

Present:

***Mr. Justice Siddiquir Rahman Miah  
and  
Mr. Justice K. M. Kamrul Kader***

Criminal Miscellaneous Case No. 2334 OF 2004  
With  
Criminal Miscellaneous Case No. 2395 of 2004  
With  
Criminal Miscellaneous Case No.6339 of 2004  
And  
Criminal Miscellaneous Case No .3987 of 2004

IN THE MATTER OF:

Rear Admiral M. Nurul Islam, NCC,PSC (Retd.)

-----Accused petitioner

(In Criminal. Misc No.2334 of 2004)

Commodore Harunur Rashid (Retd.)

-----Accused petitioner

(In Criminal. Misc. No.2395 of 2004)

Commodore (Retd.) M. Shahabuddin (E) psc (PNo-34)

-----Accused petitioner

(In Criminal. Misc. No.6339 of 2004)

Commodore A.K.M. Azad (Retd.)

-----Accused petitioner

(In Criminal. Misc. No.3987 of 2004)

**Versus**

The State-----opposite party

Mr. Mohammad Mehedi Hasan Chowdhury with

Mr.Sheikh Fazle Noor Taposh and

Mr. Mohammed Selim Hahangir, Advocates.

-----For the petitioners (In all the cases)

Mr. Md. Khurshid Alam Khan, Advocate

-----For Anti-Corruption Commission

Mr. K.M. Zahid Sarwar, D.A.G. -----For the State

Heard on: 23.01.2013, 29.01.2013 & 30.01.2013

And

**Judgment on: 14.02.2013**

**K. M. Kamrul Kader, J.**

The supplementary affidavits do form part of these applications.

These Rules were issued in the above numbered criminal Miscellaneous Cases upon 4(four) separate applications filed by 4(four) accused petitioners challenging the proceeding of Special Case No. 56 of 2003 (formerly Metropolitan Special Case No. 72 of 2003) arising out of Tejgaon Police Station Case No. 34 dated 07.08.2002 corresponding to BAC B.R. No. 81 of 2002, under sections 409/418/109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947. The Rules were issued in the following terms:

In Criminal Miscellaneous Case No. 2334 of 2004 the Rule was issued calling upon the opposite party to show cause as to why the proceeding in Special Case No. 56/03 (formerly Metro. Special Case No. 72/03) arising out of Tejgaon Thana Case No. 34 dated 7.8.02, now pending before the court of Divisional Special Judge , Dhaka, should not be quashed.

In Criminal Miscellaneous Case No. 2395 of 2004 the Rule was issued calling upon the Opposite Party to show cause as to why the proceeding in Special Case No. 56/03

(Formerly Metro. Special Case No. 72/03) arising out of Tejgaon P.S. Case No. 34 dated 07.8.02 corresponding to BAC GR Case No. 81 of 2002, now pending in the court of Divisional Special Judge, Dhaka, should not be quashed.

In Criminal Miscellaneous Case No. 3987 of 2004 the Rule was issued calling upon the Deputy Commissioner, Dhaka to show cause as to why the proceedings in Special Case No. 56 of 2003 (formerly Metro. Special Case No. 72/03) arising out of Tejgaon P.S. Case No. 34(08)02 corresponding to BAC GR Case No. 81 of 2002, under section 409/418/109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947 now pending in the court of Divisional Special Judge, Dhaka, should not be quashed.

In Criminal Miscellaneous Case No. 6339 of 2004 the Rule was issued calling upon the Deputy Commissioner, Dhaka to show cause as to why the proceedings of Special Case No. 56 of 2002, now pending in the court of Divisional Special Judge, Dhaka, arising out of G.R. No. 81 of 2002 should not be quashed.

Since all the applications under section 561A and have challenged the same proceeding, all the applications were heard together and by a single judgment these 4 Rules were disposed of.

