



## Star LAW report

## LAW week



# Question of financial interest of the state calls for transparency

**Appellate Division (Civil Jurisdiction)  
The Supreme Court of Bangladesh  
Hyundai corporation**

**V  
Sumikin Bussan Corporation & others  
Before Mr. Justice Mahmudul Amin Choudhury, Chief  
Justice, Mr. Justice Mainur Reza Chowdhury, Mr.  
Justice Mohammad Ruhul Amin and Mr. Justice  
Mohammad Fazlul Karim  
Judgment: December 4, 2001  
Result: Petition dismissed**

## Background

**Mr Ruhul Amin J:** This leave petition has been filed against the judgment and order of 4 June 2001 by a Division Bench of the High Court Division in Writ Petition No. 7 of 2001 making the Rule absolute declaring the impugned Memo dated 1-1-2001 to have been made without lawful authority and the result of the price bid opened on 21 September 2000 accepting the decision by the Chittagong Port Authority in its Board Meeting No. 8823 dated 13 September 2000 to be declared to have no legal effect.

Facts, in short, are that Chittagong Port Authority (respondent no. 2) floated tender on 14-1-2000 fixing 19 June 2000 as the last date of dropping bid for supply of four units of Rail Mounted Quay Gantry Cranes with necessary spare parts and service as per specification of the bidding documents. The bidder or bidders were required to be of eligible member countries of Asian Development Bank with which Bangladesh has commercial relation. The petitioner and 6 others dropped their responsive bid in "two-envelope system" one for technical bid and another for price bid. Technical bid was opened on 20 June 2000 and the same was examined by Technical Evaluation Committee which found the petitioner, respondents no. 1, 9 and another substantially responsive. The Technical Evaluation Committee submitted its report on 6 August 2000. The report of the Technical Evaluation Committee was examined by Supervising Committee and the said committee submitted its report on 7 September 2000 recommending respondents no. 1, 9 and another as being responsive and the petitioner was considered non-responsive. The Board of Chittagong Port Authority (Board) in its meeting held on 13 September 2000 took resolution no. 8823 declaring the three bidders which were found responsive by the Supervising Committee as responsive. In the light of the decision of the Board letters were issued to the responsive bidders informing them 21 September 2000 as the date for opening of price bid and the price bid of the respective bidders were opened on that date. On 8 July 2000 petitioner addressed a letter to the Chittagong Port Authority making certain clarification as to their bid proposal. The Board thereafter by its resolution no. 8889 dated 18 December 2000 revised its earlier decision as to the petitioner being non-responsive and thereupon declared petitioner as responsive in technical bid. On 1 January 2001 Chittagong Port Authority wrote a letter to the petitioner intimating that on 10 January 2001 his price bid would be opened.

In the background of the said facts respondent no. 1 moved the High Court Division in its writ jurisdiction and obtained Rule challenging legality of the Board's decision dated 18 December 2000 revising its earlier decision dated 13 September 2000 and thereupon intimating the petitioner date of opening of its price bid contending that as per terms of the tender if a bidder is found responsive on its scrutiny of technical bid only then price bid of the said responsive bidder would be open and in the case of the petitioner Technical Evaluation Committee and the Supervising Committee have found the petitioner non-responsive and that the Board also declared the petitioner non-responsive and thereupon price bid of the respective bidders having already opened any decision on revising the earlier decision finding the petitioner responsive for opening of the technical bid as well as price bid being contrary to the terms of the tender, the decision of the Chittagong Port Authority as communicated by its letter dated 1 January 2001 to the petitioner was illegal and that as per terms of the tender Chittagong Port Authority is legally bound to give effect to its decision dated 13 September 2000.

The petitioner, (respondent no. 8 in writ petition) contested the Rule obtained by respondent no. 1, petitioner in the writ petition, contending that he was found responsive by the Board on consideration of the materials that were left out of consideration earlier. It was also contended that the writ petition was not maintainable since final decision as to acceptance of the bid was not made.

The Chittagong Port Authority, respondent no. 2 herein, contested the Rule supporting the contention of the petitioner. Respondent no. 9 got himself impleaded in the writ petition and supported the writ petitioner contending that after opening of the price bid of the technically responsive bidders fresh declaration declaring the petitioner responsive was contrary to the terms and conditions of the tender document. The High Court Division made the Rule absolute.

As against the judgment and order of the High Court Division the petitioner has filed Leave Petition No. 171 of 2001 and the Chittagong Port Authority filed Leave Petition No. 1770 of 2001. The Chittagong Port Authority obtained order staying the operation of the High Court Division from the chamber of this Court. Later on from the chamber, Chittagong Port Authority obtained permission to open the technical bid as well as the price bid of the petitioner for evaluation and the same has already been done.

