IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 10929 of 2015

-AND-

IN THE MATTER OF

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

-AND-

IN THE MATTER OF:

Liberty Fashion Wears Limited

…. Petitioner

-Versus-

Bangladesh Accord Foundation and others

…… Respondents

Mr. Qumrul Haque Siddique with
Mr. Imtiaz Moinul Islam
..…….for the petitioner.
Mr. K.S. Salah Uddin Ahmed
……for the respondent No. 1
Mr. Azmalul Hossain QC with
Mr. Foyez Uddin Ahmed and
Mr. Suhan Khan
…for the respondent Nos. 2 and 3
Mr. Md. Yousuf Ali
…for the respondent Nos. 4 and 5
Ms. Amatul Karim, D.A.G with
Mr. A.R.M.Hasanuzzaman A.A.G. and
Mr. Abu Saleh Md. Fazle Rabbi A.A.G.
……..for the Respondents

Heard on 17.07.2016
Judgment on 01.09.2016, 04.09.2016 and 06.09. 2016

Present:
Mr. Justice Tariq ul Hakim
and
Mr. Justice Md. Faruque (M. Faruque)

Tariq ul Hakim, J:

On an application under Article 102 of the Constitution by the petitioner Rule Nisi was issued calling upon the Respondent No.1 to show cause why it should not be directed to circulate the name of the petitioner as a compliant garment-manufacturing factory amongst its members all over the world and/or pass such other or further order or orders as to this Court may seem fit and proper.

In the midst of hearing of the Rule on another application of the petitioner, a Supplementary Rule was also issued on the Respondent No.1 to show cause why it should not be directed to immediately arrange for inspection of the factory of the petitioner as per Clause 10 of the Accord agreement in accordance with all necessary protocols and publish the inspection report in its website and/or pass such other or further order or orders as this Court may seem fit and proper.

The case of the petitioner is that it is a private limited company incorporated under the Companies Act, 1994, engaged in the business of manufacturing readymade garments. The factory of the petitioner comprises three buildings, plant and machineries valued at about Taka 120 crore. It was established in the year 2001 and about 5000 workers directly depended on it for their livelihood. In 2013 the petitioner made a gross annual income of about Taka 200 crore by manufacturing and exporting readymade garments to European and American buyers including the respondent No.2 Primark, Debenhams, Target, K-mart and other well known brands/ companies .

The respondent No.1 Bangladesh Accord Foundation (hereafter referred to as Accord) is registered in the Netherlands with the primary objective of ensuring fire and building safety in the garments factories of Bangladesh for a period of five years pursuant to an agreement amongst its members under the name and style "Accord on fire and building safety in Bangladesh" (hereafter referred to as the Accord Agreement). The signatories to the Accord Agreement are more than 150 apparel corporations including the respondent No.2, 2(two) global trade unions, eight Bangladeshi trade unions and the International Labour Organization (ILO). The Accord Agreement was signed on 13.5.2013 after the Rana Plaza disaster where 1129 people died and the Tazreen Garments devastating fire of 24.11.2012. The Ministry of Labour and Employment of the Government of Bangladesh also formed a National Tripartite Committee, respondent No.4, with the owners of garments factories and Labour Organizations and adopted a National Tripartite Plan of Action (NTPA or NAP) to ensure fire and building safety in garments factories. The committee in their joint statements welcomed assistance from stakeholders (foreign garments buyers International Development Organizations, donors etc.) wanting to help improve the fire and building safety conditions in garment factories in Bangladesh leading to the setting up of the Accord Foundation by European Buyers.

Similar to Accord, American buyers of Bangladeshi garments formed an Association under the name and style “Alliance” with objectives similar to “Accord on fire and building safety in Bangladesh”. They also entered into an agreement among themselves with similar objectives like the Accord Agreement. There is an unwritten understanding between Accord and Alliance that the inspection report of Accord regarding the infrastructural fire and building safety conditions of a particular garments factory in Bangladesh would be accepted by Alliance and vice-versa. Thus if a negative report is published either by Accord or Alliance in its website, the members of both Accord and Alliance stops sourcing ready made garments from that factory and in effect the whole world stops taking goods from such a factory. Both Accord and Alliance committed themselves to work under the platform created by the respondent No. 4 National Tripartite Committee (NTC) to ensure fire and building safety measjures pursuant to the National Tripartite Action Plan (NAP) as stakeholders. The Accord agreement came into effect on 23.5.2013.

