

**8 SCOB [2016] HCD 1****HIGH COURT DIVISION  
(Special Original Jurisdiction)**

Writ Petition No. 513 OF 2009

An application under article 102(a)(i) and  
(ii) of the Constitution of the People's  
Republic of Bangladesh

Mr. A. M. Aminuddin with  
Mr. Munshi Moniruzzaman  
...For the petitioner

**Shahjibazar Power Company Limited**  
**represented by its Managing Director**  
...Petitioner

Mr. S. Rashed Jahangir, DAG  
...For respondents No. 4

Versus

Mr. M. A. Masum  
...For respondents No. 2 & 3

**Government of the People's Republic of  
Bangladesh represented by the  
Secretary Ministry of Energy and  
Mineral Resources and others**

Heard on: 13, 08.2015, 20.08.2015,  
23.08.2015, 27.08.2015, 10.09.2015 &  
14.09.2015  
Judgment on: 3<sup>rd</sup> November, 2015

...Respondents

**Present:****Ms. Justice Zinat Ara****And****Mr. Justice A.K.M. Shahidul Huq**

**From the Contract, it transpires that it has not been entered into by BPDB in exercise of statutory power and so, it cannot be said that the contract with the statutory body i. e. BPDB is a statutory contract so, as to invoke writ jurisdiction. Further we have already seen that the contract is not entered into by the Government in the capacity of sovereign. Moreover, the Contract is purely a commercial contract for purchasing electricity on rental basis. Further, the requirements as settled by the Appellate Division in the above referred case are not fulfilled.**

**For the reasons discussed hereinbefore, we are constrained to hold that the instant writ petition is not maintainable.** ... (Paras 36 & 37)

**Judgment****Zinat Ara, J:**

1. In this writ petition under article 102 of the Constitution, the petitioner has challenged the legality of Memo No. বিউবো/শাহজীবাজার ৮০ মেঃঃ রেন্টাল/২০০৮/১০৫ dated 25.08.2008 (Annexure-A to the writ petition) issued by respondent No. 5, the Project Director, Sylhet Shahjibazar 80 Metric Watt Rental Power Plant Construction Project, Bangladesh Power Development Board, refusing to issue certificates in favour of the petitioner pursuant to নং এস,আর,ও ৭৩-আইন/৯৭/১৭০০/শুক dated 19.03.1997 (hereinafter referred to as SRO No. 73). The petitioner also sought for a direction upon the respondents to issue certificate to

the petitioner pursuant to SRO No. 73 in the Form Appendix-1 of the said SRO, in respect of the goods imported by the petitioner under Letter of Credit No. 0862208010231 dated 15.04.2008 issued by Islami Bank Limited, Local Office, Dhaka.

#### Admitted Facts

2. The petitioner, Shahjibazar Power Company Limited, is a private company incorporated under the Companies Act, 1994. The petitioner has been carrying on the business of electricity generation and supply. The petitioner has been incorporated with the object of implementation of a project of Bangladesh Power Development Board for supply of electricity on rental basis. The petitioner is also registered with the Board of Investment and has obtained permission from the Board of Investment to import equipments for the purpose of construction and setting up the Power Generation Station at Shahjibazar, Hobigonj. Respondent No. 2, Bangladesh Power Development Board (hereinafter stated as BPDB) floated tender being No. 436-BPDB/Sec/Dev-75/2005 dated 21.05.2007 for design, financing, construction, operation and maintenance of a power plant to be located at Shahjibazar, Hobigonj to provide 80 MW=10% electrical energy. The petitioner participated in the tender and was awarded the tender vide Notification of Award dated 08.11.2007 (Annexure-C to the writ petition). In the Notification of Award, it was stated that the Government has approved the proposal of the petitioner against the tender. The petitioner was then incorporated for implementation of the Notification of Award. Thereafter, a contract of agreement being No. 09695 dated 14.02.2008 (hereinafter stated as the Contract) was executed between the petitioner and BPDB. The petitioner for setting up 80 MW Power Plant had opened five Letters of Credit being No. 086208010482 dated 10.08.2008, 086208010231 dated 15.04.2008, 086208010443 dated 16.07.2008, 086208010364 dated 12.06.2008 and 086208020037 dated 15.04.2008 with the Islami Bank Limited, Local Office, Dhaka (the Bank, in short). The items imported against the above mentioned five Letters of Credit are for the purpose of construction and setting up of the Power Generation Station at Shahjibazar, Hobigonj. After arrival of the goods under the Letter of Credit No. 086208010231 dated 15.04.2008, the petitioner through its Clearing and Forwarding Agent (C&F Agent) submitted Bill of Entry No. C-14734 dated 20.01.2009 for releasing the imported goods and the same was received by the Customs House, Dhaka. The petitioner applied to respondent No. 5 to issue necessary certificate under SRO No. 73 for the purpose of getting exemption from payment of customs duties, value added tax (VAT) and supplementary duties under the said SRO (Annexure-H to the writ petition). On 25.08.2005, respondent No. 5 by Memo No. বিউবো/শাহজীবাজার ৮০ মেঃওঃ রেটাল/২০০৮/১০৫ (the impugned Memo, in short) refused to issue certificate under SRO No. 73 to the petitioner.

