

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 2904 of 2021.

With

Writ Petition No. 146 of 2022.

In the matter of:

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

AND

In the matter of:

Sheikh Moniruzzaman, Proprietor
Payra Shipping and Logistics

... Petitioner (In W.P.No.2904/2021).

With

Payra Port Authority, represented by its
Chairman

... Petitioner (In W.P.No.146/2022).

-Versus-

Government of the People's Republic of
Bangladesh represented by the Secretary,
Ministry of Shipping, Bangladesh Secretariat,
Ramna, Dhaka and others

..Respondents(In W.P No.2904/2021)

With

Government of the People's Republic of
Bangladesh represented by the Secretary,
Ministry of Power, Energy and Mineral Resources,
Bangladesh Secretariat, Ramna, Dhaka and
others

..Respondents (In W.P No.146/2022)

No one appears,

For petitioner(In W.P. No. 2904/2021).

Mr. Mohammad Humaun Kabir, Advocate with

Mr. Mohammad Babrul Amin, Advocate

For petitioner (In W.P No.146/2022)

Mr. Mohammad Humaun Kabir, Advocate with

Mr. Mohammad Babrul Amin, Advocate

For respondent No.4 (In W.P No.2904/2021)

Ms. Syeda Nasrin, Advocate

For respondent No.5(In W.P. No.2904/2021)

Mr. Mohammad Jaynal Abedin Bhuiyan, Advocate

.For respondent No.6(In W.P. No.146/2022)

**Heard on: 05.03.2023, 09.03.2023 &
28.05.2023. Judgment on: 31.5.2023.**

Mahmudul Hoque, J. The subject matter in both the Rules nisi being similar and the parties are same they are taken up jointly

for hearing and disposal and as such, are being disposed of by this single judgment.

On an application under article 102 of the Constitution, Rule Nisi, under adjudication in Writ Petition No.2904 of 2021, was issued on 09.03.2021 in the following terms:

“Let a Rule nisi be issued calling upon the respondents to show cause as to why the inaction of the respondent Nos. 1 to 4 to restrain the respondent Nos. 5 to 7 from enlisting Stevedore Service Provider in pursuance to the notice of Re-Invitation for enlistment for Stevedoring Service Provider having Invitation Ref. No. BCPCL/Procurement/Enlistment/ Stevedore/ 2021/135 dated 19.01.2021 issued by respondent No.6, i.e. Company Secretary (In charge), Bangladesh-China Power Company (Pvt.) Limited (Annexure-F) should not be declared to have been issued without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.”

Rule Nisi in Writ Petition No.146 of 2022, was issued on 09.01.2022 in the following terms:

“Let a Rule nisi be issued calling upon the respondents to show cause as to why the decision of the Review Panel-4 in Appeal Petition No. 047 of 2020 dated 14.10.2020 (Annexure-“F” to the writ petition) allowing the appeal petition by the respondent No.4 and thereby advising the petitioner to revoke the current restrictive practice and allow wider participation of relevant service provider (stevedores) being contrary to section 12 of “পায়রা বন্দর কর্তৃপক্ষ আইন, ২০১৩” and the Memo No. BCPCL/Procurement/Enlistment/ Stevedore/ 2021-22/57 dated 13.10.2021 to enlisting 24 stevedore service providers by

the Bangladesh China Power Company (Pvt.) Limited (respondent No.6) for their own service in violation of section 12 of “পায়রা বন্দর কর্তৃপক্ষ আইন, ২০১৩” and the terms and conditions of clause 15 of the Agreement dated 24.11.2020 in granting permission for establishment of Jetty to the respondent No.6 (Annexure-“O” to the writ petition) should not be declared to have been passed without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.”

