14 SCOB [2020] HCD

HIGH COURT DIVISION

SPECIAL ORIGINAL JURISDICTION

WRIT PETITION NO. 1774 OF 2017

Grameenphone Limited, represented the Chief Executive Officer, GP House, Bashundhara, Baridhara, Dhaka- 1229.

..... Petitioner

VERSUS

Bangladesh Telecommunication Regulatory Commission (BTRC), represented by the Chairman, IEB Bhaban, Ramna, Dhaka-1000 and others

..... Respondents

Mr. Junayed Ahmed Chowdhury, Adv. with Ms. Sajeda Farisa Kabir, Advocate and

Present : Mr. Justice Syed Refaat Ahmed And Mr. Justice Md. Iqbal Kabir Mr. Tanvir Quader, Advocate ... For the Petitioner

Mr. Khandaker Reza-E-Raquib with Mr. Khandaker Reza-E-Rabbi, Mr. Sayed Mahsib Hossain, Ms. Meherunnesa and Ms. Nadeya Nazneen, Advocates ... For the Respondent No. 1

Heard on: 12.3.2019, 24.4.2019, 25.4.2019, 28.4.2019, 29.4.2019, 5.5.2019, 6.5.2019, 7.5.2019, 12.5.2019, 13.5.2019 and 14.5.2019. Judgment on: 25.8.2019

The Bangladesh Telecommunication Regulation Act Section 63 and 65; It is our finding further that section 65 in its entirety is the corridor within the statutory scheme through which the sanctity of the section 63 penal sanction must be gauged. Consequentially, any failure to trigger section 65 or any of its components necessarily leads to a statutory infraction resulting in a more fundamental constitutional infraction. ... (Para 95)

If the section 65 provisions are to be obliterated or to be considered a dead letter of the law one is necessarily at a loss to find other statutory mechanisms that may be called upon for due implementation of section 63. Furthermore, it is our unqualified view that the power to charge an administrative fine to a maximum of Tk. 300 Crore must always have an in-built mechanism of fair play. Otherwise one is visited with a scenario of administrative anarchy resulting from an exercise of unfettered discretion. ... (Para 95)

JUDGMENT

SYED REFAAT AHMED, J:-

1. Pursuant to this Application under Article 102 of the Constitution, a Rule Nisi was issued calling upon the Respondents to show cause as to why the (a) BTRC's show cause notice under Memo No. 14.32.0000.007.51.001. 15.974 dated 13.07.2016 (Annexure A); (b)

BTRC's Notice of Fine under Memo No. 14.32.0000.007.51.001.15.1373 dated 06.11.2016 (Annexure B) imposing a fine of BDT 30,00,00,000/- (Taka Thirty Crore) upon the Petitioner under section 65(5) of the Bangladesh Telecommunication Regulation Act 2001; (c) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.1621 dated 29.11.2016 (Annexure C) rejecting the Petitioner's discharge application dated 16.11.2016 regarding the imposition of the said fine; and (d) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.230 dated 30.01.2017 (Annexure D) rejecting the Petitioner's revision application dated 14.12.2016 regarding the imposition of the said fine shall not be declared as without lawful authority and are of no legal effect, and as to why the Respondent No. 1 (BTRC) shall not be directed to withdraw or rescind the impugned letter of imposition of fine under reference No. 14.32.0000.007.51. 001.15.230 dated 30.01.2017 (Annexure D) rejecting the revision application of the said fine shall not be directed to withdraw or rescind the impugned letter of imposition of fine under reference No. 14.32.0000.007.51. 001.15.230 dated 30.01.2017 (Annexure D) rejecting the revision application of the Petitioner and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The Petitioner is a company incorporated under the laws of Bangladesh and a duly licensed Cellular Mobile Phone Operator. The Petitioner is the largest telecommunication operator in Bangladesh in terms of revenue, coverage and subscriber base. Aggrieved and dissatisfied by the actions of Respondent No. 1 ("BTRC"), the Petitioner filed this writ petition ("the Application") challenging the following documents:

(a) BTRC's show cause notice under Memo No. 14.32.0000.007.51.001.15.974 dated 13.07.2016 ("the Impugned Show Cause Notice");

(b) BTRC's Notice of Fine under Memo No. 14.32.0000.007.51.001.15.1373 dated 06.11.2016 ("the Impugned Notice of Fine") imposing a fine of BDT 30,00,00,000/- (Taka Thirty crore) ("the Fine") upon the Petitioner under the Bangladesh Telecommunication Regulation Act 2001 ("the Act");

(c) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.1621 dated 29.11.2016 ("the Impugned Letter 1") rejecting the Petitioner's discharge application dated 16.11.2016 regarding the imposition of the Fine; and

(d) BTRC's letter of imposition of fine under reference No. 14.32.0000.007.51.001.15.230 dated 30.01.2017 ("the Impugned Letter 2") rejecting the Petitioner's revision application dated 14.12.2016 regarding the imposition of the Fine;

3. on the grounds, *inter alia*, that the process, under which the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 are issued and the Fine is imposed, is arbitrary, and the Fine is disproportionate and discriminatory.

4. Upon hearing the parties, this Court admitted the Application and by an Order dated 09.02.2017 ("the Court Order") directed the Petitioner to furnish a continuing Bank Guarantee covering the Fine made out in favour of BTRC within five working days of receipt of the Order and, thereafter, file an Affidavit-of-Compliance regarding issuance of such Bank Guarantee. This Court also directed BTRC to file an Affidavit-of-Compliance upon receipt of such continuing Bank Guarantee and place the said Bank Guarantee in the custody of this Court through the office of the Registrar, High Court Division, Supreme Court of Bangladesh.

5. In compliance with the Court Order, the Petitioner filed an Affidavit-of-Compliance on 19.02.2017 stating that the Petitioner has furnished a continuing Bank Guarantee dated 15.02.2017 covering the Fine made out in favour of BTRC.

6. Thereafter, in compliance with the Court Order, BTRC filed an Affidavit-of-Compliance on 26.02.2017 acknowledging the receipt of the continuing Bank Guarantee and that the said Bank Guarantee has been placed in the custody of this Court through the office of the Registrar, High Court Division, Supreme Court of Bangladesh.

7. BTRC filed an Affidavit-in-Opposition on 11.02.2018 ("the Affidavit-in-Opposition") seeking that the Application be rejected.

8. The Petitioner's case in the Application is as follows:

BTRC, under section 40 of the Bangladesh Telecommunication Regulation Act ("Act"), issued a permit dated 28.10.2007 with a validity period up to 10.11.2011 ("the Permit") to the Petitioner for *leasing or subleasing or sharing of, amongst others, the Petitioner's optical fiber and any other telecom installations subject to certain conditions*. These conditions included, amongst others, *sharing or leasing of any of its ...installations or system or any apparatus or facility* which included optical fiber without any discrimination (condition 7 of the Permit).

9. BTRC promulgated the Nationwide Telecommunication and Transmission Network Guidelines ("NTTNG") dated 30.11.2008 and the Infrastructure Sharing Guidelines ("ISG") dated 08.09.2008 (which was amended on 07.07.2011).

10. Subsequently, BTRC, by its letter dated 14.02.2011 ("the BTRC Permit Cancellation Letter") informed the Petitioner, amongst others that (i) validity of the Permit will not be extended beyond its expiration i.e., 10.11.2011; (ii) the Petitioner cannot make any further agreement with any party where there is Nationwide Telecommunication and Transmission Network ("NTTN"); (iii) the Petitioner cannot make any further agreement with any party for the period of non-existence of the Permit; and (iv) if any agreement is already executed and its duration exceeds the period of the Permit, that agreement shall have no legal effect on expiration of the Permit.

11. Upon receipt of the BTRC Permit Cancellation Letter, the Petitioner by its letter dated 03.11.2011 ("the GP Permit Extension Letter") wrote to BTRC about the ramification of the abrupt cancellation of the Permit and its consequential effect on the existing agreements between the Petitioner and various parties including banks, financial institutions, capital market such as DSE, CSE and CDBL, Bangladesh Navy, etc.

12. It so transpired moreover that the Petitioner by letter dated 10.11.2011 ("the Verbal Approval Confirmation Letter") (also being the date of expiration of the Permit), wrote to BTRC thanking for giving its *"verbal notification"* about the Petitioner being able to continue leasing or sharing its optical fiber network under the Permit pending BTRC's final notice.

13. BTRC never replied to the GP Permit Extension Letter or the Verbal Approval Confirmation Letter.

14. On or about 2012, the Petitioner, ADN (the proforma Respondent No. 3) and ASL (the proforma Respondent No. 4), in order to provide coordinated services to their customers, formulated a business model under the name and style of "GO Broadband" ("the coordinated service"), which they sought to present before BTRC. In this regard, ADN, by its letter dated

04.01.2012 under reference No. RA/ADN/Infrastructure/03 ("the ADN Letter") set out before BTRC the proposed business model.

15. ADN by its letter under reference No. RA/ADN/Infrastructure/04 dated 26.01.2012 sent to BTRC, the draft copy of the Business Alliance Agreement ("the Draft BAA") for coordinated services amongst the Petitioner, ADN and ASL.