Short facts relevant for the purpose of disposal of the Rule, in brief, are that one Mir Md. Joynul Abedin Shibli, an Anti-Corruption Officer (Task Force-3) of the Bureau of Anti Corruption lodged a First Information Report with the Tejgaon Police Station, which was subsequently registered as Tejgaon P.S. Case No. 34 dated 07.08.2002 under sections 409/418 and 109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act (Act No. II of 1947) was started alleging *inter alia* that in the financial year of 1995-1996 a proposal for purchase a Frigate for Bangladesh Navy with necessary specifications was sent to the Director General of Defence Purchase (hereinafter referred to as DGDP) from Naval Head Quarter. The Director General of Defence Purchase (DGDP) as per their purchase policy floated international Tender for such purchase. CSTC, China bid for the supply of F22B Frigate

and its bid was the lowest in the tender floated in 1995-1996, but without showing any justification a decision was made to purchase Frigate from Daewoo Corporation of South Korea. The decision was taken on the basis of a summary dated 06.08.1996 that contained an objection from the then Finance secretary, a decision was taken in an inter-ministerial meeting held on 31.03.1997, under the Chairmanship of the then Prime Minister to float a second international tender on 10.05.1997 for purchase of a Frigate. Subsequently, nine bidders submitted 24 bids in response to the said tender. BOMETEC PLA of China became the lowest bidder at U.S. \$ 68.00 Million, but the work order was issued for an unproven design Frigate, in favour of the 4<sup>th</sup> lowest bidder Daewoo Corporation of South Korea at U.S.\$ 99.97 Million, equivalent to Tk. 447.00 crore and an agreement was signed on 11.03.1998. Daewoo Corporation was not a pre-qualified bidder because its bid did not contain 28 equipments mentioned in the tender documents. It was purchased despite not being qualified to consider as a Frigate for lack of equipments and other

facilities and the unproven design. The Frigate was brought to Bangladesh without any sea trial before the due date. The then Prime Minister signed the purchase proposal which received on 01.07.1996 by backdating it as 30.6.1996. The Accused No. 4 wrote a letter to Daewoo Corporation on 24.06.1996 about it, even before issuance of the work order and accused No. 2 on 26.6.1996 recommend to purchase of the Frigate. The accused persons acting in collusion to each other brought this frigate, which caused financial loss at about Tk. 447.00 crores more or less.

Later the Informant Mir Md. Joynul Abedin Shibli, Officer of the Bureau of Anti Corruption, Dhaka as Investigating Officer, investigated the case and on conclusion of investigation he submitted charge sheet bearing No. 515 dated 03.08.2003 against these accused petitioners under sections 409/418 and 109 of the Penal Code and section 5 (2) of the Act-II of 1947.

Since the case was investigated by the Bureau of Anti-corruption. We need to take into consideration the charge sheet as well. The Investigating Officer in his

charge sheet stated inter alia that the then Government on 10.12.1994 took a decision to purchase a Frigate as per requirement of the Navy. Accordingly, in the year 1995-1996 the Director General of Defence Purchase (DGDP) presided over a committee consisting of 8 officers, which was formed by the Navy to examine the offers made by the different companies. Committee found Frigate's offer from Belgium and Argentina will fulfil the requirements of the Navy and acceptable. Accordingly, the committee recommended to made inspection of this Frigate and a team of Bangladesh Navy visited Belgium and Argentina in 1995. In 1995 -1996 another 10 offers were received and another committee was formed in July, 1996, who made a primary selection of five offers, as the offer of the Deawoo was not in the said five as it did not include 28 items, it was an incomplete Frigate and those are shown as owner furnished equipment in the offer. A delegation from the South Korea visited and met the Neval Chief in the April, 1996 including members of the Deawoo Corporation, thereafter, some Officials of the Navy tried to procure this

unproven design Frigate from the Deawoo Corporation. On 5.9.1995 Deawoo (Bangladesh) Co. Ltd. was formed with the help of accused No. 5. The Evaluation committee of Commodore M. Shahabuddin (1996) selected Deawoo frigate and submitted a report on 12.6.1996, in fact it was not approved by the DGDP. The Bangladesh Navy issued a letter on 24.06.1996 to the Deawoo Corporation for supply of the frigate as per previously signed Memorandum of Understanding. On 30.6.1996 a summary was prepared for the Prime Minister who signed it on 30.06.1996. In fact it was sent to the Office of the Prime Minister on 01-07-1996, to pay 10% down payment, an amount of US\$ 10 Million to the Deawoo Corporation for the said Frigate in the Financial Year 1995-96. The Director General of Defence Purchase (DGDP) sent a letter on 11.07.1996 to the Ministry of Finance asking for fund for payment in financial year of 1996-1997. With this regard on 31 March 1997 an inter-ministerial meeting was held which was chaired by the then Prime Minister, accused No. 1 and it was decided to purchase Deawoo's Frigate for 100



