. The judgment of CPTU was set aside and eventually the said decision was affirmed by the Appellate Division in 12 MLR (AD) 325.

38. But there is another vital change in the jurisprudence which cannot be brushed aside. It is often found that on the plea of violation of principle of natural justice, so many cases are being filed highlighting the aforesaid violation before this Division. Often we come across that even on a frivolous ground, contending violation of principle of natural justice, a litigant efforts to establish a right before a court of law. Certainly in a fit case violation of the principle of natural justice should be followed in its strict adherence but not in all cases. There may be exception. This view of mine finds support in the case of Maneka Gandhi vs. Union of India 2 SCR 1978 621. In the said decision Indian Supreme Court observed as under:-

> "**The audi alteram partem rule** <u>is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, merely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise</u>. That is why Tucker,I.J. emphasized in Russel v. Duke of Norfolk that "whatever standard of Natural Justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case" What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of situation. It may be a sophisticated fullfledge hearing or it may be a hearing which is very brief and minimal. **It may be a hearing prior to the decision or it may be a post decisional remedial hearing prior to the decision or it may even be a post decisional remedial hearing**. The audi alteram partem rule is

sufficiently flexible to permit modifications and variations to suit the exigencies or myriad kinds of situations which may arise. This circumstantial flexibility of the audi alteram partem rule was emphasized by Lord Reid in Wiseman v. Sorneman (supra) when he said that he would be "sorry to see this fundamental general principle degenerate in to a series of hard and fast rules" and Lord Hallison L.C. also observed in Pear-berg v. Party that the court "have taken in increasingly sophisticated view of what is required in individual cases" It would not, therefore, be right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The passport authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding is recalled."

(underlined by me).

39. In the decision of KANARA BANK V. V.K. AWASTHY it was further held by the Supreme Court of India:

"In view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellant, unless failure of justice is occasioned or that it would not be in public interest to do so in a particular case, this Court may refuse to grant relief to the employee concerned. It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. **In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing**.

40. Same principle echoed in the decision of Charan Lal Shahus in AIR 1990 (SC) as referred to above.

41. In the case of Charan Lal Sahu –vs- Union of India AIR 1990 (SC) 1480 it was observed:

"This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of Natural Justice can operate only in areas not covered by any law validly made. The general principle as distinguished from an absolute rule of uniform application seems to be that **where a statute does not in terms exclude this rule or prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram partam rule at the pre-decisional stage. If the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected the administrative decision after post-decisional hearing was good**."

42. In Abdul A'la Moudoodi –vs- West Pakistan, 17 Act (SC) 209, Farid sons Ltd. –vs-Pakistan 13 DLR (sc) 233 and Swadeshi Cotton Mills –vs- India AIR 1981 sc 818 the court of this sub-continent held that the principles of natural Justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute. *(Emphasis supplied)*

43. Further in the case of Fazal Bhai –vs- Custodian General, AIR 1961 SC 1397 it was held that where the statute does not require service of notice and the person sought to be affected has already filed a representation, the question would arise whether that person has really been prejudiced by the non-service of notice as the essence of the principle of fairness. *(Emphasis supplied)*

44. In our Jurisdiction we have found in the decision of Professor Golam Azam vs. Bangladesh that our Appellate Division also endorsed the view that the violation of principle of Natural Justice in a fit case may be construed by taking into consideration **post decisional hearing**. Justice MH Rahman (as his Lordship then was) observed:

> *"In case where no prior notice could be served, if, subsequent to the order, an opportunity of being heard is given to the person aggrieved, then that may be considered in certain circumstances to be a sufficient compliance of principle of Natural Justice.* ***Had the respondent been given a post-decisional hearing after his arrival in this country or after the show cause notice dated 23 March 1992 served on him then perhaps the appellant's case could not have been assailed on the ground of violation of the principle of hear the other side or fair hearing****. After hearing the respondent the Government could have omitted his name from the notification as it was done in a number of cases. The respondent's case is that his case is not at all different from those persons whose names were omitted from the notification and that his case is totally dissimilar from those persons who did not come to challenge the notification.*

45. Upon going through all these decisions we can safely say that the parties before us had placed sufficient materials to be treated that a decision on merit can be given on consideration of those materials on record. Before going into the merit of the Case it is also require to address the point of limitation that was forcefully argued by the petitioner HPCC. Here I want to reiterate the submissions of Mr. Quamrul Hoque Siddique that I have already discussed above.

46. The scheme of law regarding limitation have been enjoined in Rule 57 of PPR Rule, 2008.

> *"৫৭। প্রশাসনিক কর্তৃপক্ষের নিকট অভিযোগ দায়ের, নিস্পত্তি, ইত্যাদি।-(১) কোন ব্যক্তিকে তফসিল-২ এর বর্ণিত সময়সীমার মধ্যে লিখিতভাবে তাহার অভিযোগ দাখিল করিতে হইবে।"*

47. The Law is very much clear and settled in this regard for ventilating any grievance against the Procuring Entity in a given situation. In the context of the instant case I have found that 3 dates are important, of course in respect of 3 letters- vide 21.05.2018, 24.05.2018 and 27.05.2018 respectively Annexure-B, B-1 (in Writ Petition No. 10000 of 2018) and Annexure-"D" (in Writ Petition No. 9535 of 2018).

