

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

WRIT PETITION NO. 8301 of 2010

IN THE MATTER OF:

An Application under Article 102 of the Constitution
of the Peoples' Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Unilever Bangladesh Limited, ZN Tower, Plot
No. 2, Road No. 8, Gulshan-1, Dhaka-1212,
represented by its Chairman and Managing Director
Mr. Rakesh Mohan

...Petitioner

-Versus-

The Chairman, National Board of
Revenue, Rajaswa Bhaban, Segun
Bagicha, Dhaka and others

...Respondents

Mr. Fida M Kamal, Senior Advocate with
Mr. Md. Monzur Rabbi, Advocate

...For the Petitioner

Mr. Kazi Mynul Hassan, D.A.G with
Mr. Md. Nazrul Islam Khandaker, A.A.G with
Mr. Md. Faruk Hossain, A.A.G with
Mr. Md. Delwar Hossain, A.A.G with
Ms. Nazma Afreen, A.A.G

...For the Respondent No. 1

Heard on 08.08.2022, 10.08.2022, 17.08.2022,
21.08.2022, 22.08.2022, 28.08.2022, 29.08.2022 and
30.08.2022.

Judgment delivered on 25.10.2022

Present:

Mr. Justice Md. Ashfaquul Islam

And

Mr. Justice Md. Ashraful Kamal

And

Mr. Justice Md. Shohrowardi

Md. Shohrowardi, J.

This writ petition has a checkered career. After issuance of the
Rule, this Court by order dated 02.03.2011 sent the writ petition before

the Honorable Chief Justice for constituting a larger bench for disposal of the Rule. Thereafter, the Honorable Chief Justice by his order dated 28.02.2012 constituted a larger bench for hearing and disposal of the matter but it was not heard and disposed of by that bench. Again the Honorable Chief Justice by his order dated 31.08.2021 constituted another larger bench for hearing and disposal of the Rule and that bench also did not hear the same. Lastly the Honorable Chief Justice by order dated 21.07.2022 constituted this larger bench and accordingly this bench heard the matter and disposed of the Rule by this judgment.

On an application filed by the petitioner this Court by order dated 24.10.2010 issued the Rule Nisi in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why respondents No. 1 to 6 should not be directed not to allow import and/or release finished products with brand name Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the aforesaid branded products, of Unilever PLc. (which are locally produced, packaged and marketed by the petitioner) into Bangladesh, in violation of Section 15 of the Customs Act, 1969, by anyone, other than the petitioner, ie. Unilever Bangladesh Limited, and further to show cause as to why the respondent Nos. 7 to 57 should not be directed not to allow opening of Letter(s) of Credit by any importer, including the proforma-respondent Nos. 58 to 62, or anyone else, to import the aforesaid branded finished products of Unilever Bangladesh Limited, and empty packing materials of the aforesaid branded products, into Bangladesh and/or such other or further order or orders passed as to this Court may seem fit and proper.”

Relevant facts for the disposal of the Rule are that the petitioner is a Private Ltd Company registered under the Company Act, 1994 and a subsidiary company of “Unilever PLC” incorporated in the United Kingdom under the Companies Act, 1948 bearing Registration No. 41424 having its registered office at Port Sunlight, Wirral, Merseyside, CH62 4ZD. 39.25% of the shares of the petitioner company is held by the