#### Petitioner's Case

3. The equipments under the Letters of Credit were imported for setting up Power Generation Station in private sector and the petitioner has complied with the terms and conditions of SRO No. 73 and for compliance of condition No. 2, it had prayed for issuance of certificate, but respondent No. 5 refused to issue the certificate in its favour under the provisions of SRO No. 73. Respondent No. 2, the Chairman of BPDB is empowered to issue certificate, but the impugned Memo was issued by respondent No. 5 refusing to grant certificate for enjoying the tax exemption benefit by the petitioner. The benefit given as per SRO No. 73 is relating to exemption of taxes and duties at the time of importation of the machineries for setting up private sector power generation stations and the same is general in nature and applicable to all persons dealing with the said sector. But respondent No. 5 refused

to issue certificate on the ground that the petitioner is not entitled to enjoy the benefit of tax exemption under SRO No.73 and that the petitioner has agreed to pay income tax, customs duties and value added tax in the Contract. The petitioner earlier filed Writ Petition No. 6903 of 2008 challenging the same order in the High Court Division, but respondent No.7, the Commissioner of Customs, Customs House, Kurmitola, Dhaka was not made a party to the said writ petition and, as such, the order of the High Court Division was not binding upon respondent No. 7 as the goods were lying within his jurisdiction and hence, this writ petition alleging that the impugned Memo refusing to issue certificate by respondent No. 5 following SRO No. 73 is unlawful.

### **Respondents No. 2 and 3's Case**

4. Respondents No. 2 and 3, the Chairman and the Secretary of BPDB have contested the Rule by filing a joint affidavit-in-opposition as well as a supplementary affidavit-in-opposition controverting the assertions made in the writ petition contending, inter-alia, that establishment of power station on rental basis is a new concept in Bangladesh. When Private Sector Power Generation Policy of Bangladesh (revised in 2004) (hereinafter stated as the Policy) was made, the concept of purchase electric power and energy on rental basis was not in existence. Rental basis power station is established for a particular period. Exemption from corporate income tax for a period of 15 years is given for Independent Power Project (IPP) only, which is established permanently. The petitioner being a power supply company on rental basis is not entitled to enjoy the fiscal facilities as envisaged in the Policy. The Policy or SRO No. 73 is not applicable on rental basis power project. It is applicable for power supply on IPP basis. As the petitioner is not entitled to enjoy the fiscal facilities under the Policy or SRO No. 73 respondent No. 5 lawfully declined to issue certificate in favour of the petitioner. In the Contract bearing No. 09695 dated 14.02.2008, it has been clearly stated that BPDB invited tenders for supply of power on rental basis and SRO No. 73 and the Policy never intended for exemption of VAT, duties and taxes to supply power on rental basis. The petitioner with malafide intention has filed the instant writ petition with an inordinate delay. As per section 17 of the Contract (as amended) the petitioner is liable to pay all taxes and customs duties arising out of the Contract and the petitioner agreed with each and every term and condition as laid down in the Contract without having any objection. Moreover, in clause (5) of the Notification of Award in favour of the petitioner, it has been specifically and clearly mentioned that the petitioner would be liable to pay all income taxes, duties, supplementary duties, VAT, etc arising out of the Contract. Under section 19 of the Contract, it has been clearly provided that in case of any dispute arising out of the Contract, the petitioner's option is to settle the dispute either amicably or through arbitration. The petitioner has not taken any step to settle the dispute by amicable settlement or through arbitration proceeding. As the petitioner failed to avail the equally efficacious alternative remedies available in the Contract dated 14.02.2008, the instant writ petition is not maintainable without exhausting the said forums. The disputes between the petitioner and the respondents are absolutely based on commercial contract and on that count also the writ petition is not maintainable. The grounds set forth in the writ petition are all vague, malafide, false, without basis, unspecified, indefinite and therefore, the Rule is liable to be discharged.

