

6 SCOB [2016] HCD 56

**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 3807 of 2009

With

WRIT PETITION NO. 2788 of 2009

With

WRIT PETITION NO. 3272 of 2009

With

WRIT PETITION NO. 2100 of 2009

With

WRIT PETITION NO. 5641 of 2009.

Barakatuallah Electro Dynamics Ltd

..... Petitioner.

-Versus-

**Bangladesh Power Development Board
and others**

.... . Respondents

Mr. Mustafizur Rahman Khan, Advocate

..For the petitioner in all the writ petitions.

Mr. Md. Hefzul Bari with Ms. Khalifa Shamsun Nahar Bari, Advocate

...For the respondent no. 1 and 2 in Writ Petition Nos. 3807 of 2009, 2788 of 2009 .and 3272 of 2009

Mr. Mir Md. Joynal Abedin with

Mr. Mr. Mohammad Al-Amin, Advocates

..for the respondent no. 1-2 in W.P. No. 5641 of 2009.

Mr. Tufailur Rahman, Advocate

..for the respondent nos. 1-2 in W.P. No. 2100 of 2009.

Ms. Israt Jahan, D.A.G. with

Mr. Shams-ud-Doha, A.A.G with

Ms. Nurun Nahar, A.A.G

.....For the respondent no.5 and 3 and 4 in W.P. No. 2788 and 2100 of 2009 respectively.

Heard on: 08.09.2015, 15.11.2015, 17.11.2015,23.11.2015 and 30.11.2015.

Judgment on: 08.12.2015 & 09.12.2015.

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice J. N. Deb Choudhury

Bangladesh Power Development Board Order, 1972

Article 2:

It appears from Clause-(d) of Article-2 of P.O. 59 of 1972 that the term “Government” has been specifically defined therein. According to the said provision, “Government” means the Government of the People’s of Bangladesh. Clause-(h) of Article-2 further provides that “Power Board” means Bangladesh Power Development Board as constituted by the said PO 59 of 1972. The very definition of these two terms clearly indicates the intention of the Legislature in that the Legislature wanted to keep these two terms separately with separate definitions. ... (Para 12)

Doctrine of estoppel:

It is known to all that Bangladesh at a time suffered so many disadvantages because of lack of electricity supply. It is very much understandable that as against such background this kind of facilities or fiscal benefits have been given by the government through the said SRO. Therefore, we do not find any other appropriate word in any dictionary to describe them by any other term than “incentives”. The ordinary dictionary meaning of the word “incentive” as given by the Oxford Advanced Learner’s Dictionary (new 8th Edition) also supports this view of ours. Thus, it appears that the benefits given by the said SRO were in fact ‘incentives’ given to such establishments who were willing to establish power generation station in the private sector to generate electricity. The very basic term of the contract does also denote that the same was entered into for establishment of power generation plant on rental basis for generation of electricity, and the BPDB also entered into contract under sub-article (5) of Article 10 of P.O. 59 of 1972 to purchase such electricity from the petitioner company in accordance with the said agreement in order to distribute the same in the country. Therefore, while the petitioner was executing the said contract with BPDB in 2008, the contents of the said SRO issued in 1997 were very much within the knowledge of the petitioner, and knowing very well that it would not be able to get any benefit from the said SRO, it executed the said contract. Therefore, we are of the view that since the petitioner entered into contract with a clear declaration that it would not take any benefit from the fiscal incentives already given or to be given by the government in the private power generation sector of the country, it is now estopped from going back and say that it is entitled to such incentives. ... (Para 23)

Judgment**SHEIKH HASSAN ARIF, J:**

1. Since the questions of law and facts involved in the aforesaid five writ petitions are almost same, they have been taken up together for hearing, and are now being disposed of by this common judgment.