16. ASL by its letter under reference No. অগ্নি/বিটিআরসি/ইএন্ডও/২০১২-০০১ dated 05.03.2012 ("the ASL Letter") wrote to BTRC about the rationale for coordinated services.

BTRC, in reply to the ADN letter dated 26.01.2012 and the ASL Letter, under its letter bearing reference No. BTRC/E&O/22-5/2012/Pt-1-556 dated 20.06.2012 ("BTRC Provisional Approval") gave provisional approval of the coordinated service as agreed by the Petitioner, ADN and ASL under the Draft BAA subject to the following, amongst others, terms and conditions:

(i) Passive infrastructure shall be shared in accordance with the Infrastructure Sharing Guidelines;

(ii) ADN and ASL can use the distribution channel of cellular mobile operators;

(iii)For providing the coordinated service, ADN and ASL shall be responsible for deploying their own network.

17. ADN and ASL subsequently sent another copy of the Draft BAA containing the name of the Petitioner as the third party to BTRC by their joint letter dated 02.09.2012.

18. BTRC, by its letter under reference No. BTRC/E&O/5-14/2012-1016 dated 12.09.2012, provisionally approved the Draft BAA between ADN, ASL and the Petitioner.

19. ADN and ASL, by their joint letter dated 07.10.2012 ("the Revenue Sharing Letter"), shared with BTRC the revenue sharing model for the coordinated service and requested BTRC to give its approval. BTRC, by its letter under reference BTRC/SS/Tariff/ISP-Part(2)/2011-13 dated 08.01.2013 ("the Approved Revenue Sharing Model"), approved the revenue sharing model.

20. On 22.01.2013, the Petitioner, ADN and ASL finalized, and executed the Business Alliance Agreement ("the BAA") in order to provide coordinated services.

21. BTRC further issued Interim Directive on Process flow for Amended Infrastructure Guideline under reference No. BTRC/E&O/22-5/2011/103 dated 31.01.2013 ("the Interim ISG Directive") under which it is stated, *inter alia*, that telecom operators must lease the primary fiber in long haul where NTTN already exists from NTTN operators and will be allowed to take the redundant/secondary backup from other telecom operators.

22. ADN and ASL, by their joint letter dated 03.02.2013 ("the BAA Execution Letter"), informed BTRC about the execution of the BAA upon following BTRC's instructions and guidelines. The BAA Execution Letter also annexed a copy of the BAA for BTRC's perusal. However, BTRC never replied to the BAA Execution Letter.

23. Furthermore, for the purpose of the coordinated service, ADN and ASL, by their letter dated 05.12.2012, sought tariff approval from BTRC, which was later modified by ADN and ASL upon BTRC's instructions and was duly notified to BTRC by their joint letter dated

27.01.2013. BTRC, by its letter under reference No. BTRC/SS/Tariff/ISP-Part(2)/2011-94 dated 17.02.2013 approved the tariff structure of the coordinated service, which was valid till 16.08.2013. This approval of BTRC was further applied for extension by the joint letter of ADN and ASL dated 05.08.2013 which was allowed by BTRC under reference No. BTRC/SS/Tariff/ISP-Part(2)/2011-518 dated 16.09.2013, which was due to expire on 16.03.2014.

24. ADN and ASL by their letter dated 11.02.2014 wrote to BTRC for extension of the tariff approval for another year ("the Tariff Extension Letter"). In this instance as well, BTRC never replied to the Tariff Extension Letter.

25. ADN and ASL, under another joint letter dated 23.03.2014, informed BTRC about continuation of the previously sanctioned tariff approval (which by then expired) until BTRC grants a new tariff approval ("the Tariff Continuation Letter"). Again, BTRC never replied to this Tariff Continuation Letter.

26. The Petitioner executed the Business Solutions Agreement ("BSA") on 03.12.2014 with Sonali Bank Limited ("SBL") pursuant to Petitioner's role under the BAA.

27. In the above context, BTRC issued the Impugned Show Cause Notice. In the Impugned Show Cause Notice, BTRC alleged that the Petitioner has violated the provisions of the Act, the NTTNG, the ISG, or its 2G or 3G licenses by (a) entering into an agreement with SBL; and (b) sharing its fiber optic network with ADN and ASL under the BAA. BTRC further instructed the Petitioner (i) to take corrective measures by immediately stopping the services provided to SBL and cancelling the BSA; and (ii) to show cause within thirty days from the date of receipt of the Impugned Show Cause Notice as to why an enforcement order should not be issued or necessary legal actions not be taken against the Petitioner in accordance with law.

28. The Petitioner replied to the Impugned Show Cause Notice on 11.08.2016, where the Petitioner stated that:

(i) It had migrated the transmission network to an NTTN operator as a corrective measure; and

(ii) There were some semantic errors in the BSA showing the Petitioner as the service provider, while in reality, ADN and ASL were the service providers and the Petitioner has sent an amended version of the BSA to SBL correcting the inadvertent mistakes on 04.08.2016.

29. On 06.11.2016, BTRC rejected the reply of the Petitioner to the Impugned Show Cause Notice, and through the Impugned Notice of Fine, alleged that the Petitioner has *failed* to comply with the terms and conditions of the guidelines, license and the provisions of the Bangladesh Telecommunication Regulation Act 2001 and also failed to justify such failure. Hence, BTRC after determining the nature of offence and the amount of loss, has taken the decision to impose the Fine.

30. The Petitioner filed an application dated 16.11.2016 ("the Discharge Application") under section 65(3)(c) of the Act applying for discharge from the fine and denying the allegations levelled against it by BTRC as contained in the Impugned Notice of Fine. BTRC rejected the Discharge Application vide the Impugned Letter 1.

31 Thereafter, the Petitioner filed a revision application on 14.12.2016 ("the Revision Application") under section 65(5) of the Act on the ground that the Petitioner denies the allegations levelled against it by BTRC as contained in the Impugned Letter 1. The Revision Application of the Petitioner was rejected by BTRC by the Impugned Letter 2. BTRC also demanded that the Fine be paid by the Petitioner within 10 days of receipt of the Impugned Letter 2.

32. It is also important to note that along with the Petitioner, BTRC also imposed a fine of BDT 500,000/- (Taka five lac) on ADN by letter under reference No. 14.32.0000.007.51.001.15.1374 dated 06.11.2016 ("the ADN Notice of Fine") and a fine of BDT 500,000/- (Taka five lac) on ASL by letter under reference No. 14.32.0000.007.51.001.15.1375 dated 06.11.2016 ("the ASL Notice of Fine").

33. Under the coordinated services, ADN and ASL collectively earned Tk. 13,461,001/and the Petitioner Tk. 147,682,324/-. However, BTRC only imposed a fine of Tk. 5 Lac each on ADN and ASL, whereas the Petitioner was imposed with a fine of Tk. 30 Crores.

34. The Petitioner points out furthermore, the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 are all issued under section 65 of the Act despite the fact that the section was not mentioned in any of the documents. This is because in the Notice of the Fine, the Impugned Letter 1 and the Impugned Letter 2, BTRC states that the fine is imposed after determining the nature of the offence and amount of loss. It is stressed that section 65(2) of the Act empowers BTRC to fix penalty based on the nature of offence and the amount of loss.

35. BTRC's case in the Affidavit-in-Opposition is as follows:

BTRC notified the Petitioner that the term of the Permit will not be extended any further on the expiry of the Permit on 10.11.2011. Further, it is the case of BTRC that there is no scope for it as a government entity to give any verbal approval and as such it was not incumbent upon BTRC to respond to the letter dated 10.11.2011 written by the Petitioner to the BRTC.

36. It is also highlighted that upon vetting the Draft BAA between Petitioner, ADN and ASL, BTRC gave an approval subject to the fulfilment of specific conditions. It is contended that ADN and ASL never informed the BTRC about the execution of BAA. In that context BTRC's assertion is also that the BSA which was executed between the Petitioner and SBL was not in conformity with and pursuant to the role of the Petitioner under the BAA as approved by BTRC.

37. By a letter dated 30.03.2016, BTRC requested the Petitioner to explain the sort of internet service which GO Broadband provides and whether GO Broadband is a licensee of BTRC. According to BTRC it is apparent from the BSA that there was no reference therein to ADN and ASL and that the Petitioner, being a mobile phone operator, in providing to SBL Last Mile Connectivity violated different provisions of the Act. Predicated on such state of affairs, it was decided at the 200th Commission Meeting of BTRC held from 17 to 19 December to impose a fine of Tk. 30 Crore on the Petitioner for such violations.

38. Further, it is stated that BTRC did not impose the Fine under section 65(2) the Act. Since the Fine was not imposed under section 65 of the Act, there was no scope the Petitioner

to apply for discharge under 65(3)(c) of the Act. It is argued in a similar vein that since the Fine was not imposed upon the Petitioner under section 65 of the Act there was equally no scope for the Petitioner to apply for revision under section 65(5) of the Act. Therefore, a decision was taken during 20 to 26 December 2016 at the 201^{st} Commission Meeting of BTRC rejecting the Revision Application and affirming its earlier decision that the Petitioner has to pay the Fine.