It appears that challenging the tender notice as impugned in the Writ Petition No. 2904 of 2021 one Stevedoring Company namely, M/S. Nuru & Sons filed Appeal Petition No.047 of 2020 before the Review Panel-4 of CPTU which was allowed by the decision dated 14.10.2020 challenging which the Payra Port Authority filed Writ Petition No. 146 of 2022 and obtained the Rule Nisi as stated above and as such, the disposal of the Rule nisi issued in Writ Petition No. 146 of 2022 will govern the Rule Nisi issued in Writ Petition No. 2904 of 2021 and resultantly, the facts of Writ Petition No. 146 of 2022 are stated in short as follows:

The petitioner namely, the Payra Port Authority was established in the year of 2013 under the Payra Port Authority Act, 2013 and in section 12(Dha) of the said Act the power of regulating the activities of Stevedore Service Providers within the Port Area has been vested in the Payra Port Authority and by exercise of which Payra Port Authority enlisted 30(thirty) Stevedore Service Providers to provide stevedore services within the Payra Port area.

Respondent No.6 namely Bangladesh-China Power Company (Pvt.) Limited is a joint venture company of a state owned company of Bangladesh namely North-West Power Generation Company Limited and a state owned company of China namely China National Machinery Import and Export Corporation. Respondent no.6 is implementing a coal-based Payra 1320 M.W. Thermal Power Plant Project (Phase-1) at Dhankhali, Patuakhali, Bangladesh and for this purpose, the respondent No.6 needs to import coal through Payra Port. The respondent no.6 published an Invitation Ref: No. BCPCL/Procurement/Enlistment-01/2020/07 dated 21.07.2020 under the signature of Project Director (Annexure-“C”) for Enlistment of Stevedore Service Provider requiring the eligibility as follows:

“The Service Provider shall have 05(five) years of general experience. They shall have relevant experience of 03(three) years in providing Stevedoring Service in at least 01(one) National Port of Bangladesh.”

Since the respondent No.6-company is situated within the Payra Port Area, the authority of the Payra Port vide Letter bearing Memo No. 18.21.7866.007.00.002.14/155 dated 10.08.2020 informed the respondent No.6 stating *inter-alia* that the port authority already enlisted 30(thirty) Stevedore Service Providers for providing stevedoring services to Payra Port Authority and other organizations situated within payra port area. As such, the respondent No.6 is supposed to receive stevedoring services from the service providers already enlisted by Payra Port Authority and also

stating that the respondent No.6 has no scope to enlist Stevedore Service Providers on its own motion beyond the said enlisted stevedore service providers made by Payra Port Authority. Thereafter, the respondent No.6 vide Corrigendum No.01 dated 13.08.2020 (Annexure-E) revised the aforesaid Invitation for Enlistment amending the eligibility criteria for Stevedore Service Providers vide Annexure-“E” as follows:

“They shall have relevant experience of 03(three) years in providing stevedoring Service and shall be enlisted by Payra Port Authority.”

Challenging the Corrigendum No.01 dated 13.08.2020, the respondent No.7 namely M/S. Nuru and Sons filed Appeal Petition No.047 of 2020 before the Review Panel-04, CPTU. After hearing, the appeal was allowed on 14.10.2020 (communicated the same on 29.10.2020), directing the Project Director of BCPC to reinstate the original Invitation for Enlistment by cancelling the corrigendum notice published in the daily Ittefaq and also advising the Payra Port Authority to revoke the current restrictive practice and thereby allow wider participation of relevant service providers. However, the port authority was not made party in the appeal petition and as such, it had no opportunity to contest the same.

After the decision of the Review Panel-4, CPTU, the petitioner vide Letter dated 23.11.2020 again informed the respondent No.6-BCPCL that the port authority enlisted 30(thirty) stevedore service providers as per Public Procurement Act, 2006 and Rules 2008 and

the respondent No.6 is to receive service from the stevedore agencies which is enlisted by Payra Port Authority vide Annexure-“G” to the writ petition.

The respondent No.6-BCPCL established a private Jetty within the territory of Payra Port area on certain terms and conditions vide an Agreement dated 24.11.2020 (Annexure-“B” to the writ petition) wherein clause-15 provides that BCPCL will get the handling of imported and exported goods to be done by berth/ship handling operator of the port authority. But, the respondent No.6 again most illegally published a notice of re-Invitation for Enlistment for Stevedoring Service Providers being Invitation Ref. No. BCPCL/Procurement/Enlistment/ Stevedore/2021/135 dated 19.01.2021 issued by respondent No.6 under the signature of Company Secretary (In charge) Bangladesh-China Power Company (Pvt.) Limited requiring the eligibility criteria of the applicant as follows:

“The Service Provider shall have a minimum 05(five) years of overall experience in the field of stevedoring service.”