48. In the letter dated 21.05.2018 a formal complaint in keeping with Rule 56(গ)(5) of Rule 2008 was addressed by CNS to the Procuring Entity. I have already quoted the law. It is simply a complaint in apprehension of probable conspiracy and corruption. Later on in the letter dated 27.05.2018 where the reference of earlier letter dated 21.05.2018 has been made to the reference of date of cause of action dated 24.05.2018. Therefore, the submissions of the learned Counsel Mr. Siddique which I endorse apply in the affirmative in this context in as much as nowhere in schedule 2 Rule 56 has been mentioned rather Rule 57 have been encompassed in the said schedule for the purpose of asserting limitation within the meaning of Rule 57 of PPR, 2008. Rule 57 has already been quoted. I think the allegation dated

27.05.2018 is well within the time specified in schedule-2 as mentioned in Rule 57.At this point of course the learned Counsel Mr. Rais Uddin Ahmad has brought to our notice that the formal application so to say under Rule 56(গ)(5) was disposed by the Procuring Entity. But this is not material to us to decide the point of limitation. I hold that the Appeal has been preferred well within the time as required under law and this aspect has been well discussed by the Review Panel in the impugned Judgment itself.

49. Writ of certiorari is directed against order of public functionary and the local body as and when the public functionary or the local body are required to do a particular act under law which they are not doing or implementing or when such authority is debarred by any law from doing any act under the law which they are not obeying. Therefore, now comes the most significant aspect of the case that is the merit itself. For better understanding and appreciation of the issue before us the positive finding of CPTU while affirming the Appeal has to be quoted of all in the finding portion of CPTU has addressed that the Appeal was filed well within the time and we have also endorsed the said view of CPTU with positivity. Next is the findings which runs thus:-

"According to sub-clause 3 and 4of ITC Clause 21.1(c) under Section-2 (Proposal Data Sheet), the interested participants (bidders), amongst others, were obliged to submit experience certificate, which runs as under:

"3. Provide Client Testimonial of minimum one completed service within last 5 (Five) years on complete centralized real time online computer based solution involving software development, supply, implementation, operation, maintenance and support services and collection of Government Toll/Fees/Tax/Revenue under any Government, Semi-government or Autonomous Body of which, contract value not less than Tk. 40.00 (Forty) Crore or equivalent USD in a single contract (exchange rate 28 days prior to submission of EOI).

4. Provide Client Testimonial of minimum one completed service within last 5 (Five) years on complete centralized real time online computer based solution involving Software development, supply, implementation, operation, maintenance and support services and collection of Government Toll/Fees/Tax/Revenue under any Government, Semi-government or Autonomous Body and for such work, the yearly Toll/Fees/Tax/Revenue collection is not less than Tk. 250.00 (Two Hundred and Fifty) Crore or equivalent USD (exchange rate 28 days prior to submission of EOI)"

And wherefrom it appears that the participating bidders must have experience of rendering completed service on "Complete Centralized Rail Time Online Computer Based Solution inlvolv0ng Software Development, Supply, Implementation, Operation, Maintenance and Support Services, and Collection of Government Toll/Fees/Tax/Revenue under any Government, Semi Government or Autonomous Body" of which contract Value is not less than Tk.40.00 (Forty Crore or equivalent USD in a single contract and the collection is not less than Tk.250.00 Crore or equivalent USD.

HPCC-SEL. JV.

Against the requirement of experience certificate (as above), HPCC-SEL. JV submitted a certificate in the name of Shamim Enterprise (Pvt) Ltd. (SEL) and a few foreign agreements in the name of Hipluscard Corporation (HPCC), which are related to manufacturing and supply of "Prepaid Transportation Card/ Electronic Card". Certificate dated 24.02.2016 issued by Bangladesh Bridge Authority in favour of SEL and its JV partners reflects that the value of the contract was for Tk. 14.44.78.829.00 (Revised Tk.16,54,91,644.00) for Toll Collection, Maintenance of Toll Equipments, Software Maintenance and Modification, Operation and

Maintenance of Toll Boths and Associated Facilities [Page: ITC.21.1(C) .163 of Submitted proposal]. This certificate relates to undervalued contract without mentioning Toll Collection Figure and it does not relate to "Complete Centralized Real Time Online Computer Based Solution involving Software Development". The agreements, so filed by the HPCC-SEL JV with their proposal, not being experience certificate as asked for in the RFP, is not tenable in law and thus, deserve no consideration. However, for example one of such agreement is discussed hereunder: Agreement dated 23.03.2017 was executed between Hipluscard Corporation (HPCC) as "Card Manufacturer" and Inchon-Gimpo High way Co. Ltd. as "Operator" for "Issuance and Recharge of Hipass Plus Card" [Page-ITC 21.1(c)-61 to 65 of submitted proposal]. Neither of the agreements sub mitted by the HPCC-SEL JV with its proposal relates to "Complete Centralized Real Time Online Computer Based Solution involving Software Development" i.e. none of the parties of the agreement has, amongst others, any expertise of Software Development. Besides theses, those agreements were not authenticated by the concerned Bangladesh Embassy in order to validate them."