Government of Bangladesh and the rest of the share is owned by Unilever PLC. The petitioner is the only manufacturer, marketer, distributor, owner and importer of the products in question namely, Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe in Bangladesh and/or empty branded packing materials such as bottles, tubes, containers wrappers, packets, labels etc. within the territory of Bangladesh. Unilever PLC obtained necessary registration of trade, brands, patents and designs in accordance with the law in respect of the products as foresaid and the petitioner company is the licensee under Unilever PLC. Therefore, no one other than the petitioner is authorized to import using the same name of those products in Bangladesh in violation of Section 15 of the Customs Act, 1969. But some unscrupulous importers including the proforma-respondent Nos. 58-62 have been illegally importing counterfeit of the said branded products with a sinister design to make unlawful pecuniary gain using the advantage of marketing campaigns conducted by the petitioner which has caused a substantial financial loss to the petitioner and the unaware and bonafide consumers. They are also defrauded and misled in purchasing substandard counterfeit products seriously harmful to their health and safety for which the heard earn reputation and goodwill of the petitioner company is being plundered by a section of unscrupulous importers who are prejudicing the interest of the petitioner company by manufacturing, importing and marketing fake product below the required standard i.e. date of manufacture and expiry and other mandatory declaration and in the event pursuant to any complaint by any customer the entire blame stood shifted on the shoulder of the petitioner company for importation and marketing inferior quality products. Illegal and unauthorized importation of substandard and counterfeit products seriously affected the business of the petitioner company.

The petitioner filed a supplementary affidavit on 13.10.2010 stating that the unscrupulous importer imported the product in question namely, Dove under L/C No.089808010122 dated 29.05.2008 giving false trade description and consequently the customs authority restrained the said

consignment asking to produce 'No Objection Certificate' from the petitioner company by letter dated 11.08.2008 and the petitioner company did not allow such illegal import and in reply to the said letter dated 11.08.2008 the petitioner company by letter dated 21.09.2010 requested the customs authority not to allow any importers other than the petitioner company to import any of the branded finished product of Unilever Bangladesh Limited. Subsequently, on several occasions, the petitioner made numerous representations in writing to the respondents requesting them not to allow anyone other than the petitioner company to import the products in question in Bangladesh but unfortunately the authorities concerned have turned a blind eye and deaf ear to the grievance of the petitioner.

The petitioner filed a second supplementary affidavit on 14.8.2022 stating that in the financial year 2020-2021 the petitioner company paid around BDT. Tk. 2153 crore in the form of duties, taxes and dividends to the government. The petitioner company has adopted not only consistent high standards but also a highly effective and intensive marketing strategy which brings widespread customer loyalty and brand recognition for Unilever Bangladesh products and has thoroughly developed a credible and wide distribution network. The unauthorized and unscrupulous third parties are being engaged in illegal parallel or unauthorized import of the UBL products which are brought into Bangladesh illegally throughout the country depriving the government of its rightful revenue and dividend to make unlawful pecuniary gain using the advantage of marketing campaigns conducted by the petitioner which is not only causing damage to the business of the petitioner company but also violating the law of the land for which the bona fide consumers are also being defrauded and misled into purchasing substandard low-quality products. The unauthorized imported products are harmful to the health and safety of the consumers and against the interest of the petitioner company. The petitioner company is the authorized entity to use trademark of the UBL products in Bangladesh and the unauthorized users of the trademarks are importing the aforesaid goods in violation of Section 25 of the

Trademarks Act but the unauthorized importers are not under the control of the concerned authority. Hence, expired products are being imported and sold within the territory of Bangladesh.

Respondent No. 1 has filed an affidavit-in-opposition stating that Unilever PLC, London has business offices and agents to export their goods in many countries and they have the legal authority and right to export Unilever goods in any other country in the world in their business transaction including Bangladesh and any importer of the Unilever goods have a legal right to import the Unilever brand goods or to import same types of goods under Section 25(4) of the Trademarks Act, 2009 without any objection from the customs authority and the Unilever Bangladesh. It has been asserted that the statement made by the petitioner to the effect that Unilever Bangladesh Limited is the only authorized agent of Unilever PLC, London, is completely false. In the open market economy Unilever PLC, London has not/cannot legally authorize the petitioner company as the only manufacturer, sole market distributor and importer of all their products and the petitioner company could not show any documents to prove that other importers in Bangladesh have no right to import the branded goods of Unilever of the countries of origin like UK., USA, Germany, India, Malaysia, China etc. and the customs authorities are legally empowered to release the goods imported following the law:

The learned Senior Advocate Mr Fida M Kamal appearing along with learned Advocate Mr Md. Monzur Rabbi on behalf of the petitioner submits that the petitioner is the only manufacturer, marketer, distributor and importer of all Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe in Bangladesh and no other person is legally entitled to manufacture, import, distribute and market those goods within the territory of Bangladesh without prior permission of the petitioner. Section 15 of the Customs Act, 1969, আদেশ 5(6)(c) of the আমদানী নীতি আদেশ, ২০২১-২০২৪ and Section 25(2) of the Trademarks Act, 2009 imposed a restriction on unauthorized parallel importation of those goods. Therefore the customs authorities are bound to discharge their duty in accordance with law and respondent Nos. 7 to 57 have a legal

obligation not to allow open Letter(s) of Credit by any importer, including respondent Nos. 58 to 62, or anyone else, to import the branded finished products of Unilever Bangladesh Limited without prior permission of the petitioner. He further submits that since there is a bar in importation of the parallel brands of Unilever Bangladesh, the customs authorities are legally bound to discharge their duty following the provisions of law and they have a legal obligation to restrain the unauthorized importers from importing parallel goods into Bangladesh but the customs authorities are illegally releasing the goods which have been imported and in the process of importing in violation of the provisions of Section 15 of the Customs Act, 1969, আমদানী নীতি আদেশ, ২০২১-২০২৪ and the Trademarks Act, 2009. Therefore the respondent Nos. 1 to 6 should be directed not to allow, import or release aforesaid products of Unilever PLC. In support of his submission learned Advocate for the petitioner has drawn our notice to the decisions made in the case of *A. Bourjois & Co., Inca, V. Katzel*, 260 US. 689 (1923), *Lever Brothers Co. V. United States*, 981 f. 2d 1330 (D.C. Cir. 1993), *The Singer Manufacturing Co. V. Loog*, [House of Lords] 1882, *Colgate Palmolive Ltd vs Markwell Finance. Ltd* [1989] 4 WLUK 199, *Guangzhou Light Industry & Trade Group Limited and others vs Lintas Superstore SDN BHD*, Federal Court, Putrajaya (2022) 5 MLRA 245, *European Court of Justice [ECJ] Case C-143/00*, Judgment dated 13.04.2002, *Albert Bonnan v. Imperial Tobacco Company of India*, (1929) 31 BOMLR 1388, *Xerox Corporation v. Shailesh Patel*, Judgment dated 20 February 2007, *Messrs Ghulam Muhammad Dossul and Co. v. Messrs Vulcan Co. Ltd. and another*, 1984 SC MR 1024, *Abdul Wasim v. M/s. HAICO & Others*, 2002 CLD 1623, *British Broadcasting Corporation (BBC) v. Registrar, Department of Patents, Designs and Trade Marks Registry Wing, Ministry of Industries and others*, 2018(2) LNJ 114, *Abu Talha v. Bangladesh*, represented by the Secretary, Ministry of Law and others, 20 BLC (2015) 508. The learned Advocate for the petitioner has also drawn our attention to the decision made in Writ Petition Nos. 8679 and 8885 of 2006.

On the other hand the learned Deputy Attorney General Mr Kazi Mynul Hassan appearing on behalf of respondent No. 1 submits that the writ petition is not maintainable in law since an alternative and equally effective efficacious remedy are available in the Customs Act, 1969, আমদানি bXIZ আদেশ, ২০২১-২০২৪ and The Trade Marks Act, 2009. He further submits that the petitioner did not get any permission from the Bangladesh Bank under Section 18 (A) of the Foreign Exchange Regulation (Amendment Ordinance), 1976 to act as an agent of Unilever PLC, London. Therefore the petitioner is not an agent of Unilever PLC in the eye of the law and Unilever PLC, London or any subsidiary company of Unilever PLC registered all over the world are legally empowered to export their goods throughout the world including Bangladesh. He also submits that facts stated in the writ petition are disputed and contentious inasmuch as the products which would be counterfeit or parallel goods of Unilever Bangladesh can only be examined by the customs authority at the time of assessment following the procedure laid down in the Customs Act, 1969 and if the petitioner is at all aggrieved he is at liberty to draw the attention of the customs authority as regards particular consignment. Therefore the instant writ petition is not maintainable in law.