Thereafter, the Payra Port Authority vide Memo No. 18.21.7866.007.18.001.20-247 dated 04.02.2021 (Annexure-“K”) informed the respondent No.6 i.e. the Managing Director of BCPCL that the respondent No.6-BCPCL is supposed to receive stevedore services from the service providers already enlisted by the Payra Port Authority stating that the BCPCL has no power to enlist the stevedore service providers beyond enlistment list and as such, the

process of Re-Invitation notice dated 19.01.2021 is required to be cancelled. But the respondent No.6-company has neither cancelled the notice of Re-Invitation dated 19.01.2021 nor has it revised the same rather was proceeding with the process of enlistment pursuant to the notice of Re-Invitation dated 19.01.2021 (Annexure-G). Thereafter, a news report was published in the “Daily Samakal” on 13.02.2021 over the matter wherefrom it is revealed that the respondent No.6 is moving forward with the process of enlistment violating the law and directives of the Payra Port Authority which is detrimental to the interest of the Payra Port (Annexure-L). On 25.02.2021 the petitioner Port authority called on a meeting with the respondent no.6 to discuss and take decision about the stevedore issue and the billing for the use of Jetty vide Memo dated 25.02.2021 and accordingly, a meeting was held on 01.03.2021 and after a long discussion they took a decision that only the stevedores listed with the petitioner Port will be eligible to load and unload the goods within the territory of Payra Port area which was informed to the respondent No.6 vide letters dated 02.03.2021 (Annexure-M and M-1 to the writ petition).

After such decision being taken, the petitioner authority vide letter dated 10.10.2021 requested the respondent no.6 to cancel the process of enlistment of stevedore service provider along with copy to respondent Nos. 1 to 4 for taking necessary steps in this regard (Annexure-N to the writ petition), but the respondents did not pay any heed to the same, rather, the respondent No.6-BCPCL most

illegally enlisted 24 Stevedore Service Providers under Memo dated 13.10.2021 for their own service in violation of Section 12 of the Payra Port Authority Act, 2013 and also in violation of the terms and conditions of the agreement (Annexure-“O” to the writ petition).

Under such circumstances, the petitioner-Payra Port Authority filed the instant Writ Petition No. 146 of 2022 and obtained the Rule Nisi and order of stay in the manner as stated hereinabove.

Challenging the order dated 09.03.2021 passed by this Court in Writ Petition No. 2904 of 2021 issuing Rule and stay, respondent-Bangladesh China Power Company(Pvt.) Limited filed Civil Petition for Leave to Appeal No. 1398 of 2021 before the Appellate Division which has been disposed of directing “the Rule to be heard and disposed of by the High Court Division and the order of stay granted earlier by the learned Judge-in-Chamber be continued till disposal of the Rule” vide judgment and order dated 16.08.2021. Resultantly, the Rule Nisi has been fixed by this Bench at the instance of the learned Advocate for the petitioner in Writ Petition No. 146 of 2022 for hearing.

Respondent No.6 namely Bangladesh-China Power Company (Pvt.) Limited filed affidavit-in-opposition denying the material allegations made in the writ petition contending *inter-alia* that the respondent No.6 is a Joint Venture Company of North West Power Generation Company Limited (NWPGCL) of Bangladesh and China National Machinery Import and Export (CMC) of China and the

respondent No.6-company was formed to set up Payra 1320 MW Thermal Power Plant Project. On 19.03.2015 a deal was signed between NWPGL and the CMC to set up the Payra Power Plant and the estimated cost was around US\$ 1.56 billion. The plant is built on an area of 397 hectare of land. The first unit came into commercial operation in 15.05.2020 and the second unit on 8.12.2020. At present it is the largest electricity generating unit of Bangladesh in operation and is one of the most important projects. The 2nd unit started operation on 8.12.2020 and to generate such a huge amount of electricity the plant needs at least 6000 Metric tons of imported coal every day. Therefore, the respondent No.1 was given license on 15.05.2017 for establishing Jetty and Water Intake in the Rabnabad Andarmanik and Golachipa River of Nishanabaria area of Payra Port to load and unload coal. But in the said license there was no term or condition with regard to conduct tender process for appointing Stevedoring Service Provider.