2. Rules in the aforesaid writ petitions were issued in similar terms, namely calling upon the respondents to show cause as to why the same Memos, namely Memo No. 50 BIUBO(ShoChi)/Unnayan-175/2005, all dated 21.01.2009 (Annexure-A in all writ petitions), issued by the Bangladesh Power Development Board (respondent no.1), refusing to issue certificate in terms of Table 1, Clause (2) of SRO No. 73-Ain/97/1700/Shulka dated 19.03.1997 (Annexure A-1), should not be declared to be without any lawful authority and are of no legal effect and as to why they should not be directed to allow the petitioner the benefit of exemption from import duty, VAT and supplementary duty as per the said SRO with respect to the plants and equipments etc. imported by the petitioner under Bills of Entry Nos. C-66139 and C-117929, both dated 27.05.2009, Bills of Entry No. C-62928, dated 23.03.2009, C-82720 dated 15.04.2009, C-85603 dated 19.04.2009, C-85619 dated 19.04.2009, C-32621 dated 27.03.2009, C-32822 dated 27.03.2009, C-41811 dated 12.04.2009, C-41817 dated 12.04.2009, C-43400 dated 16.04.2009, C-43401 dated 16.04.2009, C-43952 dated 18.04.2009, C-14591 dated 15.04.2009, C-14593 dated 15.04.2009, C-14599 dated 15.04.2009, C-15065 dated 19.04.2009, Bills of Entry No. C-18261 dated 11.05.2009, C-18255 dated 11.05.2009, C-50518 dated 30.04.2009, C-54658 dated 05.05.2009, C-55272 dated 07.05.2009, C-100746 dated 06.05.2009, C-101566 dated

07.05.2009, Bills of Entry Nos. C-30308, C-30309, C-30310, C-30311 all dated 19.03.2009, C-30573, C-30580, C-30591 all dated 31.03.2009 and Bill of Entry No. C-101134 dated 10.08.2009 for establishing power generation station in Bangladesh.

3. Background Facts:

Short facts, relevant for the disposal of the aforesaid Rules, are that the same petitioner, being a limited company and engaged in the business of Power generation, participated in the tender floated by the Bangladesh Power Development Board (BPDB). Having become successful in the said tender, the petitioner entered into a power supply agreement, being No. 09699 dated 28.04.2008, with BPDB to establish a 51 Megawatt rental power station in Fenjugonj on rental basis for a term of 15 (fifteen) years. Accordingly, before commencement of commercial operation, it started importing different plants and equipments for establishing the said power generation station in order to generate electricity and supply the same under the said contract with BPDB. The said plants and equipments were imported from China and Canada under Letter of Credit Nos. 235908010339 dated 03.12.2008, opened through the trust Bank Ltd, Dhaka, Letter of Credit No. 308509010049 dated 13.01.2009, opened through the BRAC Bank Ltd. Gulshan, Dhaka, Letter of Credit Nos. 235908010338, 235908010340, 235908010342, all dated 03.12.2008, L/C Nos. 308509010049, 308509010050, both dated 13.01.2009, L/C Nos. 308509010080, 308509010081, both dated 18.01.2009, L/C Nos. 308509010109 dated 29.01.2009, No. 308509010164 dated 17.02.2009, No. 308509010263 dated 15.03.2009, Letter of Credit Nos. 308509010263 dated 15.03.2009, L/C No. 308509010047 dated 13.01.2009, L/C No. 308509010049 dated 13.01.2009, L/C No. 308509010295 dated 23.03.2009, L/C No. 308509010111 dated 01.02.2009, L/C Nos. 235908010338 and 235908010342, both dated 03.12.2008, Letter of Credit No. 308509010021 dated 05.01.2009, L/C No. 308509010048 dated 13.01.2009, L/C No. 308509010049 dated 13.01.2009, L/C No. 308509010080 dated 18.01.2009 and Letter of Credit No. 308509010046 dated 13.01.2009 opened through different banks. Under the said letters of Credit, partial shipments were allowed. Upon arrival of the above equipments and plants, the petitioner submitted Bills of Entry, being Nos. C 66139 and C-117929 both dated 27.05.2009, Bills of Entry No. C-62928 dated 23.03.2009, C-82720 dated 15.04.2009, C-85603 dated 19.04.2009, C-85619 dated 19.04.2009, C-32621 dated 27.03.2009, C-32822 dated 27.03.2009, C-41811 dated 12.04.2009, C-41817 dated 12.04.2009, C-43400 dated 16.04.2009, C-43401 dated 16.04.2009, C-43952 dated 18.04.2009, C-14591 dated 15.04.2009, C-14593 dated 15.04.2009, C-14599 dated 15.04.2009, C-15065 dated 19.04.2009, Bills of Entry No. C-18261 dated 11.05.2009, C-18255 dated 11.05.2009, C-50518 dated 30.04.2009, C-54658 dated 05.05.2009, C-55272 dated 07.05.2009, C-100746 dated 06.05.2009, C- 101566 dated 07.05.2009, Bills of Entry Nos. C-30308, C-30309, C-30310, C-30311 all dated 19.03.2009, C-30573, C-30580, C-30591 all dated 31.03.2009 and Bill of Entry No. C-101134 dated 10.08.2009.