We have considered the submission of the learned Senior Advocate Mr Fida M. Kamal who appeared on behalf of the petitioner and the learned Deputy Attorney General Mr Kazi Mynul Hasan who appeared on behalf of respondent No.1, perused the writ petition and the affidavit in opposition filed by the respondent No.1.

On perusal of the records, it is found that earlier this Division by judgment and order dated 29.08.2006 passed in Writ Petition Nos. 8679 of 2006 and 8885 of 2006 made the Rule absolute on the observation and findings which are quoted below:

“Admittedly the petitioner is a company engaged in the manufacturing of different branded commodities mentioned above duly registered in the country and also one of the largest tax payer of the country to the tune of Tk.80 crore per annum. It appears that some

persons and companies imported and in the process of further import of low quality products of the same brand products of the petitioner company from different countries which not only causes damages to the local industry but also threatened the revenue collection of the country.

Section 50 of the Customs Act 1969 deals with the provisions relates to prohibition of import of goods which are prohibited under the different laws enforce in the country for the time being. Admittedly the petitioner can invoke such other jurisdictions and can intimate the same to the customs authority, but it appears that in the meantime different goods of the same brands shall be imported and in our view the other remedies in such circumstances are alternative but not efficacious one rather causing regular damage to the local industry as well as causing loss to the revenue which in our view irreparable in nature.

The other provisions namely the application under the Trade Mark Act etc. though are alternative remedies available for the petitioner but the same is not efficacious one in our view. Obviously the petitioner is at liberty to invoke the other jurisdiction but at the same time, we are of the view that the local market and enterprises are required to be protected as well as the collection to revenue should be ensured. In such circumstances, the respondents should be directed to restrain any other persons or companies to import the goods as mentioned hereinabove which are branded goods of the petitioner duly registered and produced in our country.

Considering the facts and circumstances, we find merit in these two Rules. Accordingly, both these Rules are

made absolute without any order as to cost. The respondents Nos. 1-5 are restrained from allowing any person(s), companies to import the goods manufactured by the petitioner company as mentioned in both the writ petitions.”

The issue involves in the instant Rule is whether the importation of parallel goods namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the branded products of Unilever Plc. (which are locally produced, packaged and marketed by the petitioner) into Bangladesh is barred under section 15 of the Customs Act, 1969 without prior permission of the petitioner and as to whether the instant writ petition is maintainable in law.

At the very outset, it is noted that the branded goods of Unilive PLC namely Vaseline, Knorr, Dove, Pepsodent Tooth Brush, Close-Up Milk Calcium Nutrient and Axe and/or empty branded packing materials such as bottles, tubes, containers, wrappers, packets, labels etc. of the branded products of Unilever Plc. are neither contraband nor prohibited goods under any law.

Parallel importation is a non-counterfeit and branded product imported from another country to sale in the local market without permission of the trade mark owner. It also refers to grey market imports. The doctrine of parallel importation developed on resold theory or the doctrine of international exhaustion of branded products. It occurs when other importers obtained products directly from an authorized source outside the country by passing any native manufacturer or suppliers. Parallel importing is regulated differently in different jurisdictions. These goods are genuine products which are brought by individuals from overseas sellers. These goods are first purchased in an overseas market with the brand owner's permission, to be imported into the domestic market without the brand owner's permission to resell.

“Parallel imports” in the context of trademark laws means the procurement of goods from the trademark owners or their authorized personnel through legitimate trade channels in a different market (mostly in a different country) and thereafter importation of such goods without the knowledge of the trademark owners of such products for sale to the general public in a different market.