### **Respondent No. 4's Case**

5. Respondent No. 4, the National Board of Revenue, has also contested the Rule by filing a separate affidavit-in-opposition stating that the petitioner was given award for supply, installation and putting into commercial operation of Shahjibazar 80 MW=10% Rental Power Plant for a tenure of 15 years. The tender being No. 436-BPDB /Sec/Dev-75/2005 dated

21.05.2007 was purely a commercial contract/agreement signed between the petitioner and BPDB for supply of power on rental basis at the tariff provided in Schedule-8 of the Contract. The Contract not being a statutory contract between the petitioner and BPDB and the same being a simple commercial contract, the instant writ petition is not maintainable. The Government purchases electricity from two categories of power providers,- (a) Independent Power Producers (IPP), who generates power under the guidelines, terms and conditions of the Policy and (b) Rental Power Producers (RPP), who supply electricity on rental basis. The terms, conditions and the purchase price for electricity are completely different between IPP and RPP. Independent Power Producers enters with an Agreement with the Government to supply electricity on IPP basis holding the guidelines, terms and conditions laid down in the Policy. The power purchase tenure is 15, 22 or 25 years in case of IPP. Under the Policy, each IPP basis electricity provider needs to sign an implementation agreement with the Government that includes agreements on term (period), consent for project, site acquisition, construction and operation, liability and indemnification, import controls, transfer of funds, assignment and security, restrictions on acquisitions and transfers of shares or assets, force majeure, taxation and customs duties, termination and default, rights and obligations of parties upon termination, etc. Under Implementation Agreement, the IPP basis electricity provider has been given exemption from taxation in Bangladesh or withholding of tax by BPDB or GOB on its import from tariff charges. Under the Policy, each IPP basis electricity provider needs to sign a Power Purchase Agreement with the Government that includes the agreement on the price of electricity. IPPs may also need to sign Land Lease Agreement in relevant cases. On the other hand, a RPP is an awarded power supply contract on rental basis for the tenure of 3, 5 or 15 years. The RPPs do not need to fulfill the terms and conditions of the Policy. A RPP does not need to sign Implementation Agreement, Power Purchase Agreement or Land Lease Agreement. Instead of that, a RPP signs a contract/agreement for supply of power on rental basis. The Contract for supply of power on rental basis clearly shows that the power provider is liable to pay the taxes, duties, etc. Since RPP earlier knows that its income from the supply of power is taxable, it quotes the price of power accordingly. In other words, when the Government/BPDB purchases the electricity from a RPP, it pays a higher price than the price that of an IPP of similar location would charge. SRO No. 73 is not applicable to RPP and the petitioner is not required to comply with the Policy or SRO No. 73. Thus, the petitioner is not entitled to get exemption of duties, taxes, VAT, etc. under SRO No. 73. Mere issuance of license by the Bangladesh Energy Regulatory Commission cannot have any effect on the contractual obligation of the taxability of the petitioner. The petitioner submitted and signed a price schedule (Form G-2) as part of the tender document containing that the tenderer (petitioner) would be liable 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. Financial incentives provided in the Policy are not applicable for this tender. Under the principle of estoppels by acquiescence or waiver, the petitioner is estopped from claiming tax exemption and any other fiscal incentive provided in the Policy or SRO No. 73. There is an alternative forum for amicable settlement of the disputes in Section 19 of the Contract between BPDB and the petitioner. The petitioner having not exhausting the said forum, the writ petition is not maintainable and the Rule is liable to be discharged.

#### **Affidavit-in-Reply by the Petitioner**

6. The petitioner applied for IPP license, but the respondents unlawfully granted RPP license to the petitioner. Thereafter, the petitioner filed Writ Petition No. 8086 of 2009 before the High Court Division challenging issuing of RPP license. Subsequently, as per order of the

High Court Division, the Bangladesh Energy Regulatory Commission (shortly, BERC) has issued an IPP License to the petitioner on 11.01.2012. Since IPP License has been issued to the petitioner, the petitioner is entitled to enjoy all the benefits under SRO No. 73. The Policy provides that the companies generating power would be exempted from payment of customs duties, VAT, supplementary duties, etc. and the petitioner being a power generating company and IPP License having been issued in its favour, it is entitled to get exemption under SRO No. 73. But the respondents unlawfully refused to issue necessary certificate for getting exemption from payment of taxes, etc.