The Chittagong Port Authority later on filed an application with the prayer for dismissal of the leave petition for non-prosecution and this Division by the

Taka ten crore less than that of respondent no. 1's price bid. The learned Counsel for the petitioner submits that since petitioner's price bid is less for an amount of Taka 10 crore from that of the amount offered by the respondent no. 1, then keeping in view the question of economic expenditure of public money the bid of the petitioner in all fairness merits consideration. He also submits that since final decision as to acceptance of the bid in connection with the procurement of Rail Mounted Quay Gantry Cranes has yet not been finalised by the competent authority, the Chittagong Port Authority should place the bids of the petitioner along with the bids of the bidders who have earlier been found responsive before the decision making authority so that the decision making authority keeping in view the financial interest of the State finalises its decision.

In repelling the aforesaid submission of the learned Counsel of the petitioner, the learned Counsel, entering caveat for the respondent no. 1, submits that upon acceptance of the said submission if direction is made to the Chittagong Port Authority that would amount to stepping into by the Court in the domain of the decision making authority and interference in the matter of running the domestic business of the Chittagong Port Authority. This submission of the learned Counsel entering caveat for the respondent no. 1 is not well founded one since transparency in the policy/decision making as well as in the functioning of the public bodies is desired, for more than one reason, and particularly in the matter where financial interest of the State is involved, transparency of the decision making authority is a recognised matter. The learned Counsel for the petitioner, in support of his submission that the Court in the exercise of its jurisdiction of judicial review of executive functions as well as activities of State functionary in respect of the contractual matter considered the rationality and reasonableness of decision made, has referred to the decision in the case of *Tata Cellular vs Union of India*, reported in AIR 1996 (SC) 11 where in a situation like the instant one the Supreme Court of India has observed:

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such unfairness is set right by judicial review.

The observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention, the other covers the scope of the Court's ability to quash any administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

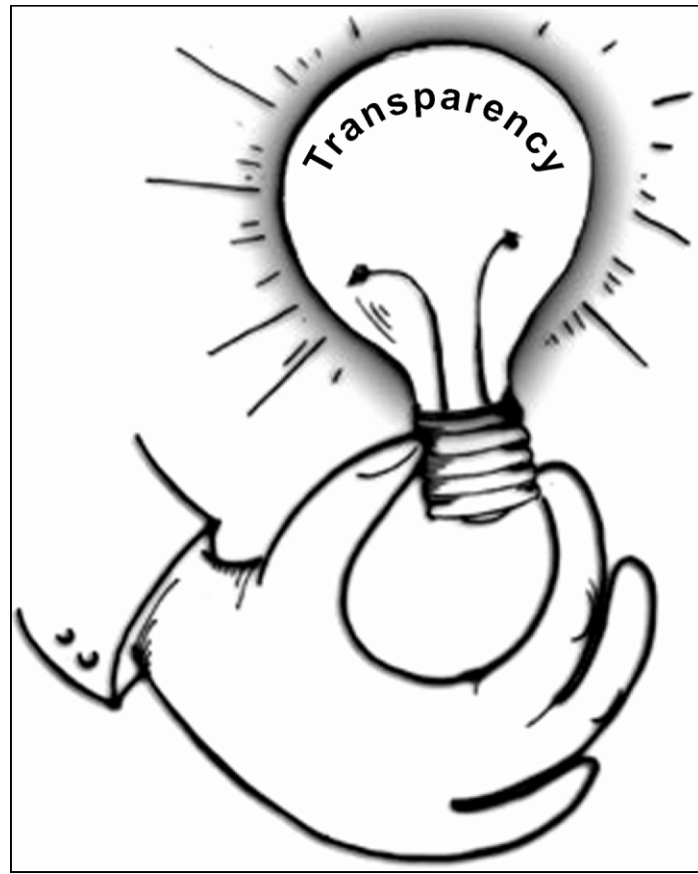
Since question of financial interest of the State is seriously involved in the instant case, in our view the Chittagong Port Authority should place the papers relating to the bid of the petitioner along with the bids of other 3 responsive bidders before the decision making authority that would ultimately finalise the matter of procurement of the cranes.

## Decision

As we have already found that respondent no. 2 (Chittagong Port Authority) declared the petitioner as responsive bidder in violation of the tender's terms and conditions and that after opening of the technical as well as financial price bid of the bidders who were found by the Board responsive in its meeting held on 13 September 2000 the action of the Board subsequently declaring the petitioner as responsive has rightly been declared without lawful authority by the High Court Division.