After the collapse of Rana Plaza, foreign buyers of readymade garments from Bangladesh became concerned about fire and safety hazards in garment factories in the country and the respondent No.2 appointed the respondent No.3 Medway Consultancy Services to inspect the factory of the petitioner. The respondent No.2 and 3 visited the factory of the petitioner on 18.5.2013 and 25.5.2013 and after a cursory visual inspection, the

respondent No.3 reported that there was a serious structural weakness in the main production building i.e. building No. 2. The same building however was reported to be safe by the respondent No.2 in an earlier report dated 28.06.2012. The respondent No.3's report stated that the slab of each floor is only just able to support its own weight and that the weight of workers or equipment on each floor is likely to cause one of these floors to collapse . Should one floor collapse, the extra weight on the floor will cause the building to progressively collapse. This was a complete surprise to the petitioner and he immediately requested the Bangladesh Garment Manufacturers & Exporters Association (BGMEA) to inspect the said building. The engineers of BGMEA certified that the aforesaid building no. 2 was safe vide their letter dated 10.06.2013. Thereafter the petitioner engaged Bangladesh University of Engineering and Technology (hereinafter referred to as the BUET) which is the most reputable Institution on civil engineering in the country and they also by their letter dated 29.06.2013 certified that the petitioner's buildings may be used with caution but minor retrofitting work should be done to make the building better. Thereafter the petitioner, at the insistence of the respondent no. 1, took advice from one Ali Asgar & Associates, a renowned engineering firm who also confirmed that the building may be used for production. Thereafter on 11.06.2013 the Respondent No.2 along with Primark (an apparel Corporation based in UK and the Respondent No.3 went to the petitioner's factory and compelled the

petitioner to shut down building no. 2 completely. After the petitioner's factory was shut down the petitioner wrote several letters to the Respondent No. 2 to review their decision but the respondents insisted that the petitioner submit proposals for retrofitting. The petitioner submitted retrofitting proposals prepared by Ali Asgar and Associates but the respondent no. 1 asked for Professional Indemnity Insurance (PII) from Ali Asgar and Associates amounting to 10 Million Pounds Sterling but that engineering firm was not willing to provide the indemnity Insurance nor did any other Engineering Consultancy Company agreeable to do so. The petitioner accordingly requested Accord to withdraw the condition of Professional Indemnity Insurance but while negotiations were going on suddenly on 15.10.2013 the Respondent No.1 informed the petitioner that all Accord brands (members of Accord) would terminate their relationship with the petitioner if it did not repair its factory. The petitioner by its letter dated 21.10.2013 and 27.10.2013 offered to comply with the requirements of the Respondent No.1 but requested it to withdraw its demand for the Professional Indemnity Insurance of 10 Million Pound Sterling because the engineering firms of this country were unwilling to provide it .

It is further stated that by this time all buyers cancelled their orders with the petitioner and the petitioner was thrown out of its business but the Respondent No.1 did not bother to inspect the petitioner's factory to determine the actual condition of the buildings.The Government of

Bangladesh intervened in the matter and requested the Respondent No.1 by letter dated 24.11.2013 under the signature of the Senior Assistant Chief, Planning Cell, Ministry of Labour and Employment to inspect the petitioner's factory but the Respondent No.1 by its letter dated 08.12.2013 addressed to the Secretary, Ministry of Labour and Employment of the Government of Bangladesh informed it that the Respondent No.1 had accepted the inspection report of the Respondent No. 3 and did not place the petitioner's factory in its list for inspection.

It is further stated that under Clause 10 of the Accord Agreement the Respondent No.1 is required to arrange inspection of all factories of readymade garments at least once by a Safety Inspector appointed by Accord to determine its safety standard but the Respondent No.1 has been refusing to inspect the petitioner's factory . On the other hand Accord published the name of the petitioner's factory in its web site as non compliant and risky causing buyers all over the world to refrain from placing orders for ready made garments to the petitioner’s factory . It is further stated that although the Respondent No.1 undertook to work in sync with the NTPA i.e. the Respondent No. 4 but the Respondent No.1 has refused to listen to the requests made by the Government of Bangladesh to inspect the petitioner's factory pursuant to clause 10 of the Accord Agreement resulting in complete shut down of the petitioner's factory causing it substantial financial loss. The petitioner again wrote to the Respondent No.1 on 30.4.2014 and

4.5.2014 to inspect its factory and the BGMEA vide their email dated 08.09.2014 also requested the Respondent No.1 to inspect the condition of the petitioner's factory . Similarly the Inspector General (Additional Secretary of the Department of Inspection for Factories and Establishments) i.e. respondent No. 5 , by its letter dated 14.9.2014 also requested the Respondent No. 1 to inspect the petitioner's factory but the Respondent No.1 has continuously refused to inspect it. The petitioner sent a Notice for Demand of Justice through its learned Advocate to the respondents on 27.10.2014 (Annexure L) to inspect the petitioner's factory but the said respondents did not bother to take any steps or even reply to the said notice.

It is further stated that (the International Labour Organization (ILO) appointed) TUV SUD, a Bangladeshi private limited company inspected the petitioner's factory on the recommendation of BGMEA and found it to be absolutely safe and satisfactory. Thereafter the BGMEA again wrote to the Respondent No.1 on 12.08.2015 to inspect the petitioner's factory but the said respondent continued to ignore the request of every one. It is also stated that Clause 10 of the Accord Agreement imposes a duty upon the Respondent No.1 to inspect the petitioner's factory as it is a supplier of readymade garments to many of signatories of the Accord Agreement but the persistent refusal of the Respondent No.1 to inspect the petitioner's factory and publication of a false report in its website about the petitoner’s factory being risky and unsafe has made the petitioner bankrupt and having no other

alternative remedy it has been compelled to come to this Court and obtain the present Rule.