Millions U. S. Dollar, on the basis of Memorandum of Understanding with the Deawoo Corporation, which was signed on 11.07.1996. The then Finance Secretary on 04.8.1996 pointed out two difficulties namely it had to pay for the financial year of 1996-1997 and in the next budget the defence expenditure would be increased and whether the payment of Tk. 170.00 crore could be defer by 2 to 3 years. His comments were overlooked and the then Prime Minister ordered for setting missile system in the Frigate, which costs US\$ 5.6 million more. The Naval Headquarter on 03.04.1997 sent a letter for approval of purchase of the frigate, the Armed Force Division (AFD) gave approval on 24.4.1997. The Naval Headquarter on 05.05.1997 directed the DGDP to purchase the frigate. Accordingly, on 11.05.1997 the tender was floated by DGDP and to evaluate the Tender 4 (four) sub-committees were formed insisting of high ranking naval officials and the tender evaluation committee submitted report on 24.07.1997 and approved it on 07.08.1997. Accordingly, the agreement was signed. The Investigating Officer further stated that the frigate was an

unproven design even though according to the terms of the tender the frigate must be a proven design. In spite of that condition the accused petitioners put pressure to select the DW 2000H Frigate in violation of the said condition of the tender and 76 mm main gun cannot be used due to its unproven design. In the contract specification there is no specification of the weapons and it was stated in the Tender that ammunitions will be provided as per Republic of Korean Navy similar type of the frigate. The accused persons also violated the provision of the General Financial Rules, Volume-1, Chapter-II of the Act-IV, contract general principle under Article 19(I) 19(II) 19(III) and 19 (V).

Due to its design problem the 76 mm main gun did not work properly and the company did not provide 2 (two) 40 mm Gun in accordance with the terms of the contract. Despite of these difficulties the Government received this Frigate and it was then commissioned on 16.6.2001. Finding *prima facie* case against these accused petitioners and others. The Investigating Officer submitted

charge sheet under sections 409/418/109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947.

Thereafter, the accused-petitioners appeared before the learned Special Judge and obtained bail on different dates. Next, the case record was transmitted to the Court of Divisional Special Judge, Dhaka. The accused petitioners appeared before the said court on 18.01.2004 along with an application for adjournment. The court below was allowed the application of the petitioners and fixed a date on 26.02.2004 for framing charge.

Having been aggrieved by and dissatisfied with the impugned proceeding, the accused-petitioners preferred these instant applications under section 561A of the Code of Criminal Procedure for quashing the proceeding and obtained these present Rules and orders of stay.

The learned Advocate Mr. Fazle Noor Taposh along with Mr. Md. Mehedi Hasan Chwdhury appearing on behalf of the petitioners submits that the petitioners are innocent; they have no connection with the offence as alleged. They have been falsely implicated in this case out

of political vengeance. The accused petitioners as high-ranking Naval Officials forwarded the specification for purchasing Frigate to the Director General of Defence Purchase (DGDP), after obtaining Government approval, as part of their official duties. Thereafter, the DGDP called an international tender and performed the initial scrutiny and forwarded a list of 24 bidders to one of the petitioner the Navy Chief. He then formed 4 Committees comprising of various Field Officers having required expertise and they submitted report with regard to the armament, hull, machineries and other naval equipments of the ships offered by the different bidders and recommended to procure this Frigate and based on the open forum discussion, the main engines of the Frigate was recommended for change. The petitioners as high-ranking officials of the Navy followed the required procedure in purchasing the said Frigate, in performance of their official duties and no irregularity or illegality has been committed in the procedure rather it has maintained the procurement rules in which they invited international

tender and accordingly, there were 4 Evaluation Committee to evaluate certain matter and upon their recommendation, the Ministerial Committee agreed to buy this Frigate. So the allegations brought against these petitioners are vague and preposterous. There is no specific allegation or overact against these accused petitioners. The learned advocate further submits that the recommendation of the petitioner was given on the basis of experts Committee report, as part of their official duties, in full compliance with the due procedure as such; the allegations are false and fabricated without any basis. He also submits that the Informant with the intention to harass and press the accused No. 1 the Prime Minister entangled her in this case due to political reason and in doing so he also entangled these accused petitioners in this case to use them as escape goats. He further submits that these allegations did not come within the preview of section 409 and 418 of the Penal Code and the section 5 (2) of the Act II of the Prevention of Corruption Act, 1947. He further submits that the petitioners are not member of the