In aforesaid view of the matter this petition is dismissed.

Rokanuddin Mahmud, Senior Advocate, instructed by Md Ataur Rahman Khan, Advocate-on-Record, for the petitioner. Syed Ishtiaq Ahmed, Senior Advocate, Dr Rafigur Rahman, Senior Advocate instructed by Serajur Rahman Advocate-on-Record, for respondent no. 1.



order dated 4 December 2001 dismissed the leave petition of the Chittagong Port Authority as prayed for.

## Deliberation

Actions of respondent no. 2 i.e. revision of its previous decision no. 8823 dated 13-9-2000, whereby petitioner was found non-responsive, by the subsequent decision no. 8989 dated 18-12-2000 and thereupon declaring petitioner's technical bid responsive is unauthorised since the later decision on revision of previous decision was made on the basis of materials which the respondent no. 2 in law is not authorised to take into consideration in arriving at decision as to the bid of the petitioner and that entanglement of the said material was also violative of the terms and conditions of the tender document.

While the petition for leave to appeal of the Chittagong Port Authority was pending for hearing that said authority obtained permission of the Court, because of the order of stay of the judgement of the High Court Division, for valuation of both technical bid and price bid of the petitioner. The learned Counsel appearing for the petitioner has submitted that evaluation of the bids has already been done and that upon evaluation petitioner's price bid is

## READER'S queries

### Your Advocate



Your advocate is **Mr. Probir Neogi** of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your problems.

**Q:** I have bought a piece of land in Chittagong City. I have a plan to construct a multistoried building on the land by taking bank loan. As I work abroad I cannot stay in the country for long. My brother, who stays in Chittagong, will materialise my plan. So far as I know I have to execute a power-of-attorney in favour of my brother so that he can take bank loan and carry on the construction conveniently. My queries are: What kind of power-of-attorney should I execute and how can I execute it? What powers should I confer upon my brother through the power-of-attorney? When can I revoke the power and can I revoke it whenever I want? What precautions should I take to prevent any abuse of the power? Please advise.

**Dr. Arif**  
Dewanhat, Chittagong.

**Your Advocate:** Generally there are two kinds of powers-of-attorney, general power-of-attorney, where the power authorises the attorney to act generally or in more than one transaction, and special power-of-attorney which is with regard to single transaction. When powers conferred include power to transfer, it requires registration. In other cases it can be executed by an affidavit affirmed before the notary public. In order to materialise your plan through your brother you have to confer upon him all such powers as are required such as powers to obtain approval of construction plan from Chittagong Development Authority (CDA) and bank loan, to sign and execute all necessary papers in this respect etc. But power to transfer is not required to be conferred in your case. A power-of-attorney can be revoked by its executant by execution of a deed of revocation. The only exception is that where the power is coupled with an interest (of the attorney/agent) i.e. the power-of-attorney is a part of security, then it is not revocable, in absence of express contract, until the interest has been satisfied or abandoned. However, the power-of-attorney you require to execute is not one coupled with interest. The safeguards against your apprehended abuse are firstly, in case of abuse it can be revoked at your option and secondly, you will not be liable for any act done by your attorney/agent in excess of the powers conferred upon him.

## LAW letter

### Independent investigation agency for criminal cases

Public life becomes insecure and unbearable due to terrorist activities. It is very unfortunate that the top terrorists are getting indulged from the law enforcing agencies. If they get such shelter from the protector of law & order, then it will be difficult to establish rule of law in the society. Top criminals are reportedly acquitted from the charges. Aren't the police cordial for punishing the culprits? Terrorists can easily manage the police to avoid charges. Even after a serious complaint, police submit final report to the effect that they have not found any proof of the case and the court finds nothing to bring charge against the criminals. Police are liable for producing witnesses & evidences of a case, Alamat, seizure list etc. for proving the case in the court. But they have miserably failed to perform their duties honestly & sincerely. There are widespread allegations of corruption; inefficiency against the police. Above all, police maintains a secret deal with the top terrorists in lieu of handsome toll. Merits of the cases can easily be weakened by the police report. So, it has become very tough for the government to keep the top terrorists in jail.

Over all law & order situation in the country is not good. It is deteriorating day by day and the terrorists have become desperate because of weakness of our law enforcing agencies. It is also alleged that terrorists are always getting support from ruling party. Police can not investigate the case independently due to political pressure. We urge the government to take necessary steps immediately in order to improve the efficiency of the investigation agencies and make their investigation meaningful. Establishment of an independent investigation agency for the criminal cases may be considered in this respect.