It is also called as ‘Grey Market’ sales owing to the reason that such imported goods are offered for sale in the country of its import through trade channels not specifically permitted by the trademarks rights holder or the trademark owner in such markets. While such products are not counterfeit, pirated or duplicate products but they are offered for sale in a marketplace through trade channels that are not authorized by the trade mark right holder” [www.witipedia.org]

“Parallel import means that patented or market goods are purchased in a foreign market and resold in the domestic market. These are known as passive parallel imports. Instead, active parallel imports occur when foreign licensees enter the market in competition with the holder of the patent or the trade mark.” [https://www.wipo.int.]

The term “parallel importation” has been explained in an article "Parallel Imports and International Trade" by Christopher Heath. (Max Planck Institute for Foreign and International Patent Copyright and Competition Law, Munich) in the following language;

"The term "parallel importation" refers to goods produced and sold legally, and subsequently exported . In that sense, there is nothing "grey" about them, as the English Patents Court in the Deltamethrin decision (Roussel Uclaf v. Hockley International, decision of 9 October 1995, [1996] R.P.C. 441) correctly pointed out. Grey and mysterious may only be the distribution channels by which these CS (OS) 1682/2006 Page 46 goods find their way to the importing country. In the importing country,

such goods may create havoc particularly for entrepreneurs who sell the same goods, obtained via different distribution channels and perhaps more expensively. In order to exclude such unwelcome competition, intellectual property rights have sometimes been of help. If products sold or imported by third parties fall within the scope of patents, trademarks or copyrights valid in this particular country, such sale or importation by third parties is generally deemed infringing. Owners of products covered by intellectual property rights have the exclusive right to put such products on the market. On the other hand, there is little doubt that once the owner of an intellectual property right has put such goods on the market either himself or with his consent, there is little he can do about further acts of commercial exploitation such as re-sale, etc., on the domestic market. Even if a car is covered by a number of patents, once the car maker has put that car on the market, there is a consensus that he cannot prevent that car from being re-sold, leased out, etc."

In the case of *Kirtsaeng v. John Wiley & sons, Inc* in 2013 following the doctrine of international exhaustion, U.S Supreme Court reversed the Second Circuit and held that

"Kirtsaeng's sale of lawfully-made copies purchased overseas was protected by the first-sale doctrine. The Court held that the first sale doctrine applies to goods manufactured outside of the United States, and the protections and exceptions offered by the Copyright Act to work "lawfully made under this title" is not limited by geography. Rather, it applies to all copies legally made anywhere, not just in the United States, in accordance with U.S. copyright law. So, wherever a copy of a book is

first made and sold, it can be resold in the U.S. without permission from the publisher.”

At this stage it is relevant here to quote Section 15 of the Customs Act, 1969 to adjudicate the dispute between the parties which runs as follows;

“Section 15 of the Customs Act, 1969

15. Prohibitions.—No goods specified in the following clauses shall be brought, whether by air or land or sea, into Bangladesh:-

(a) counterfeit coin;

(b) forged or counterfeit currency notes ¹[and any other counterfeit product];

(c) any obscene book, pamphlet, paper, drawing, painting, representation, figure, photograph, film or article ²[, video or audio recording, CDs or recording on any other media];

(d) ³[goods having applied thereto a counterfeit trade mark within the meaning of the Penal Code (Act XLV of 1860), or a false trade description within the meaning of the ট্রেডমার্ক আইন, ২০০৯ (২০০৯ সনের ১৯ নং আইন) (Trademarks Act, 2009 (Act No. 19 of 2009));]

(e) goods made or produced outside Bangladesh and having applied thereto any name or trade mark, being or purporting to be the name or trade mark of any manufacturer, dealer or trader in Bangladesh unless-

(i) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place outside Bangladesh; and

(ii) the country in which that place is situated is in that indication shown in letters as large and conspicuous as any letter in the name or trade

mark, and in the same language and character as the name or trade mark;

(f) piece-goods manufactured outside Bangladesh (such as are ordinarily sold by length or by the piece), unless the real length thereof in standard ¹[metres] or other measurements for the time being applying in Bangladesh has been conspicuously stamped on each piece in Arabic numerals; ²[***]