Evaluation Committee, who recommends purchasing this Frigate. The allegations brought against the accused petitioners are that they put undue pressure to the Secretary of Defence and others to withhold certain recommendation. There is no allegation of personal gain and the allegation do not disclosed any ingredients of the offence as alleged. The learned Advocate further submits that the facts and circumstances as contained in the F. I. R and charge sheet do not constitute any offence under sections 409 and 418 of the Penal Code and section 5 (2) of the Act II of 1947. He further submits that to commit offence under section 409 criminal breach of trust by a public servant, the prosecution has to prove not only entrustment of or dominion over the property but also that the accused either dishonestly misappropriated the property or converted, used or disposed of that property himself or that he wilfully suffered some other person to do so. The learned Advocate further submits that there is no misappropriation of any money whatsoever there is nothing entrusted to these accused petitioners. He also

submits that it does not attract of section 418 of the Penal Code because there is no cheating. There is no allegation that they received any illegal money from any person or company, they did not fraudulently or dishonestly induce any person to do such an act. He next submits that the allegation does not come within the provision of the section 5 (2) of the Prevention of Corruption Act, 1947 as the accused petitioners did not abusing their position as a public servant to obtain or attempt to obtain for himself or for other persons any valuable things or pecuniary advantages. He further submits that in the four corners of the FIR and charge sheet there is no allegation that these accused petitioners obtained any valuable things or pecuniary advantages out of this procurement. The petitioner acted in the interest of the public; in no way connected with this alleged offence of incurring financial lose to the Government allegedly resulting from the purchase of the Frigate. The learned Advocate for the petitioner further submits that in the FIR and charge sheet it was stated that there is no sufficient require equipment

in the said frigate, with this regard he submits that to enhance the combat capabilities and facilities of this frigate the Government intended to buy most modern equipments and missiles system for the said frigate from other country.

The learned advocate for the petitioner further submits that the Informant initiated this proceeding to politically victimize the then Prime Minister, the accused No.1 and in doing so the accused petitioners have been entangled in this case, only to harass and press them. The accused No. 1 filed a Criminal Miscellaneous case being No. 13162 of 2003, before this Hon'ble Court and after hearing the parties their Lordships were please to make the Rule absolute by their judgment and order and quashed the proceeding of Special Case No. 56 of 2003 in respect of the accused petitioner. Another Criminal Revisional Application being No. 985 of 2005 was preferred by the accused petitioner No. 5 before this hon'ble Court. After hearing the parties their Lordships were also pleased to discharge the petitioner Abdul Awal Mintu from the charge levelled against him. He lastly



submits that the facts and circumstances of the alleged offence against the petitioners are so preposterous that even the admitted fact no case stands against these accused petitioners.

The learned advocate Mr. Khurshid Alam Khan appearing for the Anti-Corruption Commission opposes these Rules and submits that there are specific allegations and overacts against these accused-petitioners. The Investigating Officer on conclusion of investigation submitted report, after finding prima facie case against these accused petitioners under sections 409/418 and 109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947. The allegation against these accused, attracted the provision of sections 409 and 418 of the Penal Code. The allegations against these accused petitioners also comes within the purview of the section 5 (2) of the Prevention of Corruption Act. 1947. He further submits that these are question of facts need to be decided by adducing evidence at the trial court and this court exercising jurisdiction under section 561A of the Code of

Criminal Procedure cannot be decided on the factual aspect of this case. He lastly submits that there are no illegalities and irregularities in the proceeding and there are ingredients of offence, which attracts criminal breach of trust, fraud and misappropriation of public fund by the public servants should not be interfered at this initial stage and as such, these Rules are liable to be discharged.

Mr. K. M. Zahid Sarwar, learned Deputy Attorney General appearing for the State adopted the submissions of the learned advocate appeared on behalf of the Anti-corruption Commission. We have gone through these applications under section 561A of the Code of Criminal Procedure and the materials annexed thereto.