In addition to the license, an agreement was also executed between the Payra Port Authority and Bangladesh China Power Company Limited (BCPCL) on 24.11.2020 regarding জেটি ব্যবহার ও ট্যারিফ শেয়ারিং” containing the particulars of tariff sharing and the covenants for controlling the usage of the jetty established by BCPCL under the license obtained from the petitioner authority. It is stated that there is clear provision for engagement of a Pilot of Payra Port Authority in case of incoming and outgoing ships from the jetty and also for appointing Berth Operator and Ship Handling Operator from the

operators approved/enlisted by the Payra Port Authority. But neither the license nor the agreement contain any provision for engagement of stevedoring service providers from the stevedoring service providers approved/enlisted by the Payra Port Authority. It is stated that the term ‘stevedore’ has been defined in the Regulations for Working of Chittagong Port (Cargo and Container) 2001 which runs as follows:

“Stevedore” means a person or body of persons holding a valid License issued by the Licensing Authority for supplying labour and other staff etc. on board in loading or discharging vessels in port on behalf of Master or Owner or Charterer or Agent of vessels.”

The term “Berth Operator” and “Ship Handling Operator” were introduced in “Regulations for Working of Chittagong Port (Cargo and Container) 2001 which has been amended by official gazette on 10.05.2018, pursuant to which ‘Berth Operator’ and ‘Ship Handling Operator’ have been defined as follows:

“(4a) Berth Operator” means a firm or a company which shall be required to supply and engage labour, staff, gears and appliances for handling cargo or container or both on board as well as on shore for vessels berthed at Authority’s Jetty and delivery, unstuffing and stuffing, if requires, of containers”.

(78a) “Ship Handling Operator” means a firm or a company which shall be required to supply labour, staff and gears on board for loading or discharging of vessels in jetty other than Authority’s jetty with the prior permission of the authority on behalf of the master, owner, charterer or agent of the vessels”

In view of the facts and provisions of law quoted above, it is stated that the BCPCL for the purpose of establishing a jetty and water intake at Rabanabad Andharmanik and Golachipa River of Nishanbaria area of Payra Port to load and unload the imported coal, established the jetty in compliance with the terms and conditions of the license dated 15.05.2017. Thereafter, to regulate the Tariff Sharing and Usage of the said jetty, the BCPCL and Payra Port Authority executed an agreement on 24.11.2020 whereby conditions have been imposed to be performed by the BCPCL for engagement of pilot of Payra Port Authority in case of incoming and outgoing ships from the jetty and also for engaging ‘Berth Operator’ and ‘Ship Handling Operator’ from the operators approved by the Payra Port Authority. But the said License do not contain any such restrictive covenant/provision for procuring services from the stevedore service providers approved/enlisted by the Payra Port Authority. Moreover, the Payra Port Authority Act, 2013 does not contain any provision for engaging ‘stevedore service providers’ from the stevedore service providers approved/enlisted by Port authority, as such, there is no illegality in the impugned order and the Rule Nisi is liable to be discharged.

Mr. Mohammad Humaun Kabir along with Mr. Mohammad Babrul Amin, the learned Advocates appearing on behalf of the petitioner submit that as per section 12 of the Payra Port Act, 2013 the Authority has the absolute power to enlist the stevedore service providers for providing stevedoring services within the port area and

as such, all other organizations within the port area are liable to receive stevedoring service from the service providers enlisted by the Port Authority. But the respondent No.6 most illegally published the notice of Re-Invitation dated 19.01.2021 for enlisting Stevedore Service Provider beyond the enlisted service providers of Payra Port authority and as such, the same is illegal and without lawful authority. He submits that since the respondent No.6 is a joint venture of a state owned company of Bangladesh and China, BCPCL has no legal authority to appoint any stevedore agencies who are not enlisted with the Payra Port Authority.