³[(g) goods made or produced outside Bangladesh and intended for sale, and having applied thereto, a design in which copyright exists under the Patents And Designs Act, 1911 (Act No. II of 1911) and in respect of the class to which the goods belong and any fraudulent or obvious imitation of such design except when the application of such design has been made with the license or written consent of the registered proprietor of the design; ¹[***]

(h) goods or items produced outside Bangladesh involving infringement of কপিরাইট আইন, ২০০০ (২০০০ সনের ২৮ নং আইন) (Copyright Act, 2000 (Act No. 28 of 2000)] or infringement of layout design of integrated circuit that are intended for sale or use for commercial purposes within the territory of Bangladesh]; and

²[(i) Goods made or produced outside Bangladesh in violation of the provisions of **ভৌগোলিক নির্দেশক পণ্য (নিবন্ধন ও সুরক্ষা) আইন, ২০১৩ (২০১৩ সনের ৫৪ নং আইন)** intended for sale or use for commercial purpose within the territory of Bangladesh.]

On a bare reading of Section 15 of the Customs Act, 1969 it reveals that there is neither absolute bar in importing parallel goods nor said section gives any unfettered right to the importers to import parallel goods. Section 15 of the said Act is balanced legislation. Section 15(d)(e)(g) and (h) of the said Act authorized the importers to import parallel goods

subject to compliance with the procedure/conditions as mentioned in the said provision. Nothing has been stated in said section regarding prior permission of the petitioner in importing parallel goods. Therefore the submission of the learned Advocate for the petitioner that without prior permission of the petitioner no one is legally entitled to import the parallel goods of Unilever Bangladesh is misconceived and fallacious. If any importer fails to satisfy the conditions laid down in Section 15(d)(e)(g) and (h) of said Act the customs authority is empowered under section 17 of the Customs Act, 1969 to detain and confiscate the imported goods. Therefore we are of the view that there is no wholesale restriction in section 15 of the said Act in importing parallel goods.

At this stage, it is required to examine other provisions of law relating to the importation of parallel goods.

In আমদানি নীতি আদেশ, ২০২১-২০২৪ the government made provision in Order 4 of the said আদেশ as regards the importation of parallel goods which runs as follows:

৪। আমদানি নিয়ন্ত্রণের শর্তাবলি।— এই আদেশ কার্যকর হইবার পূর্বে বা এই আদেশে নিয়ন্ত্রিত তালিকাভুক্ত হইবার পরে বা অন্য কোনো বিধান আরোপের কারণে যদি কোনো পণ্যের আমদানি নিয়ন্ত্রিত হইয়া থাকে তাহা হইলে উক্তরূপ নিয়ন্ত্রণ নিম্নবর্ণিত শর্তসাপেক্ষে হইবে, যথাঃ—

(ক) স্থানীয় কোনো শিল্প প্রতিষ্ঠানের স্বার্থ সংরক্ষণের উদ্দেশ্যে বিশেষ কোনো পণ্যের আমদানি নিয়ন্ত্রণ করা হইলে সংশ্লিষ্ট পোষক বা বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশন উক্ত প্রতিষ্ঠান কর্তৃক পণ্য উৎপাদনের বিষয়টি কঠোরভাবে নিয়মিত মনিটর করিবে;

(খ) সংরক্ষিত শিল্প (protected industry) বিশেষ করিয়া যাহারা সংযোজন কাজে নিয়োজিত তাহাদিগকে সক্রিয়ভাবে এবং সত্ত্বর প্রগতিশীল উৎপাদন শুরু করিতে হইবে,

(গ) কাঁচামালের মূল্য বৃদ্ধি অথবা বিনিময় হার হ্রাস পাওয়ার কারণ ব্যতীত যদি কোনো পণ্যের মূল্য বৃদ্ধি পায় অথবা আন্তর্জাতিক বাজারে কাঁচামালের মূল্য যতটুকু বৃদ্ধি পাইয়াছে তাহা