In a Supplementary Affidavit on behalf of the petitioner it has been further stated that BUET after inspecting the petitioner's factory submitted its report on 29.6.2013 making seven recommendations and corrective works and the petitioner complied with the said recommendations .

The Respondents are contesting the Rule by filing separate Affidavits-in-Opposition.

The Respondent No.1 Accord in its Affidavit-in-Opposition has denied the material allegations against it and stated inter alia that the Accord Agreement was signed in May, 2013 by global apparel companies, international retailers,two global trade unions and eight Bangladeshi trade union Federations. The agreement is designed to make RMG factories in Bangladesh safe and sustainable. Accord was established in the Netherlands with its liaison office in Bangladesh with permission from the Board of Investment to implement commitments of the signatory companies towards making their supplier RMG factories in Bangladesh safe. One of its objectives is to provide technical support to the National Tripartite Committee (NTC) but neither the NTC nor Accord has any authority to give directions to each other. Accord has conducted engineering based safety inspections of more than 1400 RMG factories in Bangladesh. Accord and its signatories provide significant technical support and resources to all

the RMG factories to ensure that safety hazards are identified through inspection and are properly corrected and has spent almost 50 million US Dollars over the 5 years of their agreement period for the purpose .

It is further stated that in cases where factory buildings after inspection are found unsafe rectifications are recommended and if a factory owner does not comply , the Respondent No.1 publishes it as non-compliant and since the petitioner's factory was unsafe and the petitioner did not co-operate with the Respondent No. 2 , Accord decided not to source from the petitioner's factory.It is further stated that the members of the Respondent No.1 cannot continue to do business with a factory which does not have a safe building. The petitioner's factory was inspected by the Respondent no. 2 and 3 before the Respondent No.1 opened any office in Bangladesh . Since the inspection was conducted on behalf of a signatory organization of the Respondent No.1, Accord accepted the findings of the Respondent No.3 and considered it as part of its program activities pursuant to clause 10 of the Accord Agreement. As per clause 10 of the Accord Agreement the Respondent No.1 Accord had accepted the report prepared by the Respondent No.3 as it met the standards of thorough and credible inspection. The provisio to Clause 10 of the Accord Agreement is applicable to a situation where the factory has been inspected by any signatory organization and has worked on the rectification plan as per the recommendations suggested by the inspectors. Respondent No.1 is reqired to make at least

one inspection but the petitioner has not worked on the retrofitting work and was insisting to continue operation in the unsafe building thereby risking the lives of thousands of workers . Several communications were made to the petitioner by the Respondent No.1 to do retrofitting works in its factory building and on one occasion Respondent No.1 even scheduled a visit to the petitioner's factory but when it knew that the retrofitting work had not been done or even started Accord had no option but to cancel its visit because it would be a waste of its valuable funds and time .

It is further stated that Accord even provided funds to pay salaries and bonuses to the petitioner's workers but still the petitioner repeatedly ignored the Respondent No.1's direction to complete retrofitting works of its factory and therefore the said respondent was constrained to declare the petitioner's factory as a non compliant factory . Once a factory is categorized non compliant as per the Accord Agreement the Respondent No.1 has no authority to inspect it as any inspection would be a violation of the agreement amongst the members of Accord . Furthermore such inspection would open the flood gates for other non compliant factories to demand multiple inspections. The petitioner's name was accordingly published in the respondent No. 1's web site as a non compliant factory on 14th October, 2013 and although more than 2 years have elapsed the petitioner has not carried out any retrofitting work in its factory and any inspection by the

Respondent No.1 will be a meaningless exercise involving unnecessary cost and this Rule has no substance and is liable to be discharged.

The Respondent No.2 Tesco in its Affidavit-in-Opposition has stated that in April, 2013 it initiated a program of Structural and Safety Audits of its Bangladeshi supplier factories through an international engineering consultancy firm MCS (Medway Consultancy Services) with offices in the United Kingdom and Bangladesh. On 17.5.2013 the Respondent No.2 Tesco came to know of the petitioner's name appearing in the list of "unapproved facilities" published by another major American retailer, Walmart. Immediately thereafter the Respondent No. 2 Tesco instructed Respondent No.3 MCS to audit the petitioner's factory and to report on the structural safety of the petitioner's factory building . After inspecting the petitioner's factory on two occasions it came to the finding that building no. 2 could not support itself along with the equipment and workers and revealed the risk of structural collapse, technically known as "punching shear failure" . The findings and calculations were checked by Fairhurst one of the largest Consulting Engineering Partnerships in the United Kingdom as well as another independent engineering firm called String Maynard which confirmed the Respondent No.3's findings. The Respondent No.2 thereafter urgently informed the petitioner on 7.6.2013 about the Respondent No.3's report and asked it to evaluate building no. 2 but the petitioner refused to stop production in it . The Respondent No. 2 sent a letter to BGMEA on

07.06.2013 informing it about the critical safety risks at the petitioner's factory and asked it to take immediate action to protect employees working there. The Respondent No.2's representative during its factory visit on 11.6.2015 also recommended relocating the sewing machines to the ground floor of other buildings at the site for safety of the workers in the endangered building.