He next submits that CPTU has no jurisdiction to entertain such kind of appeal or application which was filed by respondent No.7 under the Public Procurement Act, 2006 and since the said Act deals with the public fund only under section 2(33) and 3(2), the enlistment of Stevedore Agencies by the BCPCL does not involve public fund and therefore, CPTU has no jurisdiction under the Public Procurement Act, 2006 to entertain such an appeal and the decision of the Review Panel-4 of CPTU suffers from jurisdictional error and therefore, the same cannot sustain in law. He also submits that the petitioner authority vide letter dated 04.02.2021 categorically stated that the respondent No.6 company has no authority to enlist Stevedore Service Providers by Re-Invitation dated 19.01.2021 and as such the same is liable to be cancelled but most illegally the respondent no.6 enlisted stevedoring firms beyond the enlisted service providers of Payra Port Authority and hence, the

same is illegal and without lawful authority. Accordingly, he prays for making the Rule Nisi absolute.

Mr. M. Ferdous Al Bashir, the learned Advocate appearing on behalf of the respondent No.6-BCPCL submits that since the Payra Port Authority Act, 2013 and the License dated 15.05.2017 imposed no bar to the enlistment of any stevedoring service provider having license from any national port authority, the respondent No.6 did not commit any illegality and as such, the decision of the Review Panel of CPTU is liable to be followed. He next submits that none of the stevedore service providers listed/approved by the Payra Port Authority has come before the Court to vindicate their rights rather the Payra Port Authority's action for procuring services from Stevedore service Provider by BCPCL for its own jetty is seemed to have been directed to serve the interest of others and with some ulterior motive and as such, the action of the petitioner is without lawful authority and therefore, the Rule Nisi is liable to be discharged.

Having heard the learned Advocates of both the sides and on perusal of the writ petition and affidavit in opposition as well as the papers annexed thereto, it appears that the respondent No.6 requested the petitioner-Port Authority to send list of their enlisted Stevedores by a letter dated 30.11.2019 (Annexure-2 to the affidavit in opposition filed in Writ Petition No. 2904 of 2021). Since there was no response from the port authority, the respondent No.6 company was constrained to publish a tender notice being Tender

Invitation Ref. BCPCL/Procurement/Enlistment-01/2020/07 dated 21.07.2020. Against the said tender notice, the respondent authority sent a notice to the respondent no.6 BCPCL vide Memo dated 10.08.2020 alleging violation of the terms and conditions of license dated 15.05.2017 and thereby asked to take appropriate steps to engage 30 Stevedoring companies enlisted with the Payra Port Authority and therefore, the respondent No.6-BCPCL had to publish a corrigendum of the aforesaid tender notice dated 21.07.2020 including a new term "shall be enlisted by Payra Port Authority".

Against the said Corrigendum published in the "Daily Ittefaq" and inclusion of new requirement, one Stevedoring company named M/S. Nuru and Sons filed an Appeal Petition No.047 of 2020 before the Central Procurement and Technical Unit(CPTU), Review Panel and after hearing, the Review Panel of CPTU by order dated 29.10.2020 allowed the appeal directing the Project Director, BCPCL to reinstate the original Invitation for Enlistment by cancelling the corrigendum notice published in the "Daily Ittefaq" and the Payra Port Authority was advised to revoke the current restrictive practice and allow wider participation of relevant service providers.

After the aforesaid decision of the Review Panel of CPTU the petitioner authority sent a notice vide Memo dated 23.11.2020 informing that there is no scope to appoint any company other than the stevedoring companies already enlisted by Payra Port Authority as evident from Annexure-7 to the affidavit in opposition in Writ Petition No. 2904 of 2021.

However, in compliance of the decision of the Review Panel, the respondent No.6-BCPCL decided to issue another Invitation for procurement of the stevedoring services and informed the same to the petitioner authority by a letter dated 26.12.2020 and accordingly, published Tender Notice being Ref. No. BCPCL/Procurement/Enlistment/Stevedore 2021/135 dated 19.01.2021, challenging which the writ petitioner Sheikh Moniruzzaman has filed Writ Petition No.2904 of 2021 and obtained the present Rule Nisi.

It further appears that on 25.02.2021 the Port authority called a meeting with the respondent no.6-BCPCL to discuss and take decision about the stevedore issue and the billing for the use of Jetty and accordingly, a meeting was held on 01.03.2021 and it was decided that only the stevedores listed with the respondent no.4-Port will be eligible to load and unload the goods within the territory of Port authority which was informed to the respondent No.6-BCPCL vide notice dated 02.03.2021 (Annexure-12 and 13 to the affidavit in opposition in Writ Petition No. 2904 of 2021).