4. It is stated that, the Government issued SRO, being SRO No. 73-Ain/97/1700/Shulka dated 19.03.1997, in exercise of powers under Section 19 of the Customs Act, 1969 and Section 14 (1) of the Value Added Tax Act, 1991 granting exemptions from payment of customs duties, Value Added Tax, supplementary Tax, amongst others, at import and other stages for those plants and equipments to be imported permanently for establishing the said power generation station. In order to get such exemption, the conditions under Table-1 of the said SRO require the petitioner to obtain a certificate from the respondent no. 1 (BPDB) certifying that: (1) the importer is contracted with the government for establishing a power generation station, (2) the importer has not yet commenced commercial production and (3) the imported plants and equipments are directly related to generation of the electricity and

shall be used for the purpose of the contract. As the petitioner started the aforesaid importations of plants and equipments, it applied to the BPDB by its different letters, all dated 14.01.2009, requesting the BPDB to issue the said certificate so that the petitioner could obtain exemption pursuant to the said SRO. In reply to such prayer, respondent No. 1, vide impugned memos, all dated 21.01.2009, declined to issue such certificate holding that as per the terms of the said contract, the petitioner would be entirely responsible for payment of all income tax, other Taxes, VAT and duties imposed or incurred inside and outside Bangladesh and, accordingly, income tax, Vat etc. should be deducted at source and that the fiscal incentives provided in the Private Sector Power Generation Policy of the Bangladesh government would not be applicable in case of the petitioner's such plants and equipments. Being aggrieved by such refusals, the petitioner moved this Court and obtained the aforesaid Rules.

5. The Rules are opposed by the BPDB and concerned Commissioner of Customs by filing affidavits-in-opposition in some writ petitions. The common contention of the respondents are that the contract in question being a commercial contract, writ is not maintainable and that as per the terms of the contract as well as the said SRO, the petitioner is not entitled to get such exemption as claimed and that there being an arbitration clause in the contract, the dispute between the parties should be resolved through arbitration.

6. Submissions:

Mr. Mustafizur Rahman Khan, learned advocate appearing for the petitioner in all the writ petitions, at the outset, has drawn our attention to the very SRO in question, namely SRO No. 73 dated 19.03.1997. Mr. Khan submits that the petitioner having fulfilled all the terms and conditions mentioned under Table-A of the said SRO, the BPDB was legally bound to issue certificate in terms of Appendix-1 thereto in favour of the petitioner thereby enabling the petitioner to get the said tax and duty exemptions. As regards the terms of the contract, in particular the terms therein to the effect that the petitioner would not claim any fiscal incentives provided by the government of Bangladesh in private sector power generation policy, Mr. Khan argues that the word 'incentives' only relates to performance. Therefore, according to him, the benefit which has been given by the said SRO dated 19.03.1997 cannot be called 'incentives' and as such the said benefits can not be regarded to have been waived by the petitioner by executing the said contract with the BPDB. Further drawing our attention to Article 152 of the Constitution, in particular the definition of the word 'law', therein, Mr. Khan submits that since the said SRO No. 73 dated 19.03.1997 comes within the purview of the definition of 'law', even by executing a contract nobody can waive the legal benefits given by such law of the State. When a judgment recently delivered by a Division Bench in Writ Petition No. 513 of 2009 (**Shahjibazar Power Company Limited v. Government of the People's Republic of Bangladesh**, hereinafter called "**Shahjibazar case**") on the similar facts and issues has been brought to his notice, Mr. Khan argues that this Court, upon proper consideration of records as well as relevant laws, should disagree with the points of law decided by that Division Bench and, accordingly, should refer the instant writ petitions to the Hon'ble Chief Justice for constitution of a Full Bench to resolve the issues. Accordingly, referring to the said judgment dated 03.11.2015 in **Shahjibazar case**, learned advocate argues that the said Bench basically discharged the Rule in the said case on the question of maintainability of the writ petition, though some other questions of law were decided as well.