**M.H.Bari, Khulna.**

## LAW lexicon

### Estoppel

Estoppel is a rule of law that when person A, by act or words, gives person B reason to believe a certain set of facts upon which person B takes action, person A cannot later, to his (or her) benefit, deny those facts or say that his (or her) earlier act was improper. Estoppel is a bar which precludes someone from denying the truth of a fact which has been determined in an official proceeding or by an authoritative body. According to the principle of estoppel the law, in certain situations, refuses to allow a person to deny facts when another person has relied on and acted in accordance with the facts on the basis of the first person's behavior.

### Prima facie

Prima facie, a Latin term, refers to a legal presumption which means "on the face of it" or "at first sight". Law-makers will often use this device to establish that if a certain set of facts is proven, then another fact is established prima facie. For example, proof of mailing a letter is prima facie proof that it was received by the person to whom it was addressed and will be accepted as such by a court unless proven otherwise. Other situations may require a prima facie case before proceeding to another step in the judicial process so that you would have to at least prove that at first glance, there appears to be a case.

Source: The Lexic Law Library's Lexicon & Duhaime's Law Dictionary.

### WMA Medical Declaration



I have heard that a doctor has to make certain pledge before s/he is formally inducted into the medical profession. The 'Law & our rights' column quoted the same pledge in the DS dated August 18, 2002 as the World Medical Association (WMA) Declaration adopted way back in 1948. You have done a great service to ordinary folks like me by publishing the WMA Declaration. The declaration tells in very clear terms what are a doctor's moral obligations to his patient.

I strongly feel that the WMA Declaration should be translated into Bengali and prominently displayed in front of all our government hospitals and private clinics. Our Ministry of Health can make this display mandatory for all hospitals and clinics by issuing an executive order. I do not think any sensible person, including the doctors, will oppose this idea. Rather, common people will be benefited to learn what they can expect from their doctors. This might also inspire all doctors, specially the delinquent ones, to discharge their professional duties well. In Bangladesh we all are very aware of a professional organization of the doctors called Bangladesh Medical Association (BMA). Can we expect BMA to take measures to motivate their members to follow the WMA Declaration, and also arrange to display this declaration in Bengali in front of all hospitals and clinics, if the government fails to do so?

**Ashraf, New DOHS, Mahakhali**

### Corresponding Law Desk

Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk; interactive email lawdesk20@hotmail.com

### ETV regime comes to an end

The Appellate Division of the Supreme Court dismissed the review petition of the ETV upholding the High Court Division's verdict. On March 27, the High Court Division declared the licensing agreement of the ETV illegal upon a writ petition. The counsels of the ETV filed a leave to appeal petition to the Appellate Division, which was rejected, by the court on 2 July. But the court allowed them to file a review petition against the judgement. Consequently, they filed a review petition. The hearing of the review petition began on 24 August. The full bench of the Appellate Division dismissed the review petition on 29 August. The Government put the ETV's terrestrial broadcast to an end after the judgment of the Appellate Division. - Law Desk.

### Probe Commission's report on Shamsunnahar Hall incident

The Judicial Probe Commission headed by Justice Tafazzul Islam has concluded in his report that the Vice-chancellor, Proctors and the Provost of the Shamsunnahar Hall are responsible for the police atrocity. They were made responsible as they failed to ensure security of the students as the guardian of the campus. The Commission also found that both male and female police personnel stormed into the Shamsunnahar Hall of Dhaka University, beat up and assaulted the students and arrested some of them during the raid in the early hours of 24 July. The Judicial Commission was formed to investigate the real fact behind the police atrocity at the hall and find out the responsible persons. The Commission has recorded the statements of 67 people including the former Vice-chancellor and the Inspector General of Police (IGP). It has found the police statement self contradictory and inadequate to explain the situation. Police confessed before the Commission that they had entered the hall on the instruction of the assistant proctors, which was denied by the latter. They also admitted that they entered the hall at 12.30 am upon hearing a false alarm from room no.235 of the hall. The case filed against 18 female students was false and subsequent arrest of the female students as well as to put them in police lockup was improper, according to the Commission. The report of the Commission was scheduled to be submitted on 26 August. However, it could not be finalised due to a technical problem in computer. The Commission is working hard to finalise the report. - The Daily Star, 27 August.

