

BERUBARI CASE



Kazi Mukhlesur Rahman vs. Bangladesh and another

26 DLR (AD) 44

Bench

ASM Sayem, C.J. (author judge), A.B. Mahmud Hossain J, Abdullah Jabir J, and Ahsanuddin Choudhury J.

Counsels

1. Ahmad Sobhan, Senior Advocate, Abdul Malek, Md. Ansar Ali, A Z M Khalilullah, Md. Fazlul Karim, Md. Ruhul Amin [For the Appellant]
2. Syed Ishtiaq Ahmed, Additional Attorney General, K Z Alom, Deputy Attorney General, Ismailuddin Sarker, Mahmudul Islam, A.W. Bhuiyan Asst. Attorney general [For the Respondents]

Short Facts

On 10 September 1958, the then Prime Ministers of Pakistan and India signed a treaty resolving territorial disputes popularly known as Noon-Nehru Pact. The pact horizontally divided the Berubari Union no. 12 and consequently southern half of the union together with the adjacent enclaves fell on the share of erstwhile East Pakistan. However, due to tensed relations between the two arch-rivals actual possession was not delivered to East Pakistan.

The article 2(a) of the constitution of Bangladesh defined territory of Bangladesh as territory comprising the then East Pakistan on 26 March 1971.

On 16 May, 1974, in Delhi, the Prime Ministers of Bangladesh and India signed an agreement on demarcation of land boundaries popularly known as Mujib-Indira Treaty or Delhi Treaty. Clause 14 of article 1 of the treaty provided with retention of southern half of the South Berubari Union No. 12 by India in exchange of retention by Bangladesh of Dahagram and Angorpota enclaves along with perpetual lease of "Tin Bigha corridor". Unlike the Noon-Nehru Pact, the Delhi Treaty was subject to ratification by the parties. The Appellant filed a writ petition before the High Court Division challenging the Delhi Treaty which was summarily rejected. However, the High Court Division granted certificate under Article 103 (2) (a) of the constitution.

ISSUES BEFORE THE COURT

A. Competency of the appeal as well as maintainability of the application

The respondents raised four objections regarding the competency of the Appeal and the maintainability of the Application as described below:

- I. The certificate was plainly defective and consequently the appeal was incomplete. Respondents were prejudiced by summary rejection of the petition as they were denied to file affidavit incorporating material facts.

The wording of the certificate issued runs as followed:

Certificate for leave, as prayed for, under article 103 (2) (a) of the constitution is granted.

The certificate is defective because it gives no indication of judicial mind to the question as to whether the case is a fit one for appeal to this Division (Para-7). The grant of certificate of fitness for appeal is judicial function which should be performed properly with the care and certitude of a judicial mind and not as a mechanical act. The Appellate Division will strike down a proceeding started on a defective certificate which does not involve a substantial question of law as to interpretation of constitution. Mere granting of certificate will not bind the Appellate Division. (Para-6)

The High Court Division should not pass summary disposal while granting certificate. Such a mechanical approach is strongly disapproved [Para- 6]. However, the appeal before the Appellate Division is not incompetent on the score of defective certificate because the Appellant filed leave to appeal by way of abundant caution which involves a constitutional question.

- II. The Appellant does not have standing to move with the petition. The Appellant not being resident of the part of the territories involved in the Delhi Treaty he could have no interest in the affected territories. Therefore, he is not a person aggrieved within the meaning of article 102 (2) of the constitution.

The Appellant contended that the remedies under 102(2) of the constitution are discretionary; the words 'any person aggrieved' should be construed liberally and

given a wide meaning. Although the personal interest pleaded by the petitioner may be found slight or too remote in the facts and circumstances of the case.

The writ being an extraordinary relief the complainant must be in need of it and there must be absence of adequate relief. Similarly, mere invalidity of statute is not sufficient. He must also have to show sustenance or immediate danger of sustaining some direct injury as a result of its enforcement not merely an indefinite injury suffered in common with the people generally. The Appellant also did not dispute that the right to be enforced must ordinarily be personal or individual right of the petitioner himself except in the case of habeas corpus or Quo warranto.

The question is whether the Appellant can be given standing considering the special feature of the instant case.

Rights of the people are involved in the instant case. It is not expected that any person residing the territory involved in the Delhi treaty will come before the court as admittedly the territory is under administrative control of India. (para-15)

The Appellant's argument is accepted the question of *locus standi* is discretionary. The court held in para 17.

It appears to us that the question of *locus standi* does not involve the court's jurisdiction to hear a person but of the competency of the person to claim a hearing so that the question of is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case.