7. As regards the decision of that Bench to the effect that the contract in question was a 'commercial contract' and as such writ was not maintainable, Mr. Khan submits that the petitioner before this Court has not come for enforcement of rights derived from any contract,

but for enforcement rights derived from the said SRO, which is a legal instrument. Further referring to the relevant provisions of Bangladesh Power Development Board Order, 1972 (P.O. 59 of 1972), in particular Articles 10(1) and (3) and sub-article (5) thereof, whereby the BPDB has been vested with the responsibility of power generation, transmission, distribution and purchase of power, learned advocate submits that since the agreement in question is for the purchase of power to be generated by the petitioner company under the said contract, under no circumstances that contract can be called a 'commercial contract' in view of the Sharping Fishery case as decided by our apex court. On the other hand, according to him, since the said contract has been entered into by the BPDB in exercise of the empowerment conferred on it by the said sub-article (5) of Article 10, the same is a statutory contract. As regards the finding of that Bench that because of the arbitration clause the writ petition is not maintainable, learned advocate argues that since the petitioner has come before this Court for enforcement of its right under the SRO and that the writ petitions involve interpretation of different clauses of the said SRO, the Arbitration Tribunal is not empowered under the law to give interpretation of law and it is only the High Court Division which can give such interpretation. Therefore, he submits, this Court should hold that in spite of such arbitration clause, writ petition is maintainable.

8. Again, as regards the finding of that Bench to the effect that the petitioner's agreement with the BPDB is not an agreement with the government, which is the basic condition of Table 1 of the said SRO for issuance of such certificate, learned Advocate has drawn our attention again to different provisions of Articles 3(a), 4(1) and (3), 5 and 6 of the said P.O. 59 of 1972 and has tried to impress upon the Court that by those Articles the entire function of the BPDB and appointment of the members of the Board of BPDB are directly controlled by the government and the shares of BPDB are owned by the government. This being so, he submits, the BPDB can well be regarded as the government since it is owned, controlled and managed by the government. Further, as regards the finding of that Bench that since the application was not made to the Chairman of the BPDB, rather it was made to the Secretary of BPDB and as such the petitioner was not entitled to get such certificate, learned advocate submits that since on that ground the application of the petitioner was not restricted, this issue is immaterial in these writ petitions. In support of his submission that in spite of the existence arbitration clauses in the agreement between the parties writ may be held to be maintainable, Mr. Khan refers to two decisions of the Indian Jurisdiction as downloaded from internet, namely the case of **Jai Balaji Industries Limited vs. Union of India & others (W.P. (C) 5124/2014 & W.P. (C) 5127/2014)**, wherein the Delhi High Court has held that alternative remedy is not an absolute bar to writ petition and writ may be held maintainable in appropriate cases for the sake of justice. Learned advocate also refers to another decision of Indian Supreme Court in **Harbanslal Shania and another vs. Indian Oil Corpn. Ltd. and others reported in AIR 2003 SC 2010** wherein the Indian Supreme Court has held that the question of maintainability of writ petition is a Rule of discretion and further held that on three grounds writ may be held maintainable even in case of existence of arbitration clause in the agreement, the three grounds being: (1) where the writ petition seeks enforcement of any fundamental rights; (2) There is failure of principle of natural justice or (3) where the orders of proceedings are wholly without jurisdiction or the vires of an Act is challenged.