The **First** question is as to whether or not the inherent power under section 561A of the Code of Criminal Procedure can be invoked at any stage of the proceeding even at an initial stage, if it is necessary to prevent the abuse of the process of the court or otherwise to secure the ends of justice. The inherent power of this Court under section 561A of the Code of Criminal

Procedure can be invoked at any stage of the proceeding even at an initial stage. We find support of this contention in the case of **Abdul Quader Chowdhury vs. The State, 28 DLR (AD) (1976) 38**. Similar view was taken in another decision of our Apex Court in the case of **Ali Akkas Vs. Enayet Hossain and others, 17 BLD (AD) (1997) 44**.

The **Second** question is as to whether or not any irregularities or illegalities in the procurement proceeding as alleged in the F.I.R and Charge Sheet.

We have perused the FIR, charge sheet and all other materials on record. The allegations made against these accused petitioners are that they put undue pressure and abusing their position to purchase the frigate from the Deawoo Corporation. The tender for purchasing a frigate for Bangladesh Navy was floated by the DGDP on 11 May 97 vide DGDP tender no 218 / 518 / 5129 / TS / DGDP / NP-1 dated 11 May 97. In response to the tender, DGDP were received a total of 25 (twenty five) offers from 9 (nine) bidders. To evaluate these Tender offers or bids, 4

(four) sub-committees were formed consisting of high ranking naval officials, these are:-

- a. Weapons, Sensors, Combat System, Navigation, Communication & EW Equipment etc.
- b. General Features, Hull & Engineering, Electrical Powers Generation & Distribution, Auxiliary machinery, NBCD, Fire Main System etc.
- c. Seamanship Gears, Riggings, Deck fittings, anchor, cables, davit, boat life saving & diving equipment and helicopter etc.
- d. Stores & Amenities, kitchen wears, mess traps, linens, office equipment, furniture, domestic equipment etc.

These four Evaluation Sub-Committees evaluated these Tender bids for a frigate of the Bangladesh Navy, received from 9 bidders, on the basis of the tender specifications submitted by the respective bidders. Upon detailed scrutiny of all the offers it was revealed that most of the offers are far from meeting major/main requirements of Navy as evident from the offers. On the basis of the

offered/selected configurations of the frigate showing prices of the basic of ship with engines, sensors, weapons, communication, EW systems, documentation, training, tools and spares as has been prepared in the bids. The price has been calculated without considering the missile and torpedo system offered. From the price comparison position of all the offers are shown below:

Position	Local Agent/Principal	Price (US \$ in million)
1 <sup>st</sup> lowest	BOMETEC (PLA), 1 <sup>st</sup> offer, China	68.0
2 <sup>nd</sup> lowest	BOMETEC (PLA), 3 <sup>rd</sup> offer, China with SEMT PIELISTICK main engines.	78.0
3 <sup>rd</sup> lowest	BOMETEC (PLA), 2 <sup>nd</sup> offer, China with MTU main engines.	83.0
4 <sup>th</sup> lowest	DAEWOO (Bangladesh) Corporation (Payment term 1), DAEWOO, ROK	93.72
5 <sup>th</sup> lowest	Trident Agency, 1 <sup>st</sup> offer, 627B (Baseline Configuration), Bazan Spain	94.46
6 <sup>th</sup> lowest	DAEWOO (Bangladesh) Corporation (Payment term 2), DAEWOO, ROK	94.59

7 <sup>th</sup> lowest	DAEWOO (Bangladesh) Corporation (Payment term 3), DAEWOO, ROK	95.90
8 <sup>th</sup> lowest	M/s Tucano Enterprise, 2 <sup>nd</sup> offer	100.00
9 <sup>th</sup> lowest	M H Traders (HYUNDAI)	103.04
10 <sup>th</sup> lowest	M/S Unique Aviation, 3 <sup>rd</sup> offer (GEPARD 3.2- CODOG), Russia.	103.72
11 <sup>th</sup> lowest	M/S Unique Aviation 2 <sup>nd</sup> offer (GEPARD 3.2- CODOD), Russia.	106.72
12 <sup>th</sup> lowest	M/S Unique Aviation, 1 <sup>st</sup> offer (GEPARD 3 CODOG), Russia.	108.72
13 <sup>th</sup> lowest	Trident Agency 2 <sup>nd</sup> offer 627B (Upgraded Configuration), Bazan, Spain.	110.01
14 <sup>th</sup> lowest	Miladon, (Version II) Cash Payment Basis, CSTC, China.	110.40
15 <sup>th</sup> lowest	M/S Trident Agency 3 <sup>rd</sup> offer 592D, (Baseline Configurations), Bazan, Spain.	117.41
16 <sup>th</sup> lowest	Miladon (Version II) Defer Payment Basis, CSTC China.	122.60
17 <sup>th</sup> lowest	AAC Traders (Ukraine)	125.0
18 <sup>th</sup> lowest	Miladon (Version I) Cash Payment Basis, CSTC, China.	129.1
19 <sup>th</sup> lowest	Trident Agency 592D (Upgraded Configuration), Bazan, Spain.	132.94