It has also been stated that the Respondent No.1 Accord does not represent Tesco since Accord is an independent entity with its own independent press office. Tesco did not participate in or cause the publication of any report published by Accord. Tesco informed Accord about Respondent No.3's report and findings and Accord chose not to reassess the same in exercise of its own discretion and judgment. Tesco did not participate in the decision making process pertaining to the conditions imposed by Accord on the petitioner. The persistent failure by the petitioner to take remedial action in its buildings led the Respondent No.2 to stop taking readymade garments from the petitioner. Although the petitioner has claimed no relief against the Respondent No.2, the relief claimed by the petitioner if granted would amount to licensing a non compliant building as compliant without making the factual assessment of the conditions of the factory building.

The Respondent No.3 in its Affidavit-in-Opposition has stated that in April, 2013 the Respondent No.3 was appointed by the Respondent No.2 Tesco to carry out inspection of all its Bangladeshi suppliers' factories

under its program of Structural and Safety Audits following the Rana Plaza disaster. The petitioner's factory was inspected by the Respondent No.3 on two occasions, on 18.05.2013 and 03.06.2013 by a team of the Respondent No.3 led by Mr. I. A. Khan OBE , a British national and a Chartered Civil engineer from the United Kingdom. Inspection revealed various faults in building no. 2 of the petitioner's factory specially relating to the load carrying capacity of the floor slabs. Building No. 2 was of flat slab construction without beams supported on columns. On physical measurement, it was apparent that the thickness of the slab was less than that required by the Bangladesh National Building Code (BNBC). Moreover, the use of brick aggregate for the concrete slab raised further concern. The findings of the Respondent No.3 were checked by two other consultancy firms in the United Kingdom, Fairhurst and String Maynard who agreed with the calculations. The said respondent requested the petitioner to stop production at building no. 2 but the petitioner refused to do so. It is further stated that the said respondent is not a member of Accord and has no role in Accord’s decision making process and did not participate or cause the publication of any report that may have been published by Accord. It is further stated that the instant Writ Petition involves a number of disputed questions of fact and calls for an adjudication on the basis of inspection and since no relief has been claimed against the Respondent No.3 by the

petitioner there is no legal basis for making the Respondent No.3 a party in the instant Writ Petition.

The respondent No. 4 Secretary, Ministry of Labour and Respondent No. 5, Inspector General of Factories, in their separate Affidavits-in-Opposition, have stated that pursuant to the third meeting of the National Tripartite Committee (NTC) the representative of the International Labour Organization (ILO) arranged a consultation meeting with Accord and Alliance and as per their suggestions a team from the Bangladesh University of Engineering and Technology (BUET) prepared a revised version of the Operation Manual (OM) for assessing the infra-structural integrity and fire safety of readymade garments buildings in Bangladesh which was endorsed by the said meeting . In a subsequent meeting of the National Tripartite Committee (NTC) it was decided that the evaluation and recommendations of Accord and Alliance on readymade garments factories will be subject to review by a Review Panel formed under the said Operation Manual (OM). In the case of the petitioner however since the recommendation for closure of the petitioner's factory was not made by Accord, Alliance or BUET, the same was not subject to review by the Review Panel. The respondent No.1 found the assessment of the petitioner's factory by Primark and Tesco as credible and accepted it as an inspection under its own program and accordingly on 14.10.2013 and 24.10.2013 published a summary of the aforesaid inspection report in their website and declared the petitioner's

factory as a non complaint manufacturing facility . It is further stated that they welcomed Accord's initiative to assess the infrastructure of garments factories in Bangladesh under the National Tripartite Plan of Action (NTPA) framework using the Operational Manual developed by the National Tripartite Committee (NTC) under the monitoring and review system of the National Tripartite Committee (NTC). However the inspection conducted by Tesco and Primark of the petitioner's factory was not a specific inspection under the National Tripartite Plan of Action (NTPA) framework and therefore the office of the respondent No.4 by its letter dated 24.11.2013 requested Accord to include the name of the petitioner's factory in the list of factories for inspection by it. The respondent No.5 also sent a similar request by their letter dated 24.9.2014 but Accord did not comply with any of the aforesaid requests.