9. As against above submissions, Mr. Tofailur Rahman, Mr. Joynul Abedin and Mr. Md. Hefzul Bari, learned advocates appearing for the BPDB in different writ petitions, and Ms. Israt Jahan, learned Deputy Attorney General appearing for the concerned Commissioner of Customs, have made the following common submissions:-

- 1) In view of the decision of another Division Bench in unreported Writ Petition No, 513 of 2009 (**Shahjibazar case**) determining and resolving all the issues involved in the instant writ petitions, this Court should agree with that decision and, accordingly, discharge the Rules.
- 2) Since, apparently, the agreement of the petitioner was not with the 'Bangladesh Government' as stipulated by the said SRO as one of the main preconditions for issuance of such certificate, respondent no.1 has rightly refused to issue such certificate.
- 3) Since the contract in question is a commercial contract and not statutory contract, writ petition is not maintainable.
- 4) Since, admittedly, there is an arbitration clause in that contract for reference of all disputes arising out of the contract to arbitrator, the writ petition is not maintainable.
- 5) Since the petitioner's contract with the BPDB is for rental power procurement and since the said SRO No. 73 was meant only for independent power procurement agreement with the independent power producers, the petitioner cannot claim any benefit under the said SRO.
- 6) Since it has been stipulated in the contract in question that the petitioner would be liable to pay VAT, tax and all duties under the applicable laws of the land and that it would not get benefit of any fiscal incentives to be given by the government through the Private Sector Power Generation Policies, the petitioner is not entitled to get the benefit under the said SRO.
- 7) Learned advocate for the respondents have referred to various other decision, namely (a) **Mahfizul Hoque & others vs. Collector of Customs, Chittagong and others, reported in 20BLT (AD) 2012-182**, (b) **Bangladesh vs. Excellent Corporation reported in 20 BLC(AD)-255**, (c) **Ananda Builders Ltd. vs. BIWTA, reported in 57 DLR (AD)-31** and d) **Bangladesh PDB vs. Md. Asaduzzaman Sikder, 9 BLC (AD)-1**. [It may be mentioned that, in Shahjibazar's case, this case of Md. Asaduzzaman was referred to and relied upon by that Division Bench].

10. DELIBERATIONS OF THE COURT:

Extensively rigorous arguments have been made on behalf of the petitioner to disagree with the points of law decided by another Division Bench in **Shahjibazar's** case as mentioned above. According to Mr. Khan, the issue as regards commercial contract and the issue of maintainability of writ petition in spite of the existence of arbitration clause should have been decided otherwise in the said case. However, we have decided to deal with those issues of commercial contract and arbitration clause only if this Bench is convinced that:

- (a) the petitioner in fact has entered into a contract with the government and
- (b) that the benefits given under the SRO in question are not incentives.

11. After deciding those issues if it is found that the petitioner has good case on merit, only then we need to examine the issues regarding commercial contract and arbitration clause. We have decided to take this course just to avoid any possibility of unnecessary conflict with the decision in the said **Shahjibazar case** and for the sake of preventing ourselves from resorting to unnecessary academic discussions on legal issues.

(a) Whether the petitioner has entered into a contract with the Government:-

12. To address this issue, we have extensively examined the relevant provisions of the Bangladesh Power Development Board Order, 1972 (PO 59 of 1972), in particular the provisions under Articles 2, 3 (a), 4, 5 and 6 thereof. It appears from Clause-(d) of Article-2 of P.O. 59 of 1972 that the term “Government” has been specifically defined therein. According to the said provision, “Government” means the Government of the People’s of Bangladesh. Clause-(h) of Article-2 further provides that “Power Board” means Bangladesh Power Development Board as constituted by the said PO 59 of 1972. The very definition of these two terms clearly indicates the intention of the Legislature in that the Legislature wanted to keep these two terms separately with separate definitions.

13. Examination of the provisions under Articles 3, 3(a), 5 and 6 further reveals that the BPDB is a corporate body which is entitled under the law to acquire, hold and dispose of property, both moveable and immovable, and shall, by its name, sue and be sued (see Article-3). Article 3(a) of the said P.O further provides that taka five hundred crores authorized capital of the Board shall be subscribed by the government. Article 4 provides that the Chairman of the Board shall be appointed by the government and sub-article (3) of Article 4 provides that the entire discharging of functions of the Board shall be guided by the directions to be given by the government time to time. Article 5 even given the power to the government to terminate the Chairman of the Board.