39. It is submitted, accordingly, that although the impugned notices & letters were sent within the purview of the Act, however, those were not sent under the authority given to BTRC under section 65 of the Act. Further asserted is the fact that the Fine was calculated on the basis of the loss which the exchequers has suffered by Last Mile Transmission which the Petitioner has provided to SBL since 03.12.2014.

40. Mr. Khandaker Reza-E-Raquib, BTRC's learned Advocate, submits that the Petitioner, even after expiry of the Permit, proceeded further with its mala fide intention to execute a fresh agreement and/or renew the existing agreement with other entities, despite being fully aware of the fact it has no lawful authority/ approval/ Permit to provide any sort of NTTN service and having also realized that such agreement shall have no legal effect beyond 10.11.2011. It is, accordingly, asserted that such actions on part of the Petitioner not only amount to violation of the Act, but also the terms and conditions of the Permit. He further submits that the Petitioner executed the BSA, an essentially bilateral agreement, with SBL in violation of the terms and conditions of the BAA to provide various business solution products and telecommunication services including Last Mile Connectivity and/or secure point to point data connectivity, when instead it were ADN and ASL who were responsible under the BAA to provide the coordinated service. He explains further that in any case under the purview of the Petitioner's existing 2G and 3G Cellular Mobile Phone Operator Licenses, the Petitioner being an Access Network Service (ANS) operator is not authorized to provide Last Mile Connectivity and/or secure point to point data connectivity service to SBL. Hence, in the absence of any appropriate license and/or approval, the Petitioner had no legal authority to enter into any such agreement with SBL and/or others.

41. In this context Mr. Reza-E-Raquib has stressed in reiteration that as per the BAA, both ADN and ASL, as opposed to the Petitioner, were responsible to provide the Last Mile Connectivity service i.e. the final leg of delivering connectivity to a customer. However, in the instant case, the Petitioner in violation of the terms and conditions of the BAA provided this service to SBL under the BSA. He submits that the Petitioner despite having actual knowledge and being fully aware of the fact that the Tariff approval as issued in favour of ADN and/or ASL for the coordinated service expired on 16.03.2014, went ahead and executed the BSA with SBL on 03.12.2014 to provide that very coordinated service in question. The BTRC's stance here is that since the approval was never renewed and/or extended any further by BTRC after its expiry on 16.03.2014, therefore, there remains no scope for the Petitioner and/or ADN and ASL to enter into any such BSA with any customers whatsoever including SBL.

42. Mr. Reza-E-Raquib submits that even if for the sake of argument it is considered that the BSA, although prima facie executed between the Petitioner and SBL bilaterally, somehow allows for ADN and ASL to be the actual service provider for the Last Mile Connectivity leaving the Petitioner to be only involved with Lead Sales (as has been the thrust of the arguments put forth at one point by the Petitioner's learned Advocate Mr. Junayed Ahmed Chowdhury), it can still be argued that the Petitioner with its *mala fide* intention knowingly

aided and abetted ADN and/or ASL to continue their operation despite the expiry of the Tariff approval in order to deprive BTRC and/or the government of revenues rightfully due it. Such action on part of the Petitioner, according to BTRC, amounts to a clear violation of section 73 of the Act along with other provisions of the relevant guidelines and licenses.

43. Furthermore, in generally assuming the position that each and every action of BTRC, i.e., from initiation of the Impugned Show Cause Notice till imposition of the Fine was done in accordance with the provision and/or power as conferred by section 63 of the Act, Mr. Reza-E-Raquib provides us with BTRC's perspective on where such authority exercised stands vis-à-vis the Petitioner under the said section in juxtaposition to the provisions and requirements of section 65. He accordingly submits that section 63 of the Act empowers BTRC with exclusive discretion to impose administrative fines upon the violator(s) for any amount up to BDT 300 Crore for violation of any provision of the Act, regulations and/or any terms and conditions of the license or Permit. He interprets section 65 as not containing any such threshold of administrative fine as may be imposed upon the violator for the aforesaid violations. According to Mr. Reza-E-Raquib, the provisions of section 65 are triggered and come into operation only when an administrative fine may be imposed upon the violator under any provisions including but not limited to section 63 of the Act. It follows, as per his submissions, that section 65 clearly deals with the process that is to be complied while executing the order of imposition of an administrative fine which may be imposed upon the violator under the relevant provisions of the Act and not at any point in time prior to such imposition.

44. Dwelling further on the specific grievance of the Petitioner on the matter of the Fine imposed, Mr. Reza-E-Raquib submits that the respective amounts of administrative fine imposed by BTRC upon the Petitioner, ADN and ASL were proportionate to the extent of their respective involvements with the offence and while determining the same BTRC duly considered all relevant factors including but not limited to the nature/gravity of the offence committed, roles assumed, responsibilities and liabilities of the respective violators, loss of revenue amount suffered by BTRC and/or the government, *mens rea* of the respective wrongdoers etc.

45. Summing up, therefore, BTRC's position, Mr. Reza-E-Raquib highlights thus the core points of BTRC's response:

(a) BTRC notified the Petitioner that the term of the Permit will not be extended any further on the expiry of the Permit. Further it is the case of BTRC that there is no scope for the BTRC being a government entity to give any verbal approval and as such it was not incumbent upon BTRC to respond to the letter dated 10.11.2011 (i.e., the Verbal Approval Confirmation Letter) written by the Petitioner to the BRTC upon the expiration of the Permit.

(b) Upon vetting the Draft BAA between the Petitioner, ADN and ASL, BTRC gave a conditional approval i.e., the BTRC Provisional Approval, and ADN and ASL never informed the BTRC about the execution of BAA. The BSA which was executed between the Petitioner and SBL was not pursuant to role of the Petitioner under the BAA which was approved by BTRC.

(c) By a letter dated 30.03.2016, BTRC requested the Petitioner to explain the sort of internet service which GO Broadband provides and whether GO Broadband is a licensee of BTRC. According to BTRC, it is apparent from the BSA there was no reference of ADN and ASL and that the Petitioner being a mobile phone operator has been providing SBL Last Mile

Connectivity, thereby, violating different provisions of the Act. During 17 to 19.10.2016, the 200th Commission Meeting of BTRC took place where it was decided that the Petitioner shall accordingly be liable for the Fine for violation committed.

(d) Further, BTRC did not impose the Fine under section 65(2) the Act. Since the Fine was not imposed under section 65 of the Act, there was no scope for the Petitioner to apply for discharge under 65(3)(c) of the Act. Moreover, it is BTRC's case that since the Fine was not imposed upon the Petitioner under section 65 of the Act there was further no scope for the Petitioner to apply for revision either under section 65(5) of the Act. Therefore, during 20 to 26.12.2016 the 201^{st} Commission Meeting of the BTRC took place where the BTRC rejected the Revision Application of the Petitioner and affirmed its earlier decision that the Petitioner is liable to pay the Fine.

(e) Although the Impugned Letters were sent within the purview of the Act, however those were not sent under the authority given to the BTRC under section 65 of the Act. Further, the Fine was calculated on the basis of the loss which the government has suffered by Last Mile Transmission which the Petitioner has provided to SBL since 03.12.2014.

46. In summation, BTRC contends that the grounds in this Writ Petition are vague, false, unfounded and replete with misconceptions and, therefore, the Rule Nisi issued is liable to be discharged.

47. In this context, the Petitioner advances the following submissions:

(a) The connectivity services provided by the Petitioner under GO Broadband to SBL as per the terms of the BSA did not violate the BTRC Provisional Approval, the Act, the NTTNG, the ISG or the Petitioner's 2G or 3G licenses.

(b) The Petitioner did not violate the provisions of the Act, the NTTNG, the ISG, or the Interim ISG Directive by "sharing" its optical/wired transmission network with ADN and ASL for the coordinated service under the BAA rather than taking the lease of such optical/wired transmission network from NTTN licensee.

(c) Even if there is any violation by the Petitioner (which is denied), BTRC did not follow the due process when it issued the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2, since the process set out in section 65 of the Act was not followed.

(d) If section 65 of the Act does not apply (as argued by BTRC), then section 63 of the Act does not set out the way in which the Fine is to be calculated and therefore, BTRC had no basis for imposing the Fine.

(e) The Fine is discriminatory, since a regulatory authority like BTRC cannot, without any justification, adopt a different yardstick when determining the quantum of fines and penalties of the Petitioner, ADN and ASL.

(f) The Fine is wrong because BTRC did not take into account the corrective measures taken by the Petitioner.

48. This Court notes at the outset that the Petitioner's entire case is predicated on the validity of the Permit at all material times. That issue of validity constrains as first to look into section 40 of the Act as reads thus:

"40. Restrictions on according commercial permission for use of telecommunication system.- (1) An operator shall not, without a permit issued by the Commission, accord permission to any other person or allow him, on commercial basis or in lieu of fees, price or

other consideration, to use his telecommunication system or any installation or apparatus or facility by which telecommunication services can be provided.