It appears from the writ petition No. 146 of 2022 that after such decision being taken, the petitioner authority vide letter dated 10.10.2021 requested the respondent no.6 to cancel the process of enlistment of stevedore service provider along with copy to respondent Nos. 1 to 4 for taking necessary steps in this regard (Annexure-N to the writ petition). But the respondents did not pay any heed to the same, rather, the respondent No.6-BCPCL enlisted

24 Stevedore Service Providers by Memo dated 13.10.2021 for their own service.

The petitioner namely Payra Port Authority filed Writ Petition No. 146 of 2022 challenging the decision of the Review Panel of CPTU and obtained Rule Nisi in the manner as quoted above.

The point involved in this Rule Nisi is whether the respondent BCPCL has authority to enlist stevedore service providers on its own and whether the decision of the Review Panel-4 of CPTU is lawful or not?

Admittedly, BCPCL's Jetty is situated within the port area of the petitioner which is under the direct control of Payra Port Authority and the Payra Port Authority is to operate the port in accordance with the Payra Port Authority Act, 2013. Let us see the definition of the terms "কর্তৃপক্ষ", "পন্য" and "বন্দর পরিচালনা" . Section 2(2), 2(8) and 2(11) of the said Act, 2013 defined as follows:

- কর্তৃপক্ষ' অর্থ ধারা ৪ এর অধীন প্রতিষ্ঠিত পায়রা বন্দর কর্তৃপক্ষ;
- " পন্য' অর্থ যে কোন ধরনের সামগ্রী, পন্যদ্রব্য এবং কন্টেইনার ও অন্তর্ভুক্ত হইবে;
- " বন্দর পরিচালনা" অর্থ পন্য ওঠা-নামা, পন্য গ্রহণ ও হস্তান্তর, জাহাজ নিয়ন্ত্রন, জাহাজ পরিদর্শন এবং বন্দর চ্যানেল বা বন্দর এলাকার মধ্যে সংশ্লিষ্ট কর্মকাণ্ড;"

Section 11(Ka) of the said Act, 2013 deals with "বন্দর পরিচালনা" which is major function of the authority and to discharge this function the Payra Port Authority has power under section 12 and section 12(2)(Kha) of the Act which provides that the authority shall undertake the functions of বন্দরের পন্য বোঝাই, খালাসিকরণ এবং মজুদের প্রয়োজনে যেকোন কার্য সম্পাদন". So, from a combined reading of section 11(Ka) and section

12(2)(Kha) it appears that the power of enlistment of stevedores and giving stevedoring service is expressly vested in the Payra Port Authority under the Act, 2013. Moreover, the BCPCL for establishment of its own jetty in the Payra Port Area entered into an agreement/contract with the Payra Port Authority on 24.11.2020 vide Annexure-B to the writ petition No. 146 of 2022 wherein, clause 15 provided that;

“বন্দরের বিভিন্ন জেটিতে/বহিঃনোঙ্গরে জাহাজের পণ্য হ্যান্ডলিং কাজের জন্য যেভাবে বন্দর কর্তৃক বার্থ/শিপ হ্যান্ডলিং অপারেটর নিয়োগ করা হয় অনুরূপভাবে বিসিপিএল জেটিতে আমদানী/রপ্তানী পণ্য হ্যান্ডলিং এর জন্য বন্দর কর্তৃক অনুমোদিত বার্থ/শিপ হ্যান্ডলিং অপারেটর দ্বারা সম্পন্ন করতে হবে। বার্থ/শিপ হ্যান্ডলিং অপারেটর নিয়োগের ক্ষেত্রে বিসিপিএল এর নিজস্ব কর্ম পদ্ধতি অনুযায়ী করবে।”

The intention expressed in clause No.15 of the contract clearly indicates that বিসিপিএল জেটিতে আমদানী/রপ্তানী পণ্য হ্যান্ডলিং এর জন্য বন্দর কর্তৃক অনুমোদিত বার্থ/শিপ হ্যান্ডলিং অপারেটর দ্বারা সম্পন্ন করতে হবে। So, the goods either imported or exported shall have to be handled at the BCPCL jetty by the berth/ship handling operators approved by the Payra Port Authority and as such, the BCPCL cannot enlist the stevedore agency on their own choice beyond the enlisted stevedores.