14. From the above examination of material provisions, it is evident that though the Board is a corporate body and may sue or may be sued by its own name and may also acquire, hold and dispose of the property on its own, the entire activities of the Board is in fact controlled and guided by the government. The share capital is also owned by the government. Therefore, we can safely say that the BPDB is a body corporate owned and controlled by the government. However, while we say so, we do not find any legal authority or provisions either in any reported cases or in the relevant provisions of the said PO 59 of 1972 by which we can hold that the BPDB is in fact the Government of Bangladesh. Therefore, we are not able to accept the submissions of Mr. Khan that the BPDB should be called or be regarded as the Government.

15. Our view above is strengthened further by the very averments in the said SRO No. 73 dated 19.03.1997. It appears from the said SRO that though the SRO was issued by the Government through its internal resources department in exercise of power under Section 19 of the Customs Act, 1969 read with Section 14(1) of the Value Added Tax Act, 1991, the said SRO deliberately kept the Bangladesh Government, the BPDB and other entities mentioned therein separately. When, by Clause No.1 under Table 1, it provides that the concerned establishment has to be an establishment which entered into contract with the Bangladesh Government, condition No.2 under the same Table provides that the certification in that regard should be issued by the designated persons of some other authorities including BPDB. On the other hand, the prescribed form of the certificate as incorporated in the said SRO under Appendix 1 also specify the words in the following terms:

“প্রত্যয়ন করা যাইতেছে যে এ পিপ্লি----- বেসরকারী খাতে বিদ্যুত উৎপাদন কেন্দ্র স্থাপনের লক্ষ্যে বাংলাদেশ সরকারের পূর্ণাঙ্গ হিউএলএফএউজ

16. Therefore, on this point as well, we are not convinced that this SRO had made any indication that the petitioner was entering into a contract with the Bangladesh Government.

17. Further, it appears from the specific definitions as provided in the said contract dated 28.04.2008 that the term BPDB is specifically defined therein in the following terms under Section 1.1:-

“BPDB means the Bangladesh Power Development Board constituted under the Bangladesh Water and Power Development Boards Order, 1972 (PO 59 of 1972) and its successors and permitted assignees”.

18. Therefore, from the above definition as well, it appears that, the parties, while entering into contract, did not have even in their imagination that the petitioner was entering into a contract with the Bangladesh Government. Thus, we are of the view that, the petitioner has no case on this point. Therefore, we have no option but to hold that the petitioner has not entered into a contract with the Bangladesh Government.

(b) Whether the benefits under the SRO are incentives:

19. It may be mentioned that the application by the petitioner for issuance of certificate was rejected by the BPDB vide Annexure-A referring to the particular terms and conditions in the contract. Relevant parts of the Annexure-A are quoted below:-

উক্ত চুক্তি পত্রের Page-059, Section-17 অনুযায়ী প্রকল্প বাস্তবায়ন সংস্থা অর্থাৎ মেসার্স বারাকাতুল্লাহ ইলেকট্রো ডাইনামিকস লিঃ কর্তৃক প্রকল্পের জন্য আমদানীতব্য সকল প্রকার Materials, Local and Foreign Services HI Efl Duty, VAT and Tax পরিশোধের বিধান রহিয়াছে। উক্ত চুক্তিপত্রের Page-322 এ আরো নিম্নরূপ উল্লেখ রহিয়াছে:

“The Tenderer shall be entirely responsible for payment of all income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside and outside Bangladesh before COD and throughout the contract period. Applicable income taxes & VAT levied by GOB shall be deducted at source during payment of invoice. Fiscal incentives provided in private Sector Power Generation Policy (PSPGP) of Bangladesh shall not be applicable for this Tender.”

20. It appears from the above referred terms of the contract that by executing the said contract the petitioner itself agreed to pay all applicable duty, VAT and Tax etc. to be levied by the Government of Bangladesh. In this regard, it may be mentioned that the duties, VAT and taxes are levied by the Government of Bangladesh under the authority of the Acts of parliament. Thus, even if the above stipulations regarding payment of tax, vat etc. were not in the contract, the petitioner would still be liable to pay the same as per the prevailing law of the country. The only exception is that the liability of the petitioner to pay such duty, VAT and Tax is exempted either by act of Parliament or through delegated legislation. Nowhere in the four-corners of the writ petitions, the petitioner has made out any such case.