### **Arguments of the Contending Parties**

7. Mr. A. M. Aminuddin, the learned Advocate for the petitioner appearing with Mr. Munshi Moniruzzaman and Mr. Md. Minhduzzaman, has taken us through the writ petition, the affidavits-in-opposition, the supplementary affidavit-in-opposition, the affidavit-in-reply, SRO No. 73 and the relevant provisions of the Policy and advances before us, the following arguments:-

- (1) the petitioner was given RPP License by BERC and the petitioner then filed Writ Petition No. 8086 of 2009 before the High Court Division and as per order of the High Court Division, IPP License was issued in favour of the petitioner on 11.01.2012. As the petitioner holds IPP License, the Policy as well as SRO No. 73 are applicable in its case;
- (2) the petitioner has mostly complied with the conditions under the Policy and SRO No. 73;
- (3) it is true that the petitioner at the time of submitting tender agreed to pay all the taxes, duties, VAT, etc and in the Notification of Award, there is a provision for payment of taxes, duties, etc. by the petitioner, but under SRO No. 73 the Government exempted all IPP from payment of supplementary duties, taxes, etc. and, as such, the petitioner is entitled to get exemption;
- (4) The petitioner agreed to pay taxes, duties, VAT, etc. in its tender, etc. and in the Notification of Award as well as the Contract, similar provision was incorporated. But the Policy and SRO No. 73 would be applicable in the case of the petitioner, as there is no estoppel on applicability of law;
- (5) the Chairman of BPDB may issue or refuse issue of a Certificate under SRO No.73. But respondent No. 5, who had no jurisdiction, illegally refused to issue certificate for exemption of taxes, duties, VAT, etc.;
- (6) it is true that the Contract was in between the petitioner and BPDB. But BPDB executed the contract with the petitioner with the approval of the Government and therefore, it is to be treated as contract executed by the Government and, as such, the petitioner's contract is to be treated as a statutory Contract. Therefore, the writ petition is maintainable, though the petitioner has not availed the alternative remedies.

8. In support of his arguments, Mr. Aminuddin has relied on the decisions of the following cases:

- (i) Bangladesh Bank and others vs. Zafar Ahmed Chowdhury and another, reported in 56 DLR (AD) 175;
- (ii) M.A. Hai, Md. Wazed Ali Miah & Md. Moslem Vs. Trading Corporation of Bangladesh, reported in 40 DLR (AD) 206;
- (iii) Bangladesh Telecom (Pvt.) Ltd. [ In CA No. 73/92] Bangladesh Telegraph and Telephone Board and anr (in CA No.3/93) Vs. Bangladesh T&T Board and ors [in CA No.73/92] Bangladesh Telecom(Pvt.) Ltd. and another [In CA No3/93], reported in 48 DLR(AD) 20;
- (iv) Muhammad Amir Khan Vs. Controller of Estate Duty reported in PLR 1961 (SC) 119;
- (v) Commissioner of Income Tax, Karachi Vs. Mst. Khatija Begum, Partner, Shakil Impex, Karachi, reported in 17 DLR(SC) 415;
- (vi) Grameen Phone Ltd. Vs. Bangladesh Telecommunication Regulatory Commission (BTRC) and others, reported in 18 BLC, 401.

9. Mr. S. Rashed Jahangir, the learned Deputy Attorney General appearing on behalf of respondent No. 4, takes us through the notice inviting tenders by BPDB, the Notification of Award, the Contract executed between the petitioner and BPDB, the Policy and SRO No. 73 and put forward the following arguments before us:-