The Appellant is heard on the face of constitutional issue of grave importance raised in the case involving an international treaty affecting cessation of territory of Bangladesh and complaint as to impending threat to his fundamental rights guaranteed under the constitution namely, right move freely, to reside and settle in any place as well as right to franchise. The rights asserted are not local. They pervade and extend to every inch of the territory of Bangladesh stretching up to the continental shelf. (para-18)

- III. Treaty making is an act of state. Therefore, Delhi Treaty is not amenable to judicial review.

An act of state is an act of executive as a matter of policy in the course of its relations with another state, including its relations with the subjects of the state, unless they are temporarily within the allegiance of the crown. Typical acts of state are making and performances of treaties, the seizure or annexation of land or goods in the right of conquest, declaration of war or blockade. (Halsbury's laws of England) (para-19)

However, the book also pointed out that 'there can be no act of state against anyone who owes allegiance to the crown.'

In peace time the plea of act of state is not available in an action involving deprivation of rights and liberties of the citizens. The court will always intervene to examine the propriety of taking defense against a citizen. The jurisdiction of court cannot be ousted by merely raising plea of act of state. (Para-19)

- IV. The writ petition before the High Court Division was premature on two grounds. Firstly, the treaty making has two phases: formation and performance. Mere making of treaty does not affect the citizen. So, the Appellant should wait till performance of the treaty. Secondly, the Delhi treaty is subject to ratification and exchange of instruments of ratification between parties. Thus the treaty is subject to stipulation before which the petition was premature.

The first argument is unable to be accepted. In the instant case mere signing of the treaty had resulted in an impending threat to the Appellant's right as a citizen. (Para-20)

The second argument of the respondents has substance. The Delhi Treaty is subject to ratification and exchange of instruments of ratification. Thus the treaty cannot be said to be an executed treaty despite its dispositive nature. Therefore, the petition before the High Court Division was premature. The underlined reason is in language of the court,

[T]here can be no question of a document being declared to be without lawful authority and of no legal effect when the document itself stipulates that it will be effective only on the happening of a certain event in future.

The appeal is liable to be dismissed on this ground alone. However, the court heard the case on merit in relation to the question of interpretation of article 55 (2) of the constitution and found itself responsible to express its opinion on the issue. (para-21)

B. Whether the Prime Minister can unilaterally determine the boundaries of the country?

It is admitted that treaty making is an executive act so does ratification of a treaty where required. Under article 55 (2), the executive power of the republic shall be exercised by or under the authority of the Prime Minister. It is also settled that the parliament has constitutional control over the Executive. Under clause (2) of article 143 of the constitution parliament is vested with the power to determine the boundaries of the territory of the republic. Thus the Prime Minister cannot unilaterally determine the territory of the republic bypassing the parliament. This can only be done by law enacted by the parliament. (para- 24)

C. Whether the fourteenth paragraph of article 1 of Delhi Treaty providing with retention of southern Berubari Union 12 by India resulted in cessation of territory of Bangladesh?

It is true that the actual possession of the southern Berubari Union No. 12 was not delivered. However, that will not affect the right of Bangladesh over the parts of the territory. The question of sovereignty was already settled and recognized by common consent and conduct of both India and Pakistan. Moreover, the settled principle in international law cases is that sovereignty passes over even though possession is not handed over. Therefore, the southern half of the south Berubari Union no. 12 formed an inseparable and integral part of the territory of Bangladesh in view of article 2 (a) of the constitution. "Agreeing to their retention by India as stipulated in Delhi Treaty cannot but, therefore, cession of territory of Bangladesh." (para- 26)

Recourse to article 143 would be necessary even if the treaty involved settlement of territorial disputes with India and an enactment would be required. The Prime Minister under article 55 (2) cannot sign a treaty involving determination of territory and more so, cession of territory. Such treaty can only be concluded by necessary enactment by parliament, in case of determination of territory an enactment under article 143 (2) and

in case of cession of territory by amending article 2 (a) of the constitution under article 142. (para-38)

The Delhi Treaty involving cession of territory clearly requires amendment of article 2 (a) of the constitution before ratification and implementation.

Conclusion

Though the Petitioner was not an inhabitant of those enclaves, the Court accepted his *locus standi* considering the special feature of constitutional importance. The grave importance of the issue of cessation of territory has created an opportunity for the Petitioner to prove his *locus standi*. His fundamental rights to move freely and reside and settle in any place of the country have been violated. Therefore, the Court considering the importance accepted his locus standi although he was not directly affected by the provision of the Delhi Treaty.



Mohammad Shishir Manir

Advocate

Supreme Court of Bangladesh