It is further stated that there is no formal agreement between the respondent Nos. 4 and 5 with Accord and Alliance apart from the Operation Manual (OM) and the National Tripartite Plan of Action (NTPA) and therefore the said respondent cannot exercise any authority on the respondent No.1 for any of its activities outside the scope of the National Tripartite Plan of Action (NTPA) framework. Furthermore, the said respondent does not have the authority to compel the respondent No.1 to inspect a particular factory including the petitioner's factory if it is unwilling to do so as there is no binding agreement with the respondent No.1. After

introduction of the provision for review in the Operation Manual (OM) on 28.01.2014 in cases of recommendations for evacuation or closure of factories by Accord or Alliance the decision will be subject to automatic review by the Review Panel of which the respondent Nos. 4 and 5 are members . In the instant case since the inspection of the petitioner's factory was not conducted by the respondent no. 1 Accord and it was done before the creation of the Review Panel, the respondents cannot compel the Respondent No.1 to inspect the petitioner's factory

Mr. Qumrul Haque Siddique, appearing with Mr. Imtiaz Moinul Islam, the learned Advocates for the Petitioner submit that the respondent No.1 has acted arbitrarily without any legal basis in publishing the name of the petitioner in its website as a unsafe and non compliant factory prompting foreign buyers to stop placing orders to the petitioner’s garments factory and therefore causing it to be shut down. He has become bankrupt due to the arbitrary and unlawful action of the Respondent No. 1 and his fundamental right to profession, trade and business as guaranteed by Article 40 of the Constitution has been infringed. The learned Advocates further submits that the respondent No.1 without inspecting the petitioner's factory has published a false and fabricated report about the petitioner’s factory . The learned Advocates further submit that the respondent No.1 has embarked upon a policy of ‘pick and choose and although it has inspected over 1400 garments factories in Bangladesh, it has not inspected the petitioner's factory

and therefore the respondent No.1 is also liable for discrimination and is in breach of the equality Clause i.e. Article 27 of our Constitution. The learned Advocates further submit that the respondent No.1 is in breach of its own Rules and standards of operation and the provisions of "Accord on fire and safety in Bangladesh" specifically Clause 10 which requires Accord to inspect all RMG factories supplying foreign buyers at least once by an international reputed independent Factory Inspector causing loss and damage to the petitioner. The learned Advocates further submit that there is no specific contract between the petitioner and the respondent No.1 and as such the petitioner has no remedy under contract or otherwise before a Civil Court or any other forum to compel the respondents to inspect its factory and publish the findings and therefore he has been constrained to invoke the special jurisdiction of this Court under Article 102 of the Constitution. The learned Advocates further submit that the respondent No.1 did not give the petitioner any hearing or opportunity to defend itself and instead of assessing the situation themselves they relied upon a false and fabricated report by a third party and arbitrarily published the petitioner's name in its website as a non compliant Ready Made Garments facility. The petitioner was acting in the public domain performing a public function and its arbitrary unlawful action has caused loss and damage to the petitioner. In this respect the learned Advocates for the petitioner have drawn our attention to the decision

in the English case ***R v Panel on Take Overs and Mergers, ex-parte Datafin plc and another 1987 1 All England 564 .***

As against this, Mr. K.S. Salah Uddin Ahmed and Mr. Azmalul Hossain QC, the learned Advocates appearing for the respondent Nos.1, 2 and 3 have submitted in one voice that the instant Rule is not maintainable since the action impugned by the petitioner is not by a person performing any function in connection with the affairs of the republic. The learned Advocates further point out that the impugned action is by the respondent No.1, an association of foreign buyers and that they are all private entities for which the petitioner must seek relief elsewhere and cannot invoke the special jurisdiction of this Court under Article 102 of the Constitution .

Mr. K.S. Salah Uddin Ahmed, the learned Advocate for the respondent No.1 further submits that there has been no breach of provision of Article 40 of the Constitution since the petitioner is at liberty to do business with any buyer of the world and supply readymade garments to any company and that the respondent No.1 has merely stated the inspection findings on its website. The learned Advocate further submits that the respondent No.1 requested the petitioner several times to perform retrofitting works to make its factory fit and safe but the petitioner continuously refused to do so and therefore they had no choice but to publish the findings of the inspection report in its website to inform its members which calls for no interference by this Court.

Mr. Azmalul Hossain, the learned Advocate for the respondent Nos. 2 and 3 submits that no relief has been claimed against the said respondents and that their names be struck out from the Writ Petition . The learned Advocate further submits that the respondent No.2 requested the respondent No.3 to conduct certain inspections of the petitioner's factory and the respondent No.3 did so in accordance with the highest standards and submitted their report to the respondent No. 2 who in turn informed the respondent No.1. The learned Advocate further submits that the respondent No.2 does not represent the respondent No.1 in any way and takes no responsibility for the publication of the report in the respondent No.1's website.

Mr. Md. Yousuf Ali,the learned Advocate for the respondent Nos. 4 and 5 submits that there is no binding agreement between the said respondents and the petitioner and although they cannot compel it to inspect any readymade garments factory nevertheless they requested the respondent No.1 on several occasions to inspect the petitioner's factory but it did not comply. The learned Advocate further submits that after incorporating the provision for review any inspection conducted by the respondent No.1, is subject to review by a Review Panal at the request of an aggrieved party but in the instant case since the inspection was conducted prior to the inclusion of the provision for review on 28.1.2014 and since the inspection was not conducted by the respondent No.1 therefore the decision of the Respondent

No. 1 to publish the name of the petitioner as a non compliant factory could not be reviewed by the Review Panel.