- (a) the Government purchases electricity through BPDB from two categories of power providers,- (a) Independent Power Producers (IPP), who generates power under the guidelines, terms and conditions of the Policy and (b) Rental Power Producers (RPP), who supply electricity on rental basis;
- (b) the terms, conditions and the purchase price for electricity are completely different between IPP and RPP. Independent Power Producers enters in an Agreement with the Government to generate and supply electricity following the Policy and the tenure being 15, 22 or 25 years. They have to sign an implementation agreement with the Government and there are many requisites for Independent Power Producer (IPP). Under implementation agreement, the IPPs have only been given exemption from payment of taxes or withholding of tax by BPDB or GOB; The Policy and SRO No. 73 are applicable only in their case. The Rental Power Providers (RPP) are awarded power supply contract on rental basis for the tenure of 3, 5 or 15 years. They do not need to fulfill the terms and conditions of the Policy or SRO No. 73;
- (c) the Government through BPDB purchases the electricity from the IPP with much lower price than the price of the electricity supplied by RPP as RPP includes cost of taxes, duties, etc at the time of quoting price in its tenders and, as such, the Policy or SRO No. 73 are not applicable in their case;
- (d) for the aforesaid reason, in the notice inviting tenders, the tender submitted by the petitioner and the contract of agreement executed between the petitioner and BPDB, there is specific provision relating to the petitioner's liability for payment of duties, taxes, VAT and other charges. The petitioner having submitted the

tender accepting the said liability and in executing the Contract, with the said liability, there is no scope to go beyond the Contract;

- (e) the Contract executed between the petitioner and BPDB is not a statutory contract, but purely a commercial contract. Therefore, the instant writ petition is not maintainable;
- (f) in section 19 of the Contract, there is specific provision to settle the disputes either amicably or through arbitration. Therefore, there is an equally efficacious alternative remedy for settlement of disputes by amicable settlement or arbitration proceeding. But the petitioner has not availed the said forums and so, the instant writ petition is not maintainable;
- (g) only because an IPP License has been issued subsequently, to the petitioner upon direction by the High Court Division, the status of the petitioner as an electricity producer on rental basis has not changed so as to get benefit under SRO No. 73;
- (h) the petitioner has not entered with any statutory agreement with the Government and therefore, the question of issuance of certificate by the respondents or to exempt the petitioner from payment of taxes under SRO No. 73 does not arise;
- (i) in the facts and circumstances, the Rule is liable to be discharged with costs.

10. In support of his arguments on maintainability, the learned Deputy Attorney General has relied on the decisions in the cases of Sharping Matshajibi Samabaya Samity Ltd. Vs. Bangladesh and others reported in 39 DLR (AD)(1987) 85; Bangladesh Power Development Board and Others vs. Md. Asaduzzaman Sikder reported in 8 MLR (AD) 241; 9 BLD (AD) 63, Ananda Builders Limited vs. BIWTA and others, reported in 57 DLR (AD) 31 and Government of Bangladesh and others vs Excellent Corporation, reported in 20 BLC (AD)(2015) 355.

11. Mr. A. M. Masud, the learned Advocate appearing for respondents No. 2 and 3, takes us through the affidavit-in-opposition, the supplementary affidavit-in-opposition, the decision of the Ministry, the provisions of Section 17 of the Contract, the impugned order, adopts the arguments as advanced by the learned Deputy Attorney General, and adds the following arguments before us:-

- (a) as per section 17 of the Contract (as amended) the petitioner 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 and VAT, charges etc. levied by the GOB shall be deducted at source during payment of invoice;
- (b) the petitioner's Chairman and Managing Director having signed the Contract agreeing with the said provision cannot now claim that the petitioner is entitled to get exemption from payment of taxes, etc. under the Policy or SRO No. 73;
- (c) in clause (1) of Table-1 of SRO No. 73 it is stipulated that “পৱনৰ্ণ নৱ্ৰ্ণ প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।” Admittedly, the Contract was between the petitioner and BPDB and not with the Government of

Bangladesh. Therefore, there was no scope for issuance of any certificate under SRO No. 73 by the respondents;

- (d) SRO No. 73 is only applicable in case of agreement/contract between the Government and an industrial establishment;
- (e) the petitioner is provider of electricity on rental basis and therefore, SRO No. 73 is not applicable in its case;
- (f) the petitioner did not submit any application to the Chairman of BPDB for issuance of any certificate, so it cannot now claim that refusal to issue certificate by respondent No.5 is unlawful;
- (g) since SRO No. 73 is not applicable in case of the petitioner, the respondents legally refused to issue certificate under the said SRO;
- (h) in the facts and circumstances of the case, the Rule is liable to be discharged with costs.

### **Points for Determination**

12. In view of the arguments as advanced by the learned Advocate for the contending parties and the learned Deputy Attorney General, the questions to be determined in this Rule are as under:-

- (i) whether the writ petition is maintainable?
- (ii) whether the impugned Memo No. বিউবো/শাহাজীবাজার ৮০ মেঃওঃ রেকর্ডাল/২০০৮/১০৫ dated 25.08.2008 (Annexure-A to the writ petition) issued by respondent No. 5 is lawful?
- (iii) whether the respondents may be directed to issue certificate to the petitioner pursuant to SRO No. 73 in respect of its imported goods under Letter of Credit No. No. 080208010231 dated 15.04.2008 issued by the Bank?