(2) Where an operator applies for a permit mentioned in sub-section (1), the Commission may allow the application and issue a permit if, after necessary inquiry, it is satisfied that the permit applied for will not adversely affect the telecommunication system or the providing of its services, and may also impose such conditions as it considers appropriate in any particular circumstances; the permit so issued shall remain valid for a period specified therein.

(3) Where a condition mentioned in the permit issued under subsection (2) is violated, the Commission may at any time cancel the permit."

49. The Petitioner adopts the positions that its Permit was issued under section 40 of the Act allowing the *leasing or subleasing or sharing* of, amongst others, the Petitioner's *optical fiber and any other telecom installations subject to certain conditions*. It is the Petitioner's firm stance that there was no infraction on the part of the Petitioner which would entitle BTRC to cancel the Permit under section 40(3) of the Act. More significantly yet it is submitted further that at all material times, the Permit remained valid and subsisting because:

(a) BTRC never expressly denied that the Permit expired even when the Petitioner asked for its continuance by the GP Permit Extension Letter.

(b) BTRC never expressly denied that the Permit expired even when the Petitioner asked for its continuance by the Verbal Approval Confirmation Letter.

50. It is submitted by the Petitioner's learned Advocate, Mr. Junayed Ahmed Chowdhury that as a matter of law, there is a presumption of acceptance when there is non-reply to letters where, under the facts, there is an obligation to reply and disavow the claim if untrue (Boerner v. United States 117 F 2d 387 (1941) at p. 391). From the facts, when the Petitioner, in the context of things and considering the gravity of the matter, under the Verbal Approval Confirmation Letter, asked of BTRC to confirm the continuance of the Permit and execution of new contracts thereunder as per verbal notification of BTRC, it was imperative, Mr. Chowdhury asserts, for BTRC to reply and deny that it had given any such verbal notification. He further highlights that in this case, after receipt of the BTRC Permit Cancellation Letter, the Petitioner sent two letters, namely - (a) the GP Permit Extension Letter and (b) the Verbal Approval Confirmation Letter. In these two letters, the Petitioner positively asserted its intention of continuing with the activities under the Permit and execution of new contracts thereunder. Especially, in the Verbal Approval Confirmation Letter, the Petitioner concluded by saying that "We would now be conveying this notification to our customers so that they are assured of their service continuity". This assertion of the Petitioner under the Verbal Approval Confirmation Letter (and also the GP Permit Extension Letter) Mr. Chowdhury argues to be crucial for the purpose of this case. He points out that none of these two letters evoked a contradiction or denial of BTRC and BTRC allowed the Petitioner's statements in the GP Permit Extension Letter and the Verbal Approval Confirmation Letter to remain unchallenged. It is submitted that if BTRC had any reservation about the Petitioner's claim that BTRC had given its "verbal notification", it was incumbent upon BTRC, in the context of this case, under the principles enunciated in Boggavarapu Subba Rao v. Telagamsetti Venkata Rao reported in 2004 (4) ALD 426 and Richardson v. Dunn reported in 2 QB 218 to reply and dispel such assertion of the Petitioner. But in the

facts it so transpired that instead of replying to the GP Permit Extension Letter and the Verbal Approval Confirmation Letter, BTRC, for the first time, in its 200th meeting held from 17.10.2016 to 19.10.2016, while discussing the issue of the verbal approval, concluded that তাছাড়া কমিশন হতে যেকোন বিষয়ে মৌখিক অনুমোদনের কোন সুযোগ নেই। ("there is no scope for a verbal approval issuing from the Commission in any given matter") and reiterated the same position in its 201st meeting held from 20.12.2016 to 22.12.2016 and 26.12.2016. Mr. Junayed Ahmed Chowdhury stresses that under the laws governing oral information and subsequent confirmation, where action has to be taken on the basis of oral information, it is mandatory for the person giving such oral information to confirm the same in writing, and the person who has received such information, in turn, is required to seek confirmation of the oral information in writing as early as possible *(TSR Subramanian (India Supreme Court) Writ Petition (Civil) No. 234 of 2011)*. Here, the Petitioner (that is the person receiving the verbal notification), upon receiving such information, informed BTRC by written confirmation under the Verbal Approval Confirmation Letter, to which BTRC never replied (either affirming or rejecting it).

51. Hence, the Petitioner contends that as a result of BTRC's failure to reply to these two Letters dispelling the Petitioner's position about the continuity of the Permit, the Permit remains valid and subsisting and was not cancelled under section 40(3) of the Act. Resultantly, it is submitted that the Petitioner was entitled under the Permit to go ahead with the sharing of, amongst others, its optical fiber with ADN and ASL under the BAA.

52. Having heard the submissions and considered the facts, pleadings and documentation on brought record in this case this Court is led to arrive at a finding at the outset that the nationwide NTTNG are of overriding effect with regard to the BAA and BSA. In this the application of the NTTNG has necessarily to be read with that of the ISG. The NTTNG are intended at all material times to provide an overview of the licensing and regulatory framework for applicants like the Petitioner to obtain license under the said guidelines. Consequentially, no person or entity can be allowed to develop, build, operate and maintain NTTN without a valid license issued by BTRC. Significantly further, the NTTNG had been prepared to create NTTNs with a view to separating Transmission Network Services and Access Network Services. The end result, therefore, must be that the law and the standards as the NTTNG must prevail over all contractual pathways that were sought variously by the Petitioner to operate in avoidance of the same. We also find the BTRC Permit Cancellation Letter (of 14.02.2011), considered on its own, to be an adequate advance notice to the Petitioner to get its act together before the expiration of the Permit on 10.11.2011 and avoid precisely the pitfalls anticipated therein and in which the Petitioner in the facts finds itself in. The Permit Cancellation Letter pertinently and presciently reads thus:

"With reference to the subject mentioned above, I am directed to inform you that NTTN License has been issued to some entities for providing NTTN service by using the optical fiber network on commercial basis, which is the primary business of the NTTN Licensees. Hence, the term of the permit issued under section 40 of the Bangladesh Telecommunication Regulation Act, 2001, to Grameen Phone Limited will not, on its expiration, be extended for any further period. You are requested not to make any further agreement with any party where there is NTTN network. You are further requested not to make any agreement with any party for the period of non-existence of your permit. If any agreement is already executed and its duration exceeds the period of your permit, that agreement shall have no legal effect on expiration of the permit." 54. Predicated on that finding the GP Permit Extension Letter (of 03.11.2011) and Verbal Approval Certification Letter (of 10.11.2011) to BTRC appear to this Court to be the Petitioner's devices at avoidance of and suspending the inevitable consequences of the Permit's expiration. The facts, however, additionally indicate that the Petitioner was able to contrive such a situation in circumstances in which the BTRC itself was complicit. That conclusion also rings true of payments made and received by BTRC from the Petitioner in the post-November, 2011 period. It has been the Petitioner's contention that it chose to so act and operate on the basis of verbal assurance or *"verbal notification"* from BTRC itself, thereby, providing a leeway and license to the Petitioner to override the law.

55. In this context, Mr. Reza-E-Raquib has submitted candidly for the BTRC that the said regulatory authority was unaware of what the Petitioner was up to for a period of nearly five and a half years computed from the date of issuance of the BTRC Permit Cancellation Letter and leading into the issuance of the Impugned Show Cause Notice. It is submitted further it is only upon the BSA being executed that certain ISPs alerted the BTRC to the Petitioner's machinations. We are also given to believe by Mr. Reza-E-Raquib that the verbal assurance or *"verbal notification"* relied on by the Petitioner had at some point been possibly forthcoming from then incumbent Chairman, BTRC who incidentally passed away in 2012.

56. Indeed further, it can be agreed, and as done so by Mr. Junayed Ahmed Chowdhury an obligation attached to the BTRC to respond to the GP Permit Extension Letter and the Verbal Approval Confirmation Letter even given the adequacy and sufficiency of the BTRC Permit Cancellation Letter as found upon hereinabove. That said and BTRC being clearly remiss in not duly responding to the Petitioner's letters, in the facts such lapse is not found by this Court to be a fatal one and does not detract from the efficacy and adequacy of the BTRC Permit Cancellation Letter. By that reason this Court finds no reason to accept Mr. Chowdhury's assertions that BTRC's lapses contributed to the entrenched legal terms and conditions declaring the Permit's expiration on 10.11.2011 to be somehow, and inexplicably so, neutralized and placed in abeyance, thereby, permitting of the subsistence and continuity of the Permit beyond the expiry date. There is furthermore no ground found to attest to the view that section 40(3) of the Act had not been triggered off in the facts.