20 <sup>th</sup> lowest	Miladon (Version I) Defer Payment Basis, CSTC, China.	143.7
21 <sup>st</sup> lowest	Tucano 3 <sup>rd</sup> offer Canada.	250.0
22 <sup>nd</sup> lowest	Tucano 4 <sup>th</sup> offer Canada.	350.00
23 <sup>rd</sup> lowest	Tucano 5 <sup>th</sup> offer Canada.	650.00
24 <sup>th</sup> lowest	Tucano 1 <sup>st</sup> offer Canada.	675.000

From the above comparative statements of prices of all bids following observations are made:

a. Offers of BOMETEC, (PLA) with different engines are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> lowest in terms of price. However, none of these three lowest offers could be considered due to non-compliance of the tender specifications namely standard displacement, fixed pitch propeller, 380 volt power supply, combat system and helicopter.

b. Offers by DAEWOO, ROK stands are the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> lowest as per various terms of payment. These offers generally meet the tender specifications as far as dimension, hull and engineering, seamanship gears, navigation equipment, sensors and combat system, weapon and armament, communication and EW, stores and amenities including training, with minor observations.

Hence, the committee recommends for acceptance of the 4<sup>th</sup> lowest offer subject to fulfilling the minor observations during contractual agreement. 6<sup>th</sup> and 7<sup>th</sup> offer by DAWEEO need not be discussed.

We have perused the report of the 4 (four) Evaluation Sub-Committees, where from it was transpired that the committee recommended to buy this frigate, which is the 4<sup>th</sup> lowest, after careful consideration of general and technical specifications of all the offers and scrutinizing all comparative statements of offer and the offer made by the Deawoo as most of the tender requirements as specified by the DGDP are fulfilled. The offers made by the BOMETEC (PLA) with the different engine are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> lowest in terms of type, However none of these lowest offer could be consider due to not compliance of the tender specification namely the ship displacement, 6 feet propeller, 380 volt power supply, Combat System and Helicopter. Offers of the Deawoo of Republic of Korea stands at the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> lower as per various terms of the payment, these offers generally meet



the tender specification as per dimension of Hull, Engineering, Seamanship Gears, Navigation Equipments, Sensor, Combat System, Weapon, Armament, Communications, Solar System and other military equipments. Hence the committee recommended for acceptance of the 4<sup>th</sup> lowest offer subject to fulfilling the minor observation during contractual agreement, such recommendation was made by the 4 (four) evaluation sub-committees, it was ultimately forwarded to the inter-ministerial Committee chaired by the then Prime Minister, the accused No. 1 and according to that recommendation this frigate was bought from the Deawoo Corporation.

We do not find any irregularities in the procurement proceeding. That was properly recommended by the Military Experts and according to the recommendation it was purchased from the Deawoo Corporation. The allegations against these accused petitioners are that they abuse their power and position as highest naval officials of the Bangladesh Navy, are preposterous. In the whole procurement procedure none of these accused petitioners

are members of the 4 Evaluation Sub-Committee and the decision was taken by the supreme authority, which is the inter-ministerial committee chaired by the Prime-Minister. We find that the allegations have been made against the accused petitioners are false and fabricated. There is no ingredient of criminal breach of trust or any entrustment to the property. There is no allegation of inducement, there is no evidence that the accused petitioners obtained or attempt to obtain any pecuniary advantage from any person or any company and the allegation with regard to the quality of the frigate itself, armament and other military equipments are of world class which is admitted by the then Chief Advisor of the Care Taker Government and the highest Naval Officials of at that time.

The **Third** question is as to whether or not allegations made in the F.I.R and Charge Sheet attracts the provision of Sections 409 / 418 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947.