It is true that the term “stevedore” has not been defined in the Payra Port Authority Act, 2013. But the same has been defined in the Regulation 2(84) of the Regulations for Working of Chittagong Port (Cargo Container) 2001. Pursuant to Office Order No.77/2019 dated 03.12.2019 the Payra Port Authority by order dated 31.12.2020 made the provisions of Regulation for Working of Chittagong Port (Cargo and Container) 2001 and Mongla Port

Mobilization (Cargo and Container) Rules 2010 applicable for the Payra Port Authority in regard to the appointment of agent. As such, the learned Advocate for the petitioner authority claimed that as per the provision of the Payra Port Authority Act, 2013 read with Regulation 68 of the Regulation for Working of Chittagong Port (Cargo and Container), 2001 of Chittagong Port which has been adopted by Payra Port Authority, the petitioner authority rightly enlisted 30 stevedores service providers following the due process of law.

One of the main objects of enactment of the Payra Port Authority Act, 2013 is to maintain the national security with regard to the operation of port, its management, development, enlargement of the port and over all maintenance. It is true that vessels of different origins from different destinations of the world shall anchor in the port. So, the dealings and overall functions of all the vessels of different origins are to be directly dealt with and supervised by the Port authority. Resultantly, the Payra Port Authority shall have control over the stevedore service providers enlisted and permitted by Port authority to work as stevedore. If stevedore service providers are engaged not from the enlistment list of Stevedore Service Providers of PPA, then the Port Authority shall not have any control over such stevedore service providers. In that case, the enlistment and permission to work as stevedore service providers by anybody other than Payra Port Authority in contravention of the existing legal framework there remains a risk to the national security.

Now the question, whether the decision of the Review Panel-4 of CPTU is lawful?

We need to focus the relevant facts in a nutshell for moving the Review Panel of CPTU is that BCPCL issued Invitation of Enlistment of stevedore service provider on 21.07.2020 and thereafter, the Payra Port authority vide letter dated 10.08.2020 informed the respondent BCPCL to the effect that there is no scope to enlist the stevedore service providers outside the list of Payra Port Authority based on which the BCPCL revised the Invitation for Enlistment vide Corrigendum No.01 dated 13.08.2020 stating thus:

“They shall have relevant experience of 03(three) years in providing stevedoring Service and shall be enlisted by Payra Port Authority.”

Challenging the Corrigendum No.01 dated 13.08.2020 the respondent No.7 namely M/S. Nuru and Sons filed Appeal Petition No.047 of 2020 before the Review Panel-04, CPTU. After hearing, the appeal was allowed on 14.10.2020 and by memo dated 29.10.2020 communicated the same directing *the Project Director of BCPC to reinstate the original Invitation for Enlistment by cancelling the corrigendum notice published in the daily Ittefaq and also advising the Payra Port Authority to revoke the current restrictive practice and thereby allow wider participation of relevant service providers.* However, the port authority was not made party to the appeal petition and as such, it did not have any opportunity to contest the same.

It is true that the complainant filed the Appeal Petition before the Review Panel of CPTU under Rule 56 of the Public Procurement Rules, 2008 which provides the grounds on the basis of which complaint can be lodged against procuring entity (ক্রয়কারী) .

By issuing Corrigendum No.1 dated 13.08.2020 the BCPCL intended to procure the service of the stevedore service provider and as such, the point to be adjudicated upon, whether the BCPCL comes under the definition of procuring entity (ক্রয়কারী) within the meaning of Rule 2(14) and 2(51) of the PPR, 2008 which read as follows:

“2(14) ক্রয়কারী(procuring entity) অর্থ সরকারী তহবিলের অর্থ দ্বারা কোন পণ্য, কার্য বা সেবা ক্রয়ের জন্য প্রশাসনিক ও আর্থিক ক্ষমতাসম্পন্ন ক্রয়কারী;”