57. Mr. Khandaker Reza-E-Raquib has also contended, and not without merit, that the Petitioner resorted to "subterfuge" in "making payments" to BTRC under illegal FON Sharing Devices post - 2011. It is here that this Court is constrained to find on an abdication of regulatory responsibility on BTRC's part. We fail to understand how and why a regulatory authority as BTRC with its considerable statutory powers failed to detect and stop the Petitioner on its tracks for nearly five and half years after the expiration of the Permit on 10.11.2011. This is all the more baffling given that BTRC permitted the Petitioner to operate on an understanding, verbal or otherwise, failing to invoke its considerable penalizing powers under the Act. It would stand to reason that the charging and penalizing powers as found, for example, in sections 63 and 65, and considerable as they are, must be based on equally significant powers and duty to detect and prevent commission of offences under the Act. Such powers of detection and prevention ostensibly remained in abeyance for five and half years until issuance of the Impugned Show Cause Notice on 13.07.2016. It is our finding that BTRC does not at any material time and generally possess the luxury and privilege under the

statutory régime to assume readily ready compliance with the law by any entity as and including the Petitioner.

58. Given that finding above, we are concerned that in all likelihood the BTRC and the State exchequer have been ill-served by BTRC's inertia for an inordinate length of time and by the delayed regulatory response evident in the Impugned Show Cause Notice in lieu of prompt action demanded much earlier in the facts in 2011. Such prompt action was clearly anticipated otherwise following the BTRC Permit Cancellation Letter (of 14.02.2011). BTRC regrettably went into a deep slumber thereafter or chose to look the other way. That said, and predicated on our findings on the facts and issues focal to the issuance of the Impugned Show Cause Notice this Court holds that BTRC, albeit belatedly, grasped the gravity and nature of the offence committed by the Petitioner in its true legal context and accordingly no legal infirmity is found in the issuance of the Impugned Show Cause Notice. By that reason, the information on record indicates that the Petitioner had at material times been operating a system and/or providing service in violation of conditions of its license or Permit in a manner as constitute an offence under section 73(1)(a) of the Act as satisfactorily argued upon by the BTRC's learned Advocate, Mr. Reza-E-Raquib.

59. Yet another significant aspect of the Petitioner's grievance against BTRC is that due process has not been followed when issuing the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2:

The learned Advocate for the Petitioner, Mr. Junayed Ahmed Chowdhury emphasizes that even if it is accepted that the Petitioner violated the BTRC Provisional Approval, the Act, the NTTNG, the ISG or the Petitioner's 2G or 3G licenses, even then, it is submitted that the Fine is imposed without following the due process of law. Mr. Chowdhury's submissions in this regard has two parts - (a) whether section 65 of the Act applies or not; and (b) if section 65 of the Act applies, then whether its requirements were fulfilled or not.

60. As noted earlier, BTRC has relied on section 63 of the Act to impose the Fine and denies that section 65 of the Act applies to this case. As per the section 63(1) of the Act, if a licensee or a permit holder violates any provision of this Act or regulations or any condition of the licence or permit, in operating a system or in providing a service, then:

"...কমিশন একটি নোটিশের মাধ্যমে উক্ত ব্যক্তি বা লাইসেন্সধারীবা পারমিট বা সনদের ধারককে ৩০ দিনের মধ্যে এইমর্মে লিখিত কারণ দর্শানোর নির্দেশ দিতে পারিবে যে কেন তাহার বিরুদ্ধে একটি বাধ্যতামূলক বাস্তবায়ন আদেশ (enforcement order) ইস্যু বা উক্ত লাইসেন্স পারমিট বা সনদ বাতিল করা হইবেনা।"

61. Section 63(3) of the Act further states that:

"যদি উপ-ধারা (১) এর অধীনে ইস্যুকৃত নোটিশের কোন জবাব বা অভিযোগকৃত বিষয় সম্পর্কে কমিশনের নিকট সন্ত্মোষজনক ব্যাখ্যা উপস্থাপন না করা হয় বা কমিশন কর্তৃক নির্দেশিত সময়ে উহার নির্দেশিত সংশোধন বা প্রতিকার না করা হয়, তাহা হইলে কমিশন লিখিতভাবে কারণ

উল্লেখপূর্বক একটি আদেশদ্বারা-

(ক) উক্ত লংঘনকারীর উপর অনধিক ৩০০ (তিনশত) কোটি টাকা প্রশাসনিক জরিমানা এবং উক্ত আদেশের পর যত দিন লংঘন চলিতে থাকে উহার প্রতি দিনের জন্য অনধিক অতিরিক্ত ০১ (এক) কোটি টাকা প্রশাসনিক জরিমানা আরোপ করিতে পারো" 62. Section 63(1) and (3) of the Act clearly give BTRC the right to impose an administrative fine. However, Mr. Chowdhury submits that section 63 of the Act does not itself speak out about the procedure or the basis on which such fine be imposed. For those procedural niceties of mandatory application, Mr. Chowdhury stresses, we have to turn to section 65(1) of the Act which gives BRTC the right to make regulations for imposition of administrative fine in instances of violation of any section or provision of the Act. Moreover, section 65(2) of the Act states that:

"এই আইনে বা প্রবিধানের যে সকল বিধান লংঘনের ক্ষেত্রে প্রশাসনিক জরিমানা আরোপনীয় সেই সকল ক্ষেত্রে কমিশন অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া] জরিমানা আরোপ করিবে লংঘনকারীকে এইমর্মে একটি নোটিশ দিবে যে, তিনি উক্ত নোটিশ প্রাপ্তির পর তাহার দোষ স্বীকার করিয়া নোটিশে নির্ধারিত প্রশাসনিক জরিমানা উহাতে নির্ধারিত সময়ের মধ্যে প্রদানের মাধ্যমে দায় মুক্ত হইতে পারেন এবং এই ব্যাপারে তাহার কোন বক্তব্য থাকিলে তাহাও উপস্থাপন করিবেনা"

63. It is validly explained that section 65(2) has several limbs, which are as follows-

(a) First Limb: If a violator contravenes any section/provision of the Act for which administrative fine can be imposed (এই আইনে বা প্রবিধানের যে সকল বিধান লংঘনের ক্ষেত্রে প্রশাসনিক জরিমানা আরোপনীয় সেই সকল ক্ষেত্রে), then (সেই সকল ক্ষেত্র)

(b) Second Limb: BTRC, upon determining the nature of the offence and amount of loss (কমিশন অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া), shall impose fine (জরিমানা আরোপ করিবে), and

(c) Third Limb: BTRC shall serve a notice on the violator to the effect that (লংঘনকারীকে এইমর্মে একটি নোটিশ দিবে যে) he may, after receipt of the notice, make the payment of the fine mentioned in the notice within the time stipulated therein and get himself discharged (তিনি উক্ত নোটিশ প্রাপ্তির পর তাহার দোষ স্বীকার করিয়া নোটিশে নির্ধারিত প্রশাসনিক জরিমানা উহাতে নির্ধারিত সময়ের মধ্যে প্রদানের মাধ্যমে দায় মুক্ত হইতে পারেন) and the violator may also present his position in this regard (এবং এই ব্যাপারে তাহার কোন বক্তব্য থাকিলে তাহাও উপস্থাপন করিবেন).

64. Therefore, and equally satisfactorily, it is submitted by Mr. Chowdhury that the interrelationship between sections 63 and 65 of the Act is as follows:

(a) To ascertain whether or not a violation under the Act has occurred, BTRC can issue a show cause notice under section 63(1) upon a suspected violator.

(b) If the suspected violator gives unsatisfactory reply to the show cause notice, then Section 63(3) allows BTRC to impose a fine within the prescribed limit.

(c) Once BTRC decides to impose a fine on the violator under section 63, BTRC then would *determine* the fine under section 65(2) by keeping অপরাধের ধরন ও ক্ষতির পরিমাণ (nature of offence and the amount of loss) in mind.

(d) BTRC would then issue a notice under section 65(2) to the violator stating the amount of the fine and would ask the violator to pay such fine within a prescribed time limit.

From the facts, the following points are highlighted as important by the Petitioner-

(a) The Impugned Show Cause Notice does not expressly say that it was issued under section 63 of the Act.

(b) But the Impugned Show Cause Notice ordered the Petitioner to take corrective measures by immediately stopping the services and to show cause within 30 (thirty) days ... as to why enforcement order shall not be issued. These are requirements of section 63(2) (উক্ত নোটিশে ... সংশোধন বা প্রতিকারের জন্য করনীয় সম্পর্কে সুনির্দিষ্ট বর্ণনা থাকিতে হাইবে) and

63(3) of the Act (কমিশন একটি নোটিশের মাধ্যমে উক্ত... পারমিট... ধারককে ৩০ দিনের মধ্যে এই মর্মে লিখিত কারণ দর্শানোর নির্দেশ দিতে পারিবে যে কেন তাহার বিরুদ্ধে একটি বাধ্যতামূলক বাস্তবায়ন আদেশ (enforcement order) ইস্যু... করা হইবেনা).

(c) It has not been expressly stated in the Impugned Notice of Fine that the Fine was imposed under section 65 of the Act.

(d) The Impugned Notice of Fine imposed the Fine after determining the nature of offence and the amount of loss which is the Second Limb of section 65(2) of the Act (অপরাধের ধরন ও ক্ষতির পরিমাণ নির্ণয় করিয়া).