50. Mr. Siddique in this context has elaborated his stand in the affidavit in reply dated 05.11.2018 filed on behalf of Respondent No. 6, CNS. He has addressed all of the issues there. It has been stressed that the bidder submits documentary evidence related to completion of computer based solution involving software development, supply, implementation, maintenance and support services and collection of government toll/ fees/ text/ revenue under any government, semi government or autonomous body or which, the contract value is not less than 40 (Forty) crore or equivalent USD in a single contract. But the documents submits by the HPCC indicate that it is under contract with its client Korean Express corporation for supply of prepaid type IC (smart Card only) HPCC clearly failed to provide any documentary evidence related to toll collection software development implementation maintenance and support services of software as required under sub- clause 3 of ITC clause 21.1(c) under section 20 (proposal data sheet).

51. Further, it is noted that non compliance of clause 4 of ITC 21.1© under Section 2 has been clearly observed by the CPTU which is evident in supplementary affidavit filed by the HPCC in entire G series. There are lots of correspondences and testimonial and almost all of them are written in the letter head of HPCC and those are not even endorsed by the local Bangladesh Embassy. These are the positive findings of fact which have been categorically addressed by the CPTU while taking it's decision. Even in case of marking there is also a positive findings in the impugned decision endorsed by the CPTU and accepted in favour of the Respondent No. 6, CNS. Significantly, it has been submitted though not by an affidavit that no mark at all was given to the petitioner HPCC in this regard.

52. Logical justification together with the decisions focusing on the issues have been well articulated in the discussions as made above. Therefore, unhesitatingly I hold that the decision of CPTU in allowing the Appeal suffers from no legal infirmity.

53. Another submissions made by the learned counsel Mr. Abdun Nur in Writ Petition No.10000 of 2018 that the formation of CPTU suffers from corum non judice has no legs to stand. The law is very much clear in this respect. Rule 58(2) PPR, 2008 envisages:

"৫৮(২) আইনের ধারা অনুসারে, রিভিউ প্যানেল গনং করিবার উদ্দেশ্যে সিপিইউ, তফসিল-২ অনুযায়ী এবং নিম্নবর্ণিতভাবে সুবিদিত বিশেষজ্ঞগণের একটি তালিকা প্রস্তুত করিবে-

(ক) নিম্নবর্ণিত ৩ (তিন) শ্রেণীর প্রতিটি হইতে ১ (এক) জন করিয়া সদস্য সমন্বয়ে রিভিউ প্যানেল গঠন করিতে হইবে;

(অ) ক্রয় সংক্রান্ত আইনগত বিষয়ে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ, যাহাদের মধ্যে সরকারি, আধা-সরকারি, স্বায়ত্তশাসিত প্রতিষ্ঠানসমূহ বা কর্পোরেশনের অবসরপ্রাপ্ত সিনিয়র কর্মকর্তাগণ অন্তভুক্ত হইতে পারেন;
(আ) কারিগরি বিশেষ জ্ঞানসম্পন্ন এবং ক্রয়কার্যে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ; এবং
(ই) ক্রয়কার্য ও চুক্তি ব্যবস্থাপনার রীতিনীতি এবং অভিযোগ ও বিরোধ নিষ্পত্তির বিষয়ে অভিজ্ঞতাসম্পন্ন সুখ্যাত বিশেষজ্ঞগণ, যাহারা ফেডারেশন অব বাংলাদেশ চেম্বার অব কমার্স এন্ড ইন্ডাস্ট্রী কর্তৃক মনোনীত হইতে পারেনঃ
তবে শর্ত থাকে যে, প্রজাতন্ত্রের চাকুরীতে কর্মরত কোন কর্মকর্তা রিভিউ প্যানেলে অন্তর্ভুক্ত হইতে পারিবে না।''

54. The Review Panel in question was constituted by one District Judge, another person from FBCCI and another one was a former Secretary. Therefore, Sub-Rule 'অ' and 'ই' of 58(2) had been complied with in terms of the requirement therein and in respect of 'আ' the learned counsel Mr. Abdun Nur did not come up with any credential of the former Secretary so to make us belief that the former secretary was a person without any technical knowledge. It was his duty to show us that.

55. Therefore, these Rules should be discharged being devoid of any substance from all point of views.

56. In the result both the Writ Petitions are discharged, however, without any order as to cost. The concerned authorities are hereby directed to implement the decision of CPTU forthwith.

57. The orders of stay granted earlier by this Court is hereby recalled and vacated.

58. Communicate at once.