### **Examination of the record**

13. We have examined the writ petition, the affidavits-in- opposition, supplementary affidavit filed by respondents No. 2 and 3, affidavit-in-reply and the materials on record. We have also gone through the Contract, the Policy and SRO No. 73. We have further carefully studied the decisions as referred to by the learned Advocates for the contending parties and the learned Deputy Attorney General.

### **Deliberation of the Court**

14. The points for determination are inter-related and so, those are taken up together for consideration for the sake of convenience of discussions.

15. We have already noticed that Contract of Agreement being No. 09695 dated 14.02.2008 was executed between the petitioner and BPDB for generation and supply of electricity on rental basis. From Annexure-K, it transpires that Certificate No. RPP-0010 was



issued in favour of the petitioner with effect from January 8, 2009 under the terms and conditions incorporated in License No. BEREC/Power/RPP-0010/8/0008/0541 dated February 19, 2009. Therefore, it is evident that no license was issued by BEREC in favour of the petitioner when the machineries were imported by the petitioner. But, subsequently, license was issued in favour of the petitioner on February 19, 2009 with effect from January 8, 2009 i.e. long after opening of the Letters of Credit and submission of Bills of Entry. However, since RPP license was issued to the petitioner, the petitioner filed a writ petition being No. 8086 of 2009 and the High Court Division by judgment dated 03.06.2010 decided that there was no scope to issue Rental Power Producer License to the petitioner and so, directed for issuance of a proper license in favour of the petitioner. Whereupon, IPP license was issued in favour of the petitioner on 11.01.2012.

16. Be that as it may, the admitted fact is that the petitioner is generating and supplying electricity on rental basis. The tender inviting generation and supply of electricity and the Contract for supply of power on rental basis executed on 14<sup>th</sup> February, 2008 have not been filed by the petitioner. However, at the time of hearing and delivery of judgment, the learned Deputy Attorney General placed the same before us.

17. Section 1 of Tender document is relating to instructions to the Tenderers. Clause 28 of this section reads as under:-

“28 Taxes and Duties

28.1 The supplier shall be entirely responsible for all taxes, duties, license fees, and other such levies imposed or incurred until delivery of the contracted goods to the Purchaser.”

18. Agreeing with the aforesaid condition as contained in the tender document, the petitioner submitted tender accepting entire responsibilities for all taxes, duties, license fees and other such levies imposed or incurred.

19. In the Tender Price Schedule (Form G-2), clause 6, the Tenderer i.e. the petitioner specifically mentioned as under:-

“6) **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 tax and VAT levied by GOB shall be deducted at source during payment of Invoice. **Fiscal incentives provided in Private Power Sector Generation Policy of Bangladesh shall not be applicable for this Tender.”**

(Bold, emphasis supplied)

20. Now, the petitioner cannot claim that Private Sector Generation Policy is applicable to it.

21. Section 17 of the Contract reads as under:-

“17. Taxes

**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 through out the contract period. Applicable**

**income tax & VAT levied by GOB shall be deducted at source during payment of Invoice.**

The Company shall import required machinery, equipment etc. as per prevailing import policy of Bangladesh.”

(Bold, emphasis given)

22. The relevant portion of SRO No. 73 (Annexure-G to the writ petition) reads as under:-

“টেবিল-১

- (১) সংশ্লিষ্ট শিল্প প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।
- (২) বিদ্যুৎ জ্বালানী ও খনিজ সম্পদ মন্ত্রণালয়ের অন্যান্য যুগ্ম সচিব পদমর্যাদার কর্মকর্তা ডাইরেক্টর জেনারেল (পাওয়ার সেল), পল্লী বিদ্যুতায়ন বোর্ডের চেয়ারম্যান বা বিদ্যুৎ উন্নয়ন বোর্ডের চেয়ারম্যান, অতঃপর প্রত্যয়নকারী কর্তৃপক্ষ বলিয়া অভিহিত, এর নিকট হইতে পরিশিষ্ট-১ এ বিধৃত বিষয়ে চালানওয়ারি একটি প্রত্যয়নপত্র আমদানিকৃত প্লান্ট ও ইকুইপমেন্ট খালাসের সময় সংশ্লিষ্ট শুল্ক স্টেশনে দাখিল করিতে হইবে।
- (৩) সংশ্লিষ্ট প্লান্ট ও ইকুইপমেন্ট বাণিজ্যিক উৎপাদন শুরু করার পূর্বেই আমদানি করিতে হইবে।