We have considered the submissions of the learned Advocates and perused the averments and the Annexures.

Since maintainability of this Rule has been challenged by the learned Advocates for the respondent Nos. 1,2 and 3 on the ground that the impugned action was not performed by a person in the service of the Republic we will address this point first .

Article 102 of the Constitution states:

1) *"The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this constitution.*
2) *The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-*
   (a) on the application of any person aggrieved, make an Order –
   (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
   (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect ;or
   (b) on the application of any person, make an order-
   (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or
   (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.
   (iii) …..

A plain reading of the aforesaid provision of the Constitution shows that pursuant to Article 102(1) this Court is empowered to give directions or orders to any person or authority for the enforcement of any aggrieved person's fundamental rights .

Generally to maintain an application under Article 102(1) the impugned action must be by a person who is in the service of the Republic or a statutory body or a local authority . The language of Article 102(1) however clearly states that a person must be aggrieved by the action or order of "any person" including a person acting in connection with the affairs of the Republic. Thus it is not necessary for the impugned act or order to be done or made by a public functionary or statutory body or local authority for Article 102(1) to be attracted. When fundamental rights of a person is infringed the remedy under Article 102(1) is available to the aggrieved person irrespective of whether he is in the service of the Republic, local authority, statutory body or even a private capacity.

In the case of ***Moulana Md. Abdul Hakim Vs. the Government of Bangladesh and others reported in 34 BLD (HCD)(2014) 34*** *it has been held "when issues of fundamental rights are raised, the sanction under Article 102(1) is clearly of availability of redress against "anyone", or "any authority", inclusive of any person performing any function in connection with the affairs of the Republic. The reference to government functionaries*

must accordingly be seen as an appendage made to the broader category of "anyone" or "any authority" by way of abundant caution."

Similarly in an unreported decision of this Court in Writ Petition No. 2499 of 2010 in the case Rokeya Akter Begum Vs. Bangladesh and others it has been held "as far as Article 102(1) is concerned i.e. when fundamental rights are relied on, the question of status of the impugned person or authority losses its relevance because the phrases "any person or authority" in the said sub-Article necessarily refers to a person or any authority , irrespective of his/it's status. Decisions by such a person or any authority , whether he /it is a public functionary or a private one, is hence reviewable, provided however, that infringement of one of the fundamental rights , figured in Part III of the Constitution, is in question . In so far as such a person need not be a public functionary, little complication arises in fundamental rights oriented cases."

In ***Rajuk Vs. A. Rouf Chowdhury and others in 61 DLR (AD) 28*** it has been held when violation of fundamental right as enumerated in the Constitution is the only ground and no violation of legal right or law has been alleged whatsoever resort may be taken under Article 102 of the Constitution. This decision of the Appellate Division establishes that when any violation of fundamental rights enumerated in Part III of the Constitution is established , this Court may issue appropriate orders provided the aggrieved person has no other alternative remedy before any other court.Thus it appears when

infringement of fundamental rights is alleged, this Court under Article 102(1) can give directions to any person or authority irrespective of whether he is in the service of the Republic or not for redress of the aggrieved person's loss or grievance.

The question however as to when a person is performing functions in connection with the affairs of the Republic has caused considerable concern in many countries of the world where the common law is practiced resulting in considerable jurisprudence.

Since private bodies are increasingly performing public functions the courts are intervening and passing appropriate directions and orders reviewing the action, inaction and functions of private bodies. The Courts regulate their discretion by looking at the nature of the function exercised by the private bodies and by scrutinizing whether the body is acting in the public domain and whether the aggrieved person has any other alternative efficacious remedy. This view has also been confirmed in the Indian case of ***Board of Control for Cricket V. Cricket Association of Bihar and others AIR 2015 SC 3194 .***

In the Landmark English case ***R v Panel on Take Overs and Mergers, ex-parte Datafin plc and another reported in 1987 1 All England Reports 564*** the Court of Appeal held that where a public duty is imposed on a body, expressly or by implication, or where a body exercises public functions the court will have jurisdiction to entertain an application for judicial review of that body's decision. There is no single test however as to what is public

function. The source of the body's power is a significant factor; if it is by an Act of Parliament or subordinate legislation then the body's action will be subject to judicial review. On the other hand, if the decision of the body is derived solely from contract its decision will not be amenable to judicial review. In such cases the Court will try to decide whether the impugned action has been performed in the public domain in which case the court is likely to infer that the decision has been taken in connection with the affairs of the Republic. A government element may also appear where governmental functions are carried out by private bodies. By contrast, when the nature of the function is such that it does not generate any interest of the Government then the body's action will not be subject to judicial review. Thus not only the source of the power of the body but also the nature of the action exercised by it will determine the availability of judicial review. It also appears that when a private sector body steps into the shoes of a public body then its action will be amenable to judicial review. In ***Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust v. V. R. Rudani reported in AIR 1989 SC 1607*** it has been held :

"The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartments. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226."