### Crimes against women and children on the rise

Crimes against women and children have taken a serious turn all over the country. Bangladesh Shishu Odhikar Forum (BSAF) organized a opinion sharing meeting where the speakers said that child killing had gone up due to predominance of cruelty, and violence all over the country. A total of 418 children were killed and more than 400 were subjected to rape during the last seven months in different parts of the country. Of the victims 59 were killed after rape, 17 for dowry and 342 for other reasons. Explaining the reasons behind it the speakers told that social deviations, lack of rapid police actions and absence of punishment of the killers left the children vulnerable. On the other hand a total of 368 incidents of women repression took place during the first five months of this year, according to police report. According to non-Governmental sources, 100 women were killed for dowry, 12 were killed after rape, 1 was killed by acid throwing and 15 committed suicide in shame after rape. Besides, 368 women were subjected to rape during this period. - Law Desk.

### Consumers cheated in Narail

The consumers are cheated in Narail District as non-iodized salt is being sold in all markets defying government's ban. The government strictly prohibited the production, storage, distribution and sale of non-iodized salt across the country. Violation of the government's order is a punishable offence. But a section of corrupt traders is marketing non-iodized salt and selling it in packets of iodized salt with impunity bribing the officials concerned, local people alleged. The innocent people are purchasing the salt due to cheap price. -The Bangladesh Observer, 21 August.

### Adulterated food flooded Panchagarh markets

Adulterated food items and poor quality of commodities have flooded the markets of Panchagarh district. According to physicians a large number of people have been suffering from various diseases after consuming spurious food and poor quality of commodities. -Law Desk

### Are the law enforcers liable?

The government alleged that insincerity and inefficiency of the field level police officers are behind the failure to control the law and order situation. Recent incidents of abduction and killing of children have added to the concern at different levels of the government over law and order situation. The Cabinet on Law and Order, which took around 162 decisions at a series of meetings and brought massive changes in the police administration to improve the situation, has failed to check the crimes. Both the cabinet body and Ministry of Home Affairs sources identified several factors including the negligence of the police which have been obstructing improvement of law and order. Besides, conflict between the home minister and the state minister for home and sharp division of the police officials regarding the implementation of the decisions of the cabinet body have also caused the government to fail. The government has already taken various short term and long term measures to deter the root of the crimes and deal with criminals as well as their godfathers. Enactment of Anti Terrorism Law and employment of the BDR personnel in the city to check crimes failed due to a section of law enforcers' negligence to duty. - The Daily Star, 24 August.

### ILO's programme against child labour

A Memorandum of Understanding (MOU) was signed recently by ILO, UNICEF and BGMEA against the child labour in Bangladesh. This programme is a sequel of the ILO's International Programme for Elimination of Child Labour. This programme will help bring an end to child labour in the Garments sector. -The Bangladesh Observer, 24 August.

### Government to update laws on IPR

The Government will update the laws on Intellectual Property Rights (IPR) to make them conform to the WTO's trade related aspects of the Intellectual Property Rights (TRIPS) agreement. The Ministry of Commerce is now scrutinizing the draft law, which is likely to be submitted to the Parliament soon. Commerce Minister Amir Khasru Mahmud Chowdhury said this while addressing a seminar "Role of Intellectual Property Rights in Business Strategy and Development". In view of poor enforcement of IP rights the commerce minister stressed for the consumers' awareness about the quality of various products. -The Financial express, 27 August.

### Increasing trend in juvenile delinquency

Juvenile delinquency is increasing alarmingly in the country, mostly in the capital city. Among the criminals arrested by the police, 40% were juvenile, according to police source. They are engaged in crimes like theft, extortion, and abduction and even in murder with firearms. More than 40 juveniles were arrested by the police in various charges in the month of July. They were involved in criminal activities by different criminal gangs in most cases, according to police source. -Daily Sangbad, 27 August.

### Amendment of Pakistan Constitution

President Pervez Musharraf had amended the Constitution of Pakistan in order to give himself powers to sack an elected parliament. The military ruler of Pakistan has formalised the presence of military in politics by this amendment. This amendment will empower the president to dismiss the National Assembly at his discretion. He also formalised a National Security Council, which includes Military Chief and 8 civilian political leaders. Pervez Musharraf would be *ex officio* president of the council. The Council would serve as a forum for consultation on important foreign policy decisions and national issues. Opposition parties of Pakistan, Islamic groups and legal experts strongly rejected the constitutional changes by military ruler that will help him capture overall power of Pakistan after October general election. "These changes make president and armed forces more powerful than that of elected representatives" according to Hamid Khan, the president of the Supreme Court Bar Association of Pakistan. - The Daily Star, 23 & 24 August.