টেবিল-২

- (১) অস্থায়িভাবে আমদানিকৃত ইরেকশন ম্যাটেরিয়ালস, যন্ত্রাংশ বাণিজ্যিক উৎপাদন শুরুর পূর্বে যে কোন সময় আমদানি হইতে হইবে এবং বাণিজ্যিক উৎপাদন শুরু হওয়ার ৬ (ছয়) মাসের মধ্যে বিদেশ ফেরত পাঠাইতে হইবে।

(Underlined by us)

23. It is not the case of the petitioner that it has imported erection materials, equipments and machineries on temporary basis or that it has returned those machineries within six months from the date of commercial production.

24. Mr. Aminuddin, in course of arguments, relied on the conditions as mentioned in Table-1 of SRO No. 73.

25. Under condition No. (1) of Table-1 of SRO No. 73 an industrial establishment would be entitled to get exemption of import duties, VAT and supplementary duties for import of plant's equipments permanently for establishment of power generation station, on condition that,- “সংশ্লিষ্ট শিল্প প্রতিষ্ঠানকে বাংলাদেশ সরকারের সহিত চুক্তিবদ্ধ হইতে হইবে।”

26. Admittedly, tenders were invited by Bangladesh Power Development Board (BPDB). The petitioner submitted tender in response thereof and the petitioner entered into the Contract with BPDB. The Contract for supply of power on rental basis, executed on 14th February, 2008, also shows that the same is between the Bangladesh Power Development

Board and Shahjibazar Power Company Limited (the petitioner). Therefore, it is evident that the Contract of the petitioner is not with the Government. It is true that approval might have been taken from the Government before entering into the Contract by BPDB. But, for that reason, it cannot be said that the Contract is entered by the People's Republic of Bangladesh with the petitioner or that the contract is entered by the Government in the capacity as sovereign.

27. Now let us examine the impugned Memo dated 25.08.2008. For better understanding, the relevant portion of the Memo is quoted below:-

“.....

অতএব আপনার প্রেরিত পত্রের মর্ম অনুযায়ী বিষয়োক্ত এস আর ও-৭৩-আইন/৯৭/১৭০০/শুক্ক তারিখ ১৯ শে মার্চ, ১৯৯৭ এ বর্ণিত ছক পরিশিষ্ট-১ মোতাবেক আপনাদের প্রতিষ্ঠানের অনুকূলে আমদানীকৃত Plant এবং Equipment খালাসের নিমিত্ত প্রত্যয়নপত্র জারী করার সুযোগ আছে বলে প্রতীয়মান হয় না।”

28. We have earlier seen that in order to issue a certificate under Table-1 of SRO No. 73, the Contract should be between the Government and an industrial establishment and, as such, there is no scope for issuing certificate under SRO No. 73 by the respondents.

29. The learned Advocate for the petitioner submits that respondent No. 5 had no jurisdiction to refuse issuance of the certificate, as the Chairman of BPDB is the authority to issue or refuse issuance of such certificate. But the petitioner neither claimed nor produced any iota of evidence showing that it ever applied to the Chairman of BPDB for issuance of certificate under SRO No. 73. The learned Advocate for the petitioner also admits that the petitioner has not applied to the Chairman, BPDB for issuing certificate under SRO No. 73.

30. From the application filed by the petitioner to issue certificate under SRO No. 73 (Annexure-H to the writ petition), it appears that application was given to respondent No. 5 for issuance of certificate and respondent No. 5 with reference to SRO No. 73 refused to issue certificate by the impugned Memo. Now, the petitioner cannot claim that the impugned Memo is unlawful.

31. In view of the above, it is evident that the petitioner, without applying to the Chairman, BPDB for issuance of certificate under SRO No. 73, has filed this writ petition seeking direction upon BPDB represented by its Chairman and other respondents for issuing certificate under SRO No. 73.

32. Section 19 of the Contract is relating to choice of law and resolution of disputes. Section 19.2 of the Contract reads as under:-

“19.2 Resolution of disputes

(a) Amicable Settlement

BPDB and the Company shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or its interpretation.