In the case of ***Consumer Education and Research Centre and others Vs. Union of India and others reported in AIR 1995 (SC) 922*** the Supreme Court of India held that in an appropriate case, the Court would give appropriate directions to the employer be it the State or private employer to make the right to life meaningful; to prevent pollution of work place; protection of the environment; protection of the health of the workmen or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by the Supreme Court under Article 32 and Article 142 of the Constitution. In the aforesaid case the Supreme Court issued mandamus upon a private industry for the enforcement of the petitioner's fundamental rights .

In the Datafin case Lloyd L.J. held

> *" If the body in question is exercising public law functions or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review. It may be said that to refer to public law in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other".*

In Bangladesh the responsibility for inspecting factories and their safety vests on the Inspector General of Factories i.e. respondent no. 5. This is

conferred by sections 61 and 62 of the Bangladesh Labour Law, 2006 which provide as follows:

> ***"Sec.-61: Safety of the building and the machinery.*** *-(1) If any inspector deems it necessary that any building or any of its part or any of its passage, machinery or plant is in such condition that it is dangerous to life or security of man then he shall by a written order direct to take the necessary steps within the specified time.*
>
> *(2) If it deems to any inspector that any building of any factory or establishment is very dangerous to life or safe of man then he shall, by written order to the owner restrict their of such building or part of a building until the repairment or re-shaping.*
>
> ***Sec.-62: Precautions about fire****. - In every factory at least one exit way with each floor must be attached so that at the time of fire accident it can be used as a substitute way and necessary provision for extinguishing fire should be taken.*
>
> *(2)If any inspector deems it fit that as per sub-section (1) there is no means of exit, then he shall, by an order writing to the owner inform him to take necessary steps within the stated period of time.*
>
> *(3)In every factory or establishment no exit way from the room shall be made under lock and key so that every man working inside it can get easily open and all three type of doors, if not sliding type, shall be made in such way so that it is kept open outward or if any door is between the two rooms, it must be kept open clear to the exit way and no such door shall be kept under lock and key at the working hour.*
>
> *(4)Every passage for exit must be used except the exit during the time of fire accident and every such window door or any other exit must be worked with red letters.*
>
> *(5)To aware or whistle the workers in such establishment the provision for easily audible whistle must be maintained in for each working workers.*
>
> *(6)For all the workers of the factory of each establishment there shall be made an exit way for all at the time of fire accident.*
>
> *(7) In any factory or establishment where in any above place of the ground floor ten or more workers one working or explosive or easily inflammable substance*

is used or is stored then the workers shall be cautions about the incident of fire and can determine what they should to do at that time and so that they can take proper and full-fledged training and so why necessary steps should also be taken for it.

(8) In every factory and establishment having fifty or more workers a rehearshlor of extinguishing of fire shall be maintained and for this reason a record book must be preserved by the owner."

The work of checking and inspecting the safety conditions of all readymade garments factories in the country within a short time after the Rana Plaza tragedy was not possible for the Government. The Government therefore welcomed the assistance of other stake-holders like Accord and Alliance through the National Tripartite committee (respondent No.4) and the National Tripartite Plan of Action (NTPA) in this regard. The agreement of the respondent no. 1 Accord states that all Bangladeshi garments factories supplying its members would be inspected at least once by an independent Safety Inspector appointed by the respondent No.1. The commitment of the respondent No.1 to inspect fire and safety facilities of readymade garments factories in Bangladesh at their own expenses is no doubt a welcome step for the improvement and development of the infrastructure of garments factories in the country. In the process they are assisting the Inspector General of Factories of the Government in ensuring fire and building safety of readymade garments factories in the country. Respondent No.1 has accordingly inspected over 1500 garments factories in the country and found some of them to be non compliant and lacking

adequate facilities on fire and building safety. Thus it is apparent that the respondent No.1 has been acting with the consent of the Inspector General of factories and assisting it in inspecting and ensuring the safety of the garments factories in the country and therefore performing functions" in connection with the affairs of the Republic".

Furthermore the Respondent No 1 has been performing a public function and acting in the public domain.The facts seem to be similar to the aforesaid Datafin case. Thus the petitioner's application under Article 102(1) is maintainable on this ground as well.

In the instant case the petitioner's right to profession trade and business as guaranteed by Article 40 of the Constitution has been infringed by the arbitrary act of the Respondent No.1 in publishing/showing the name of the petitioner as a non compliant and unsafe garments factory in its website without inspecting it and therefore in the opinion of this Court the Rule is not only maintainable under Article 102(1 but has substance.