21. It further appears from the said referred terms of the contract that the petitioner also agreed not to take any ‘fiscal incentives’ provided in private sector power generation policy of Bangladesh. Now, the question is whether the benefits given by the SRO in question, namely SRO No. 73 dated 19.03.1997, may be called fiscal incentives. It appears from the said SRO that the same started with the following preamble or introduction, namely:-

“Customs Act, 1969 (IV of 1969) HI section 19 H প্রদত্ত ক্ষমতাবলে সরকার, জাতীয় রাজস্ব বোর্ডের সহিত পরামর্শক্রমে এবং মূল্য সংযোজন কর আইন, ১৯৯১ (১৯৯১ সনের ২২ নং আইন) এর ধারা ১৪(১) এ প্রদত্ত ক্ষমতাবলে জনস্বার্থে বেসরকারী খাতে বিদ্যুৎ

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যন্ত্রাংশকে উহাদের উপর আরোপনীয় আমদানি শুল্ক, মূল্য সংযোজন কর ও সম্পূরক শুল্ক
হইতে অব্যাহতি প্রদান করিল।”

(Underlines supplied)

22. Therefore, the very preamble of the said SRO refers to the policy decision of the Government in that the said SRO was issued for giving fiscal benefits mentioned therein, to encourage establishment of power generation stations in the private sector for the public interest in order to generate electricity in Bangladesh.

23. It is known to all that Bangladesh at a time suffered so many disadvantages because of lack of electricity supply. It is very much understandable that as against such background this kind of facilities or fiscal benefits have been given by the government through the said SRO. Therefore, we do not find any other appropriate word in any dictionary to describe them by any other term than “incentives”. The ordinary dictionary meaning of the word “incentive” as given by the Oxford Advanced Learner’s Dictionary (new 8th Edition) also supports this view of ours. Thus, it appears that the benefits given by the said SRO were in fact ‘incentives’ given to such establishments who were willing to establish power generation station in the private sector to generate electricity. The very basic term of the contract does also denote that the same was entered into for establishment of power generation plant on rental basis for generation of electricity, and the BPDB also entered into contract under sub-article (5) of Article 10 of P.O. 59 of 1972 to purchase such electricity from the petitioner company in accordance with the said agreement in order to distribute the same in the country. Therefore, while the petitioner was executing the said contract with BPDB in 2008, the contents of the said SRO issued in 1997 were very much within the knowledge of the petitioner, and knowing very well that it would not be able to get any benefit from the said SRO, it executed the said contract. Therefore, we are of the view that since the petitioner entered into contract with a clear declaration that it would not take any benefit from the fiscal incentives already given or to be given by the government in the private power generation sector of the country, it is now estopped from going back and say that it is entitled to such incentives.

24. In view of above, since on the very basic two points, we are of the view that the petitioner has no case at all, namely that the petitioner has not been able to show that it entered into a contract with the Government of Bangladesh and that the benefits given by the said SRO are not incentives, this Court is of the view that it does not need to examine other issues, namely whether the agreement in question was a commercial agreement or statutory agreement. Because, apparently, the petitioner has not come before this Court for enforcement of any terms of the said contract, rather it has come before this Court for enforcement of the benefits given under the said SRO. Therefore, the issue whether the contract was commercial or statutory is an irrelevant and immaterial issue in the facts and circumstances of the case. For the same reason, since on the main two issues we have already held that the petitioner has no case, we are also not inclined to address the other issue regarding arbitration clause in the said contract inasmuch as that even if on that issue the petitioner succeeds, the Rule in this writ petition will still be discharged.

25. Having regard to the above facts and circumstances of the cases, we find no merit in the Rules and, accordingly, the same should be discharged. In the result, the Rules are discharged without any order as to costs.

26. The ad-interim order, if any, thus stands recalled and vacated. The respondents are at liberty to deal with the Bank Guarantees furnished by the petitioner in accordance with law.