(A) In order to constitute an offence under section 409 of the Penal Code it is necessary that there must be an

entrustment of property or with any dominion over property in his capacity of a public servant, who commits criminal breach of trust in respect of that property. For constituting offence under this Section the accused must commits criminal breach of trust within the meaning of section 405 of the Penal Code. Entrustment is an essential ingredient of offence of the criminal breach of trust, a man cannot be guilty of this offence unless he is entrusted with some valuable property or things. The accused must be entrusted with property or with dominion over property, which he misappropriates or converts to his own use or dispose of. For an offence under this section the first requirement is that the property must be proved to have been entrusted and a subsequent conversion of the property entrusted to him or use of the property by the accused. In a case where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused dishonestly misappropriated, converted, used or disposed of the

property himself or that he willfully suffered some other person to do so. "Dishonesty" is the essential ingredient of the offence under section 409. In the instant case, admittedly, basic ingredients of contract i. e. offer, acceptance, passing of consideration, transfer of Frigate and commission of the Frigate in the Navy has been concluded satisfactorily. We have perused the F.I.R, Charge Sheet and other materials on record; we find that there are some allegation of irregularities, such as the accused persons also violated the provision of General Financial Rules, these decisions were taken by the inter-ministerial meeting chaired by the then Prime Minister, which is the highest authority, who took decision on financial matter, in the interest of the country, this is nothing to do with these petitioners. We find support of this contention in the case of **Alauddin and others Vs. The State 4 BLD (HCD) 75** it has been held:

*"Mere irregularity in purchasing articles will not attract the provision of Section 409 of the Penal Code- To bring home the charge the prosecution must prove not only the*

*entrustment of or dominion over the property but must also prove that the accused either dishonestly misappropriated the property or converted, used or disposed of that property himself or that he willfully suffered some other person to do so."*

We do not found any allegation that the petitioners misappropriated any property which was entrusted to them. We are of the view that no offence under section 409 of the Penal Code has been disclosed in the instant proceeding.

**(B)** In order to constitute an offence under section 418 of the Penal Code it is necessary that there must be an allegation of cheating with knowledge. For constituting offence under Section 418 of the Penal Code the accused must cheat within the meaning of section 415 of the Penal Code. Section 415 of the Penal Code reads as follows:

*"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit*

*to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

In the instant case, there is no allegation that the accused petitioners received any illegal money from any person or company; they did not fraudulently or dishonestly induce any person to do such an act. We have perused the materials on record and find there is no initial intention for deceiving the State or any evidence of inducement on the part of accused petitioners.

(C) In order to constitute an offence under section 5 (2) of the Prevention of Corruption Act 1947, it is necessary that there must be an allegation that the accused petitioners as public servants who commits or attempts to commits "criminal misconduct" within the meaning of section 5 (1) of the Prevention of Corruption Act 1947. Section 5 (1) of the Prevention of Corruption Act 1947 reads as follows:

**5. Criminal Misconduct.-** (1) A public servant is said to commit the offence of criminal misconduct,

(a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the 3[Penal Code], or

(b) if he accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

*(d) if he by corrupt or illegal means or by otherwise abusing his position as public servant, obtains 4[or attempts to obtain] for himself or for other person any valuable thing or pecuniary advantage 5[, or]*

*(e) if he or any of his dependents is in possession, for which the public servant cannot reasonably account, or pecuniary resources or of property disproportionate to his known sources or income.*

*Explanation.- In this clause "dependent" in relation to a public servant means his wife, children and step children, parents, sisters and minor brothers residing with and wholly dependent on him.]*

In the Instant case, the allegations were made against these accused petitioners are that they put undue pressure and abusing their position to purchase the frigate from the Deawoo Corporation and abusing their position as public servants to obtain or attempt to obtain for themselves or for other persons any valuable things or pecuniary advantages. We have perused the materials on record it transpires that in the four corners of the FIR and charge sheet there is no allegation that these accused petitioners



obtained any valuable things or pecuniary advantages out of this procurement. The petitioners acted in the interest of the public and for the country at large, they are in no way connected with this alleged offence of incurring financial loss to the Government allegedly resulting from the purchase of the Frigate. Further, the decision to purchase the Frigate was made after careful consideration and recommendation made by the 4 Evaluation Sub-Committees, who are Military Experts and the decision to purchase the Frigate was taken by the supreme authority, which is the inter-ministerial committee chaired by the Prime-Minister. In the whole procurement procedure none of these accused petitioners are members of the 4 Evaluation Sub-Committees. The allegations against these accused petitioners are that they abuse their power and position as highest naval officials of the Bangladesh Navy, are preposterous. We find that the allegations have been made against the accused petitioners are false and fabricated. There is no illegality or irregularity in the procurement procedure and it was made by following the

rules of procedure or the rules of business. We find support of this contention in the case of **Begum Khaleda Zia vs State 55 DLR 596** it has been held:

*“Criminal intention is sine qua non for an offence under section 5(1) of the Prevention of Corruption Act, 1947. When a decision is taken collectively or even individually by following the rules of procedure or the rules of business criminal intention behind such decision should not normally be inferred.”*

Under such circumstances, we are of the view that no offence under section 409 and 418 of the Penal Code and section 5 (2) of the Prevention of Corruption Act 1947 has been disclosed in the instant proceeding.

We also observed that BNS Bangabandhu is one of the most modern Frigates of Bangladesh Navy, which was brought from South Korea. It was named after Bangladesh’s founding father Sheikh Mujibur Rahman, who is popularly termed as ‘Bangabandhu’, it is capable of serving in combat role, as well as performing peacetime maritime duties. It was laid down on March 11, 1998 as ‘Bangabandhu’ at Deawoo Shipbuilding & Marine

Engineering, Republic of Korea, and commissioned on 20<sup>th</sup> June 2001 as BNS Bangabandhu. Later, the ship was decommissioned for political reason in disguise of repair works and placed it in reserve class -III as DW 2000H frigate on February 13, 2002. According to the Chief Advisor of the then Care-taker Government, it is the most modern ship in Bangladesh Navy serving till today. The allegation made in the charge sheet that it was an unproven design is erroneous. It is an Ulsan (Modified) class frigate and ULSAN class frigate usually used by the South Korean Navy till today. The ship biased on western technology and the same class of frigate still active in various Navies in the World. The main engine of the BNS Bangabandhu is CODAD: 4 SEMT- PIELSTICK 12 VPA6V280 STC diesels engine, which is one of the best naval engine in the world, various Navies in the World including U. S. Navy use this engine till today. The main gun of this Frigate is one Otobreda 76 mm 62 super rapid automatic gun, which was installed along with 4 (four) 40 mm /70 (2 twin) compact CIWS, Otobreda guns, these

guns are Italian made. The Otobreda 76 mm gun is a naval artillery piece built by Italian defence conglomerate of Otobreda, which is capable of very high rate of fire. These are one of the best guns in the World and used by the western Navies and various other countries. The hull, armament, main engine and other materials installed at the time of purchasing this frigate are of World class. It is evident from the record when this frigate was re-commissioned on 12.03.2003 by the then Chief Advisor of the Care Taker Government, it was stated that it is the most modern Naval surface ship of the Bangladesh Navy and the ship's Combat management system, missile system and other equipments are of World class **(annexure-D)**. This frigate was decommissioned only for political reason to harass and press the then Prime Minister and in doing so they entangled these accused petitioners in this case. The Evaluation Committee correctly recommended to buy this ship, according to the recommendation of the Military Experts, the Government took decision to procure this ship. There is no illegality or

irregularity in the procurement procedure and the recommendation was made by the committee after considering our national interest and the security needs of our country. We find that the prosecution has deliberately and meticulously hyperboles the materials and facts contained in the F.I.R. and charge sheet in order to prosecute the accused petitioners for harassments.

Under the facts and circumstances of the case and the observation made above, we find substance in the submissions made by the learned advocate for the petitioners.

**Accordingly, these Rules are made Absolute.**

The proceeding of Special Case No. 56 of 2003 (formerly Metropolitan Special Case No. 72 of 2003) arising out of Tejgoan Police Station Case No. 34 dated 07.08.2002 corresponding to BAC B.R. No. 81 of 2002 under section 409/418/109 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947 in respect of these accused petitioners Rear Admiral Mohammad Nurul Islam, Commodore Harunur Rashid (Retd), Commodore

A.K.M. Azad (Retd.) and Commodore (Retd.) M Shahabuddin (E) psc (PNo-34), is hereby quashed. The accused petitioners are on bail in this case; therefore discharged them from their respective bail bonds.

The orders of stay issued at the time of issuance of these Rules are hereby vacated.

Send down the lower court's record with a copy of the judgment and order at once.

*Siddiqur Rahman Miah, J.*

I agree.

*B.S.*