(e) BTRC, in its 201st meeting dated 20.12.2016 to 22.12.2016 and 26.12.2016, while calculating the Fine observed that উক্ত জরিমানা ধার্য করার ক্ষেত্রে Grameenphone Limited কর্তৃক সংঘটিত অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পাদিত চুক্তিতে উল্লিখিত ফিস এন্ড চারজেস এর আলোকে সংঘটিত রাজস্ব ক্ষতি বিবেচনা করা হয়েছে।

(f) BTRC has stated that the Fine was imposed under section 63 of the Act and, therefore, the Petitioner does not have any scope under section 65(5) to apply for a revision.

(g) But, BTRC itself has stated that they have allowed the Petitioner fifteen days to apply for filing its revision application.

(h) Section 63 of the Act does not have any provision for filing and entertaining any revision application. Section 65(5) contains a provision for filing revision within fifteen days.

(i) BTRC did not reject the Revision Application on the ground that section 65 of the Act did not apply.

(j) In its 201st meeting dated 20.12.2016 to 22.12.2016 and 26.12.2016, while rejecting the Revision Application, BTRC observed that গ্রামীনফোন লিঃ এর রিভিশন আবেদনে প্রদন্ত বক্তব্য, যৌক্তিকতা ও আইনগত দিক গ্রহণযোগ্য না হওয়ায় কমিশন রিভিশন আবেদনটি নাকচ করে ৩০ ... কোটি টাকার জরিমানা আরোপের সিদ্ধান্ত বহাল রাখল।

(k) BTRC had full authority to reject the Revision Application outright on the ground that section 65 did not apply. But, BTRC dismissed the Revision Application on its merits (রিভিশন আবেদনে প্রদন্ত বক্তব্য, যৌক্তিকতা ও আইনগত দিক গ্রহণযোগ্য না হওয়ায়).

65. Therefore, it is submitted that the argument of BRTC that the Impugned Notice of Fine has been issued under section 63 of the Act cannot stand because:

(a) Section 63 does not contain provision on the form of notice. The form of the notice is specified in the Third Limb of section 65(2).

(b) Section 63 does not contain any provision about the factors which would be taken into account for calculating the Fine. The factors are stated in the Second Limb of section 65(2).

(c) BTRC entertained the Revision Application and rejected it on merits and not on the grounds that section 65 did not apply. The rejection of the Revision Application (which was filed under section 65(5)) on its merit is tantamount to BTRC's tacit acknowledgement of the use of section 65 of the Act.

66. Moreover, it is submitted that section 65(5) of the Act cannot be taken in isolation and must be construed in light of the rest of the subsections of section 65 of the Act. Neither does section 63 of the Act have any provision for an application of revision, nor does it allow the parties to only use section 65(5) of the Act. It is submitted that BTRC cannot issue a notice under section 63 of the Act and entertain Revision Application under section 65(5) of the Act and leave out the mandatory procedure set out in section 65(2), (3) and (4) of the Act for their own benefit. Mr. Chowdhury relies here on the *ratio decidendi* of the judgment in *Sajida*

Foundation v Post Office Savings Bank reported in 31 BLD(HCD)2011 470 where this Court at para 18, held as follows:

"... it is a cardinal principle of interpretation that a statutory provision is not to be construed in isolation and must be interpreted in its proper context (Abdus Samad Azad v Bangladesh 44 DLR 354 at para 12). The term 'context' means the situation or scenario without reference to which the statutory provision in question would become ambiguous. ... this Court finds that generally the context would be the preamble ... and each part of Rule 36 B and other provisions of the ... Rules shedding light on the other (Amin Jute Mills v Bangladesh 29 DLR (SC) 85)."

67. Thus, in light of *Sajida Foundation*, it is submitted that if section 65(5) of the Act is taken in isolation of the rest of the subsections of section 65 of the Act, it becomes *"ambiguous"*. Section 63 has not made any provision that gives BTRC the right to jump to 65(5) of the Act, for an application of revision, without paying heed to the rest of the subsections of section 65.

68. The *ratio decidendi* in the *Sajida Foundation Case* has merited our due consideration and it is noted in this regard that in *Abdus Samad Azad v Bangladesh* reported in 44 DLR 354, this Court at para 12, held as follows:

"...it is a cardinal principle of interpretation of statute and also provisions of the constitution which is also a statute that it need be interpreted not in isolation but always by reference to the context in which the said expression appeared. It is also cardinal principle of interpretation of a statue that in interpreting of a statute that in interpreting the law the court will take the law as it would find the law and take every word found there in its ordinary meaning as expressly said in the act itself. Legislature meant what is said and had not meant what it had not said and thus nothing can be added to an expression even by implication, where the expression is unambiguous and clear, and no lacuna can be filled in on the basis on the so-called supposed intention of the legislature nor an interpretation be given to reach a law which the court may consider to be the law, keeping in mind the principle that any interpretation which would lead to repugnancy need to be avoided if it can be so avoided, without doing any injustice to other provisions of the Act."

69. Upon a consideration of the above, this Court has arrived at the conclusion that pursuant to such firmly endorsed principle of interpretation, BTRC cannot, to borrow phraseology from the *Abdus Samad Azad Case*, add an "*expression*" to section 63 and imply that if a notice is sent under section 63, one can make an application of revision under section 65(5) of the Act. We hold that the legislature never intended section 65(5) of the Act to be read in isolation, without paying heed to the rest of the subsections of section 65 of the Act. BTRC cannot try to fill the "*lacuna*" on the basis of the "*supposed intention of the legislature*" but interpret the statute by what the legislature had actually said. If section 65(5) is read together with section 63, without rest of the subsections of 65, it will lead to "*repugnancy*", which the court, in the *Abdus Samad Azad Case*, has asked to avoid.

70. Furthermore, in *Amin Jute Mills v Bangladesh* reported in 29 DLR (SC) 85, the Appellate Division, at para 9, held as follows:

"One of the basic rules of interpretation of statute is that to understand the meaning of a particular provision of an Act one if to read the Act as a whole each part shedding light on the other and the following observation of Lord Wright in the case of Jennings v Kelly,

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decided by the House of Lords and reported in 1940 A.C. 206. Same case (1939) All. E.R. 464 maybe referred in this connection:

'the proper course is to apply the broad general rule of construction, which is that section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest'."

71. Thus, pursuant to the *Amin Jute Mills Case*, it is accepted by this Court that a broad general rule of construction is required in this case and section 65 of the Act "*must be construed as a whole, each portion throwing light on the rest*". Consequently, it is this Court's finding in acceptance overall of the submissions by Mr. Chowdhury that the Impugned Notice of Fine on the Petitioner was issued under section 65(2) of the Act.

72. That finding consequentially leads us to ask if section 65 applies, then whether its requirements were fulfilled or not in the facts. Here, it is submitted that BTRC did not follow the due process elaborated in section 65 of the Act while imposing the Fine. The notice mentioned in section 65(2) of the Act, Mr. Junayed Ahmed Chowdhury argues, must follow the process stipulated in section 65(3) which states as follows:

"(৩) উপ-ধারা (২)-এ উল্লেখিত লংঘনের ব্যাপারে-

(ক) একজন পরিদর্শক প্রাসংগিক তথ্যাদি সহ নির্ধারিত নোটিশের ফরমপূরণ এবং দস্তখত করিয়া উক্ত নোটিশ-

(অ) অভিযুক্ত ব্যক্তির নিকট ব্যক্তিগতভাবে প্রদান করিবেন; অথবা

(আঁ) পরিদর্শকের জানামতে অভিযুক্ত ব্যক্তির সর্বশেষ বাসস্থান বা কর্মস্থলের ঠিকানায় প্রেরণ করিবেন; ...

(গ) অভিযুক্ত ব্যক্তি উক্ত লংঘন-

(ই) অস্বীকার এবং উহার সমর্থনে তাহার লিখিত বক্তব্যও প্রয়োজনীয় দলিল বা তথ্য পেশ করিয়া উক্ত জরিমানার দায় হইতে অব্যাহতির জন্য নোটিশে উল্লিখিত সময়ের মধ্যে কমিশন সমীপে আবেদন করিতে পারেনা"

73. Thus, pursuant to section 65(3)(a) of the Act, once a notice of administrative fine is issued by an inspector ($\Re \overline{\Re} + \overline{6}$) of BTRC upon an alleged violator, the accused may file a discharge application under section 65(3)(c)(iii) defending its position and asking for discharge from any administrative fine.

74. Section 65(4) of the Act sets out the process under which a discharge application of a violator (under section 65(3)(c)(iii)) would be decided. Section 65(4) of the Act states as follows:

"(৪) উপ-ধারা (৩)(গ) এর উপ-দফা (আ) বা (ই) এর অধীনে আবেদন করা হইলে কমিশন কর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা সমগ্র বিষয়টি বিবেচনা ক্রমে লিখিত ভাবে সংশ্লিষ্ট কারণ উল্লেখ পূর্বক তাহার সিদ্ধান্ত প্রদান করিবেন এবং এইরূপ সিদ্ধান্তের ৩ (তিন) দিনের মধ্যে আবেদনকারীকে সিদ্ধান্তের অনুলিপি প্রদান করিবেনা"

75. Accordingly, once a discharge application of the violator under section 65(3)(c)(iii) of the Act is received, an appointed officer of BTRC (কমিশনকর্তৃক এতদুদেশ্যে নিযুক্ত একজন কর্মকর্তা), under section 65(4) of the Act, shall consider the whole matter before him

and decide with reasons accordingly (সংশ্লিষ্ট কারণ উল্লেখপূর্বক তাহার সিদ্ধান্ত প্রদান করিবেন).