For Article 102 (2) to be attracted however the petitioner must be aggrieved by an action of a person performing functions "in connection with the affairs of the Republic", or local authority or statutory body and he should be without any other alternative remedy or redress . The remedy sought by the petitioner is simply a direction on the Respondent No.1 for inspecting the petitioner's factory and publishing the findings in its website. If the petitioner's factor is unsafe and not fit in any way then the Respondent No.1

has nothing to loose. The petitioner cannot seek remedy from the Civil Court or any other forum in the form of a direction since there is no contractual relationship with the respondent No.1. Similarly an action for defamation also will not serve any purpose since the petitioner wants the Respondent No.1 to publish the accurate condition of its factory. Thus to compel the Respondent No. 1 to inspect its factory and publish the findings in its website the petitioner does not appear to have any other alternative remedy. In such view of the matter therefore this Rule is also maintainable unde Article 102 (2).

In the instant case it is admitted that the respondent No.1 never inspected the petitioner's factory but relied upon a report submitted by the respondent No.3 who inspected the petitioner's factory at the request of the respondent No.2 on 18.5.2013 after Accord was created although Clause 10 of the Accord Agreement clearly stipulates that all garments factories would be inspected by an independent internationally reputed Inspector appointed by Accord. The petitioner's factory was never inspected by an Inspector appointed by the Respondent No.1 despite several requests by the petitioner and the Government. The respondent no. 1 without inspecting the petitioner’s factory published its name in its website and stated it to be a non compliant and unsafe factory resulting in adverse publicity of the petitioner's garments factory causing all European buyers not only to cancel their existing orders but also refrain from giving future orders to the petitioner factory . Due to

the adverse report of the respondent No.1 in its website even American buyers of readymade garments represented by Alliance refrained from giving orders to the petitioner causing it huge financial and economic loss and driving it to bankruptcy.

The contention of the respondents that the petitioner's factory was not inspected by the Respondent No. 1 as it did not comply with its report to make certain structural improvements of its factory building is misconceived since there is no such precondition for inspecting a factory in the Accord Agreement and therefore the arbitrary insistence of such condition prior to inspecting the petitioner's factory is illegal and not sustainable in law. Furthermore, in the inspection report of the respondent No.3 although certain apprehensions have been expressed regarding safety of the petitioner's factory, no specific and detailed corrective measures was suggested and therefore the petitioner was justified in requesting the inspection of his factory by the respondent No.1 or its appointed Safety Inspector to specify the nature of correctional works required for the petitioner's factory so that compliance may be made to the satisfaction of the said respondent. The arbitrary imposition of pre-conditions by the respondent No.1 for inspecting the petitioner's factory and publishing a report containing adverse remarks in its website has caused serious damage and loss to the petitioner which could have been easily avoided by the respondent No.1 by merely inspecting it as it did in the case of other garments factories. This

policy of pick and choose, of inspecting some factories and not inspecting the petitioner's factory cannot be condoned or approved by any standard of fairness. The Respondent No.1 Accord was acting in concert with the Inspector General of Factories of the Government of Bangladesh through the National Tripartite Action Committee to ensure the safety of ready made garments factories in Bangladesh and therefore the Respondent No.1 was acting in connection with the affairs of the Republic . Their failure to act in accordance with law, by publishing a report in their website about the petitioner's factory without inspecting it is a breach of Clause 10 of their own agreement and the action may be subject to judicial review under Article 102(2) of the Constitution also.

The submission by the learned Advocate for the respondent No.1 that if a direction is given to the respondent No.1 to inspect the petitioner's factory it will open up the floodgates for other non compliant factories to come to this Court and obtain similar orders is misconceived since it has not been denied that the petitioner is the only factory whose name has been published on the respondent No.1's website as a non compliant factory without inspecting it. Had the petitioner's factory been inspected it could seek relief before the Review Panel. Other non compliant factories therefore have every opportunity to review the decision by the Review panel.

It is not for this court to decide whether the petitioner's factory is safe for manufacturing garments or direct any particular foreign buyer to place orders with the petitioner. The foreign buyers are free to decide where to place their orders and from which source to procure their products; what this court is concerned about is that the petitioner's name should not be published in the website of the Respondent No.1 as a non compliant/ unsafe factory without any prior inspection in accordance with the terms and conditions enumerated in its own Agreement.

It is to be noted that the respondent No.4 (National Tripartite Committee headed by the Secretary, Ministry of Labour and Employment) as well as the respondent No.5 (Inspector General of Factories of the Government of Bangladesh) requested the respondent No.1 to inspect the petitioner's factory but the request was not complied with and since the respondents did not have any binding contractual relationship with the respondent No.1 they were unable to compel it to comply with their request. The petitioner therefore had no other choice but to approach this court and invoke the special jurisdiction under Article 102 of the Constitution.

The petitioner's application is thus not only maintainable both under Article 102(1) as well as under Article 102(2) and also has substance for the reasons stated above.

Accordingly, the Rule is made absolute.

The respondent No.1 is directed to immediately arrange for inspection of the petitioner's factory as per Clause 10 of the Accord Agreement and other necessary protocols and publish the inspection report in its website and circulate it among its members all over the world.

There will be no order as to costs.

Md. Faruque (M. Faruque), J:

I agree