(b) Arbitration

If the parties are unable to reach a settlement as per Section 19.2(a) within twenty-eight (28) days of the first written correspondence on the matter of disagreement, then either Party may give notice to the other party of its intention to commence arbitration in accordance with Section 19.2(b).

The arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force. The place of Arbitration shall be in Bangladesh.”

(Underlined by us)

33. Admittedly, the petitioner has not availed the forums of amicable settlement and arbitration.

34. We have already seen that the impugned Memo has been issued by respondent No. 5 in response to the petitioner’s application. The petitioner has not applied to the Chairman, BPDB for issuance of certificate under SRO No. 73. Thus, it is evident that the petitioner has not applied to the appropriate authority under clause (2) of Table-1 of SRO No. 73.

35. Furthermore, there are equally efficacious alternative remedy for settlement of dispute through amicable settlement and arbitration. The petitioner ought to have availed those forums. Without availing those forums the instant writ petition cannot be said to be maintainable. Further, the petitioner’s Contract with BPDB is for supply of power on rental basis. The latest decision of the Appellate Division on the principle of availing writ jurisdiction relating to Contract as reported in 20 BLC (AD) (2015) is as under:-

“14, This Division upon consideration of different decisions of the subcontinent in Bangladesh Power Development Board vs Mohammad Asaduzzaman Sikder, 9 BLC (AD) 1, recapitulated the principle upon which writ jurisdiction can be invoked for breach of contract as under:

- (a) **the contract is entered into by the Government in the capacity as sovereign;**
- (b) where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;
- (c) where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, **but “if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory”;**
- (d) where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and **the contract so entered by the statutory body is not an exercise of statutory power then merely because one of the parties to the contract is a statutory or public body such contract is not a statutory contract;**

- (e) when contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;
- (f) where the contract has been entered into in exercise of statutory power by statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligation.

15. It is stated in the above case that **no writ is maintainable unless the aforesaid requirements are fulfilled.** In the above case, the writ petition sought a direction upon the Government and its official to make payment for the execution of the works as per work order given to him. Though the High Court Division made the rule absolute, this Division set aside the judgment on the reasoning that the writ petition is not maintainable. **None of the above conditions for seeking a relief in writ jurisdiction is available to the writ petitioner and thus, the writ petition is not maintainable. Similar views have been expressed in an unreported case in Civil Appeal Nos. 244-250 of 2005. Those cases were relating to construction of a bridge on the basis of tender. In that case also this Division approved the views taken in Asaduzzaman Sikder and held that the writ petition is not maintainable.**

16. The Government is under no obligation to pay commission to the writ petitioner for the works done on behalf of its principal. The High Court Division unnecessarily wasted its energy in exploring Annexures-D, E, E-1, J and J-1, which are nothing but correspondences made among the writ respondents, and the writ petitioner's principal's correspondences with the Government and its reply and after the execution of the contract. In the contract, as observed above, no provision was provided for payment of commission to the writ petitioner by the Government of Bangladesh. The High Court Division, in the premises, on a misconception of law made the rule absolute. The writ petition is a misconceived one.

The appeal is allowed without any order as to cost. The judgment of the High Court Division is set aside.”

(Bold, to give emphasis)

36. From the contract, it transpires that it has not been entered into by BPDB in exercise of statutory power and so, it cannot be said that the contract with the statutory body i. e. BPDB is a statutory contract so, as to invoke writ jurisdiction. Further we have already seen that the contract is not entered into by the Government in the capacity of sovereign. Moreover, the Contract is purely a commercial contract for purchasing electricity on rental basis. Further, the requirements as settled by the Appellate Division in the above referred case are not fulfilled.

37. For the reasons discussed hereinbefore, we are constrained to hold that the instant writ petition is not maintainable.

38. The facts and circumstances of the instant case and the decisions as referred to by the learned Advocate for the petitioner are quite distinguishable and so, not applicable in the facts and circumstances of the instant case. Therefore, we do not like to discuss those decisions unnecessarily.

39. In view of the above, we find no merit in the submissions of Mr. A M. Aminuddin and we find merit and force in the submissions of Mr. S. Rashed Jahangir and Mr. A. M. Masum.

40. As it is decided that the writ petition is not maintainable, we are not inclined to discuss further in the matter being redundant.

41. In the result, the Rule is discharged without any order as to costs.

42. The respondents are at liberty to encash the bank guarantee.

43. Communicate the judgment to respondents No. 1 and 2 at once.