76. It is clear further from the construction of sections 65(3) and 65(4) that the inspector (পরিদর্শক) issuing show cause notice under section 65(3) must be a different person than the appointed officer of BTRC (কমিশন কর্তৃক এতদুদ্দেশ্যে নিযুক্ত একজন কর্মকর্তা) under section 65(4).

77. It has not escaped this Court's attention that in this case, however, the person signing the Impugned Show Cause Notice, the Impugned Notice of Fine, the Impugned Letter 1 and the Impugned Letter 2 is the same person (one Mr. S. M. Golam Sarwar, Senior Assistant Director of BTRC resulting in a clear violation of sections 65(3)(a) and 65(4) of the Act as the same person has acted as the inspector (পরিদেশ্য নিযুক্ত একজন কর্মকর্তা) under section 65(3)(a) under section 65(4) of the Act.

78. Moreover, under section 65(5) of the Act, once BTRC receives a written application of revision from an alleged violator regarding the decision of the officer under section 65(4), it is required to afford an opportunity of hearing (গ্রেনানির যুক্তিসঙ্গত সুযোগ দিয়া) to the alleged violator and the inspector (পরিদর্শক). However, evidently after the Revision Application was filed by the Petitioner, no such hearing was conducted by BTRC under section 65(5) of the Act and without any such hearing the Impugned Letter 2 was issued.

79. If it is accepted that section 65 of the Act does not apply (which is BTRC's case), the question then arises as to the basis on which the Fine was imposed by BTRC. The Petitioner's view is that section 63 of the Act has no basis of imposition of the Fine. In this context it is to be noted that section 63 of the Act specifies the upper limit of the administrative fine, but does not lay down the factors, based upon which BTRC can calculate the figure for a fine. Moreover, in the 201st meeting of BTRC, in আলোচ্যসূচি ১৩(গ), BTRC stated that:

"...এখানে উল্লেখ যে, উক্ত জরিমানা ধার্য্য করার ক্ষিত্রে Grameenphone Limited কতৃক সংঘটিত অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পদিত চুক্তির উল্লেখিত ফি'স অ্যান্ড চারজেস এর আলোকে সংঘটিত রাজস ও ক্ষতি বিবেচনা করা হয়েছে।"

80. Thus, BTRC in making the statement অপরাধের ধরন এবং সোনালী ব্যাংকের সাথে সম্পদিত চুক্তির উল্লেখিত ফি'স অ্যান্ড চারজেস এর আলোকে has relied on section 65(2) of the Act which allows BTRC to determine the fine based on অপরাধের ধরন ও ক্ষতির পরিমাণ. It is to be noted that section 63 of the Act contains no such provision as *"the nature* of offence and the amount of loss" (অপরাধের ধরন ও ক্ষতির পরিমাণ) for imposing the Fine.

81. It is apply submitted to this Court's satisfaction that BTRC cannot whimsically change its mind as to which section it would like to rely upon to pursue its case. On one hand, BTRC claims in its Affidavit-in-Opposition that section 65 of the Act does not apply but on the other, it has taken the benefits of section 65(2) of the Act to determine and impose the Fine on the Petitioner. The Petitioner emphatically highlights this as arbitrary which has made a mockery of the regulatory exercise of power under the Act. This Court finds that stance of the Petitioner legally tenable and sustainable to the exclusion of that by BTRC.

82. This Court is reminded here of the judgment in *D.N Ghosh vs. Additional Sessions Judge* reported in *AIR 1959 Cal. 208*, where the Calcutta High Court observed in para 12 as follows:

"... The underlying principle is as follows: Prescribing an offence and its punishment is essentially a legislative act. But provided that this can be attributed to the legislative body, the actual working out of it can be delegated to a non-legislative body. The most simple example will be where the legislature itself prescribes the rules, makes its violation an offence, and lays down the penalty. Next, it may delegate the power to make rules to a nonlegislative body but declare that violation of such rules when prescribed would be an offence and prescribe the penalty. ...The legislative body, instead of prescribing the precise penalty may also lay down the limit or standard, leaving it to the non-legislative body to prescribe the penalty within such limits or in accordance with the standard laid down.

83. Furthermore, in *Commonwealth v. Walter W. Diaz* reported in 95 N.E 2d 666 (Mass. 1950), the Massachusetts Supreme Judicial Court held as follows:

"The fact that the statute empowered the commissioner, subject to the board's approval, to provide penalties for the violation of the regulations did not render it invalid. This is not a case where the statute authorized the commissioner to fix such penalties as he saw fit. Had the statute attempted to do that we have no doubt that it would have been an excessive delegation of power. See State vs. Curtis, 230 N.C. 169; People vs. Ryan, 267 N.Y. 133."

84. Predicated on the above, this Court, therefore, arrives at the finding that the legislature through section 63 of the Act has laid down the limit of penalty for an administrative fine which is a permissible delegation of power to BTRC by the legislature. However, the actual working out of the penalty and the standard and factors to determine and calculate such penalty has been laid out in section 65 of the Act. Thus, this is not a case where the Act authorized BTRC to fix such penalties as it saw fit under section 63 of the Act (as stated in Commonwealth v. Walter W. Diaz). This is rather a case where BTRC has calculated the Fine based on the standard laid down in section 65(2) of the Act (as stated in D.N Ghosh). But by denying the applicability of section 65 of the Act, BTRC has in effect made out a case that it has the power to fix the Fine under section 63 of the Act, which has absolutely no stipulation about the factors that would be considered by BTRC before arriving at a particular figure for the Fine. That proposition, in this Court's opinion, cannot be sustained in view of the provisions of section 63 read with section 65 of the Act and must be rejected. It is this Court's finding consequentially that BTRC did not follow the due process elaborated in section 65 of the Act while imposing the Fine. By that reason the Fine itself is found to be shorn of all legality and efficacy.

85. At this juncture, this Court has been asked by the Petitioner to ascertain further whether the Fine imposed is disproportionate and arbitrary:

This issue arises primarily in the context of ADN, ASL and the Petitioner contractually proceeding the coordinated service yet the Petitioner being fined BDT 30 Crore whereas the amount of fine imposed on ADN and ASL were BDT 5 Lac each.

86. Documents brought on record establish that BTRC has determined the amount of loss, i.e. by examining the fees and charges mentioned in the BSA, to decide on the amount of the Fine, at paragraph (ix) of the Impugned Letter 1 and Impugned Letter 2. Furthermore, BTRC, in its 200th meeting dated 17.10.2016 to 19.10.2016, while discussing the imposition of fine on the Petitioner, ADN and ASL, observed that:

"কমিশন সভার আলোচনাকালে ... কমিশনকে জানান যে, Grameenphone Ltd বর্ণিত শুধুমাত্র সোনালী ব্যাংক-কে GO Broadband সেবা প্রদানের মাধ্যমে বিগত দু-বছরে কমপক্ষে প্রায় ৩০ (ত্রিশ) কোটি টাকা আয় করেছে।"

87. However, Mr. Junayed Ahmed Chowdhury points out that the Petitioner's income from the coordinated service, since its inception, is not anywhere to BDT 30 Crore. He submits that from the facts, BTRC did not produce any document which would establish that the Petitioner earned BDT 30 Crore from the coordinated services. Rather, the facts clearly show that BTRC was guessing a figure for the Fine on the assumption that the Petitioner earned $\overline{\Phi}N^{\gamma}$ and $\overline{E}N^{\gamma}$ and

(a) the Petitioner's income as কমপক্ষে প্রায় BDT 30 Crore from the service provided to SBL; and

(b) the fine of BDT 5 Lac each for ADN and ASL.

88. It is also submitted that the expression কমপক্ষে প্রায় ৩০ (ত্রিশ) কোটি টাকা does not have any legitimate basis and was a purely guesswork for BTRC to impose the Fine on the Petitioner.

89. At this juncture this Court is reminded of a cautionary note expressed by the Court in Parasakthi Pictures Mart vs Collector Of Customs, 1995 (80) ELT 189 Tri Chennai, the Customs, Exercise and Gold Tribunal of Tamil Nadu which reads as follows:

"...I find it difficult to appreciate as to how there is such a substantial difference in the quantum of fine and penalty between the two ... persons similarly placed cannot be treated dissimilarly and this is the underlying spirit of Article 14 of the Constitution of India. The ... adjudicating authority cannot without any justification adopt a different yardstick in meting out the penal consequences by fixing the quantum of fine and penalty in one case which is far at variance with the one in another case. It is also well settled by the authoritative pronouncements of the Supreme Court that even in the matter of penalty in the nature of the breach and contravention between two persons in a similar or identical cannot be discriminated against the other in regard to the quantum of fine or penalty."