“2(51) সরকারী তহবিল অর্থ সরকারী বাজেট হইতে ক্রয়কারীর অনুকূলে বরাদ্দকৃত অর্থ অথবা কোন উন্নয়ন সহযোগী বা বিদেশী রাষ্ট্র বা সংস্থা কর্তৃক সরকারের মাধ্যমে ক্রয়কারীর অনুকূলে ন্যস্ত অনুদান ও ঋণ এবং আইনের উদ্দেশ্য পূরণকল্পে সরকারী, আধা-সরকারী বা কোন আইনের অধীন প্রতিষ্ঠিত কোন সংবিধিবদ্ধ সংস্থার তহবিল”

Admittedly BCPCL is a private company limited by shares incorporated with China National Machinery Import and Export(CMC) and North-West Power Generation Company Limited in accordance with the Private Sector Power Generation Policy, 2004. The company before the Review Panel while submitting written statement has stated as follows:

“1. BCPCL does not use fund under Government Budget or took loan, Grants and Credits through the Government by the Development Partners or foreign states or organizations and

fund of Government, Semi-Government or statutory organizations.

2. BCPCL as independent power producer has separate agreements such as joint venture agreement between NWPGL and CMC facility agreement and framework financial agreement between BCPCL and Export Import Bank of China. BCPCL is not using public fund to run its operation.

3. BCPCL is following BCPCL Procurement Procedures 2019 approved by BCPCL Board of Directors. As per of the process, BCPCL invited for enlistment by using the loan from the export import Bank of China.”

So, from the above, it is clear that BCPCL did not proceed to procure the service of the stevedore service providers with Government Fund rather wanted to take service by using the fund obtained from the Export-Import Bank of China and as such, BCPCL does not come within the meaning of the Procuring Entity and resultantly, the appeal petition before the Review Panel of the CPTU is not maintainable in the eye of law.

Admittedly the Payra Port authority has not been made party to the appeal before the Review Panel. But, the Review Panel of CPTU while allowing the appeal advised the Payra Port Authority to revoke the restrictive practice and to allow wider participation of relevant service providers. Such advice without hearing the payra Port authority is not only uncalled for but also against the principle of natural justice.

We have already observed that a meeting was held on 01.03.2021 in between BCPCL and Payra Port Authority and after a long discussion in presence of the representative of BCPCL it was decided that it would not provide any work order to any stevedore outside the enlisted stevedores enlisted by Payra Port Authority and as such, BCPCL is under obligation to enlist stevedores service providers from the enlisted stevedores of the Port Authority as per minutes of the meeting and terms and condition of the agreement entered in between the parties.

Be that as it may, we find that out of the aforesaid twenty four stevedores service providers 23 enlisted stevedore service providers are working in the jetty of BCPCL. For the reasons and discussions made hereinabove, we find substance in the Rule Nisi as well as in the submissions of the learned Advocate for the petitioner in writ Petition No. 146 of 2022.

In the result, the Rule Nisi issued in Writ Petition No. 146 of 2022 is made absolute. Accordingly, the impugned decision of the Review Panel-4 in Appeal Petition No. 047 of 2020 dated 14.10.2020 (Annexure-“F” to the writ petition) allowing the appeal petition by the respondent No.4 and thereby advising the petitioner to revoke the current restrictive practice and allow wider participation of relevant service provider (stevedores) being contrary to section 12 of “পায়রা বন্দর কর্তৃপক্ষ আইন, ২০১৩” and the Memo No. BCPCL/Procurement/Enlistment/Stevedore/ 2021-22/57 dated 13.10.2021 enlisting stevedore service providers by the Bangladesh China Power Company (Pvt.) Limited

(respondent No.6) beyond the enlisted stevedores in violation of section 12 of “পায়রা বন্দর কর্তৃপক্ষ আইন, ২০১৩” and clause 15 of the Agreement dated 24.11.2020 are hereby declared to have been made without lawful authority and is of no legal effect.

In the light of the observation made hereinabove the Rule Nisi issued in Writ Petition No. 2904 of 2021 is disposed of.

There will be no order as to cost.

Communicate the judgment and order at once.

Md. Mahmud Hassan Talukder, J.

I agree.