90. BTRC may indeed argue that due to the Petitioner's financial position, the Fine is justified. But BTRC is reminded by this Court of the American case of *State Farm MUT*. *Automobile INS. Co. v Campbell* reported in 538 U.S. 408 (2003), ("Campbell") where the Supreme Court of Utah in a similar vein tried to justify its decision of awarding a massive award to the State Farm by referring to its enormous wealth. But the U.S Supreme Court in declining to accept that stance stated in pages 426 and 427 of its judgment that:

"The Utah Supreme Court sought to justify the massive award by pointing to ... State Farm's enormous wealth.

Here the argument that State Farm will be punished ... with reference to its assets...had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."

91. These cautionary notes have found favour with this Court. Thus, this Court holds that pursuant to the *Parasakthi Pictures Mart ratio*, BTRC cannot without any justification adopt

different and distinct yardsticks when determining the quantum of fines and penalties of the Petitioner, ADN and ASL especially when BTRC imposed the Fine on the Petitioner by arriving at the disputed figure on the basis of the expression $\overline{\Phi}N\overline{\Lambda}$ and $\overline{\Lambda}$. Also, under *Campbell*, the wealth or financial position of the Petitioner cannot be a basis for imposing the disproportionate Fine when the basis of such imposition is unconstitutional, illegal and arbitrary.

92. It must not also be lost sight of that this second limb of the Petitioner's case concerns the construction to be accorded to sections 63 and 65 of the Act in determining the প্রশাসনিক জরিমানা or administrative fine payable by it in the facts. It is in that context that the Petitioner has impugned the BTRC's memos, letters of imposition and rejection orders comprising of the Impugned Notice of Fine of 6.11.2016, the Impugned Letter 1 of 29.11.2016 and the Impugned Letter 2 of 30.01.2017.

93. It is here that this Court has found merit in Mr. Junayed Ahmed Chowdhury's submissions that precisely because of BTRC's enormous responsibilities and powers it must operate within a regulatory boundary marked by the strictest application of the law. That has engaged this Court's attention in examining the necessary co-relationship between the provisions of section 63 and 65.

94. A proper reading of these two provisions with regard to both the determination and imposition of administrative fines leads us to discount BTRC's contention that section 63 is a stand-alone provision allowing for invocation independently of section 65(2) of the Act. Such contention notwithstanding, it is to be noted that in the orders issued by BTRC it has never adopted a position outright that certain provisions of section 65 shall not apply. Rather, the thrust of BTRC's actions as evident in the Impugned Notice of Fine and the Impugned Letters 1 and 2 has been of a liberty assumed to selectively apply the provisions of section 65 in preference to and exclusion of other equally applicable provisions. That *modus operandi*, as Mr. Chowdhury has satisfactorily submitted, runs counter not only to the scheme of the Act but to entrenched principles of statutory construction upheld by this very Court for example, in the Sajida Foundation Case reported in 31 BLD(HCD) 2011,470. The Sajida Foundation Case ratio condemns and discourages an administrative authority's presumed power and discretion to pick and chose certain provisions of a governing statutory provision in isolation of its other interconnected provisions. Section 65 read on its own is found by this Court to be of a composite nature with each of its three pillars or limbs being organically woven into a rudimentary statutory textual fabric requiring invocation of each provision in the sequential order as clearly laid out in that section. In that light, BTRC's invocation solely of a section 65(5) process in preference to and exclusion of the other interconnected provisions and stages operates in denial of that composite thrust and objective of section 65 and is, hereby, found to be misconceived in law.

95. It is our finding further that section 65 in its entirety is the corridor within the statutory scheme through which the sanctity of the section 63 penal sanction must be gauged. Consequentially, any failure to trigger section 65 or any of its components necessarily leads to a statutory infraction resulting in a more fundamental constitutional infraction.

96. If the section 65 provisions are to be obliterated or to be considered a dead letter of the law one is necessarily at a loss to find other statutory mechanisms that may be called upon for due implementation of section 63. Furthermore, it is our unqualified view that the power to charge an administrative fine to a maximum of Tk. 300 Crore must always have an

in-built mechanism of fair play. Otherwise one is visited with a scenario of administrative anarchy resulting from an exercise of unfettered discretion. That mechanism of fair play is clearly devised in section 65 of the Act and can only be, therefore, ignored at the peril of not only the Petitioner but also BTRC. That appears to be the misstep taken by BTRC in its selective application of the law and in ignorance of this organic relationship between sections 63 and 65. By that reason, it is this Court's finding that the Impugned Notice of Fine and the Impugned Letters 1 and 2 are indeed the products of processes not sanctioned in law and from which presently no legal consequences can, accordingly, follow.

97. It is in that regard that the Impugned Notice of Fine and the two Impugned Letters are found to have been issued without lawful authority and of no legal effect and are consequentially, set aside with BTRC being, hereby, directed to embark afresh upon a process of imposition of an administrative fine as envisaged, in particular, in section 63(3)(ka) to be read in conjunction with the procedural provisions and protections granted under Section 65 in general and sections 65(2) (3) (4)(5)(6) and (7) as applicable in that sequence.

98. Significantly further, an intriguing aspect of this case has been revealed through the Petitioner's Supplementary Affidavit of 05.05.2019 in which it is stated that despite the expiry date of the Permit on 10.11.2011, the Petitioner continued to undertake activities of lease or sharing of fibre optic network purportedly on the basis of the Verbal Approval Confirmation Letter dated 10.11.2011 (Annexure-I). The Petitioner's continued activity under the Permit on the Verbal Approval Confirmation Letter is evidenced primarily by the fact that despite the Permit's expiry date of 10.11.2011 the Petitioner ostensibly kept on paying and BTRC kept on receiving revenue share from the Petitioner for the periods of October-December 2011, January-March 2012, April-June 2012, July-September 2012, October-December 2012, January-March 2013, April-June 2013, July-September 2013 and October-December 2013 for income arising out of fibre optic network. True copies of documents evidencing receipts of revenue share by BTRC from the Petitioner on account of fibre optic network during the periods of October-December 2011, January-March 2012, April-June 2012, July-September 2012, October-December 2012, January-March 2013, April-June 2013, July-September 2013 and October-December 2013 have been brought on record in the form of Annexures- AM, AM-1, AM-2, AM-3, AM-4, AM-5, AM-6, AM-7 and AM-8 to the said Supplementary Affidavit of 05.05.2019. The Petitioner has further provided a breakdown in Annexure AO of BTRC's earning of revenue shares on account of lease of sub-lease of the Petitioner's fibre optic network.

99. It is in this context that this Court deems it prudent to alert the office of the Comptroller and Auditor General of Bangladesh (Auditor General) to all financial dealings that transpired between the Petitioner and BTRC between 10.11.2011 till the issuance of the Impugned Show Cause Notice on 13.07.2016 in order that the Auditor General may consider undertaking an audit of BTRC's accounts for that period at least with a view to determining further the propriety or not of the financial transactions/ revenue sharing between the Petitioner and BTRC as above indicated.

100. It is to be noted that at the time of the issuance of the Rule on 09.02.2017 the Impugned Letter 2 rejecting the revision application of the Petitioner was stayed (with periodic extensions granted thereafter), subject to the Petitioner furnishing a continuing Bank Guarantee covering the administrative fine amount of Tk. 30 Crore made out in favour of BTRC. It is noted further from the Orders of 20.02.2017 and 27.02.2017 of this Court that

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both the Petitioner and BTRC through Affidavits-in- Compliance individually filed have attested to the issuance and furnishing as well as receipt of such Bank Guarantee. As further contemplated in the Order of 09.02.2017 the said Bank Guarantee remains in custody of this Court as represented by the Office of the Registrar, High Court Division, Supreme Court of Bangladesh. In light of the findings and order above, the Registrar, High Court Division is, hereby, directed to hand over the said continuing Bank Guarantee to BTRC with receipt to be duly issued by BTRC and the said Bank Guarantee shall be retained by BTRC during the entire process of the determination and imposition of the administrative fine upon the Petitioner in accordance with law and as above directed by this Court.

101. Furthermore, from pleadings on record this Court is given to understand that a statutory forum for final determination on orders of administrative fine, and as envisaged in section 82(a) of the Act, is yet to be established notwithstanding that nine years have elapsed since introduction of section 82(a) into the law. Indeed, the Rule Nisi was issued on the understanding and specific pleading on behalf of the Petitioner that a judicial review of this matter was being sought in the absence of such appellate authority as contemplated in section 82(a). It is hoped that either in this very instance or future such instances of disputed determination and imposition of administrative fine an aggrieved party would have due recourse to such appellate authority duly constituted by the government.

102. Let a copy of this Judgment and Order be especially served upon the office of the Comptroller and Auditor General of Bangladesh for reference and future action, if any.

103. The Rule Nisi as issued on 09.02.2017 is, accordingly, disposed of with the findings, observations and directions as above.

104. BTRC shall strive to complete the process for determination and imposition as above directed within a period of 4 (four) months from the date of receipt of a certified copy of this Judgment and Order.

105. There is no Order as to costs.

106. Communicate this Order at once.