অপেক্ষা তুলনামূলকভাবে যদি স্থানীয়ভাবে উৎপাদিত পণ্যের মূল্য অসমানুপাতিক হারে বৃদ্ধি পায় তাহা হইলে সংশ্লিষ্ট পোষক বা বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশনের সুপারিশের ভিত্তিতে আমদানির উপর আরোপিত নিয়ন্ত্রণ প্রত্যাহার করিবে,

(ঘ) ইসরাইল হইতে অথবা উক্ত দেশে উৎপাদিত কোনো পণ্য আমদানিযোগ্য হইবে না এবং উক্ত দেশের পতাকাবাহী জাহাজেও কোনো পণ্য আদানি করা যাইবে না;

(ঙ) কোনো পণ্যের আমদানি নিষিদ্ধকরণ অথবা বাধানিষেধ আরোপের সিদ্ধান্ত সম্পর্কে যদি কাহারও কোনো আপত্তি থাকে তাহা হইলে উক্ত ব্যক্তি বা প্রতিষ্ঠান বিষয়টি বাংলাদেশ ট্রেড এন্ড ট্যারিফ কমিশনের নিকট উস্থাপন করিবে এবং উক্ত কমিশন বিষয়টি পরীক্ষার পর সুপারিশ আকারে বাণিজ্য মন্ত্রণালয়ে বিবেচনার জন্য পেশ করিবে।

A bare reading of the আমদানি নীতি আদেশ, ২০২১-২০২৪ and Section 15 of the Customs Act, 1969 reveals that in pursuance of section 15 of the said Act, a supplementary provision has been made in the said Order for the interest of the local industry. As per provision of order 4 (Uma) of the said Order, any aggrieved person is entitled to draw the attention of the Trade and Tariff Commission as regards violations of any condition on importation of parallel goods. After receiving any objection regarding the importation of parallel goods, the Trade and Tariff Commission under Order 4(Uma) of the আমদানি নীতি আদেশ, ২০২১-২০২৪ shall examine the objection and made a recommendation to the Ministry of Commerce. Order 5(6) of the said order stipulates that in case of import of registered branded product, an attested copy of intellectual property certificate from the country of origin issued by the concerned government or authorised authority or department is to be produced before the customs authority at the time of the release of the imported goods.

As regards the submission of the learned Advocate Mr Fida M Kamal regarding the patent right of the petitioner it is relevant here to quote the provision of Section 96 of the Trademarks Act, 2009 which is stated below:-

“96. Suit for infringement, etc., to be instituted before District Court.—No suit—

- (a) for the infringement of a registered trademark;
- (b) relating to any right in a registered trademark;
- (c) relating to any corrected right in the registered trademark;

and

- (d) for passing off arising out of the use by the defendant of any trademark which is identical with, or, deceptively similar to, the plaintiffs trademark, whether registered or unregistered;

shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.”

The petitioner is the registered trademark holder of the goods in question. Section 96 of the said Act has given protection to the petitioner. Under Section 96 of the said Act, the petitioner company is legally entitled to file suit before civil court for violation of any provision of the Trademarks Act, 2009.

On examination of the aforesaid provisions of law, it reveals that the legislature made specific provisions in Section 17 of the Customs Act, 1969, Order 4 of the বাংলাদেশ আমদানি নীতি আদেশ, ২০২১-২০২৪, and Section 96 of the Trademarks Act for alternative, effective and equally efficacious remedy to the petitioner for violation of any condition laid down in Section 15 of the Customs Act, 1969 regarding importation of parallel goods. Article 102 of the Constitution is not meant to circumvent or bypass statutory procedures as stated above. When a right is created by a statute, which prescribes a remedy or procedure for enforcing the right, resort must be had to that particular statutory remedy before seeking extraordinary and discretionary remedy under Article 102(2) of the Constitution. Judicial prudence demands that this Court should refrain from exercising its jurisdiction under the said constitutional provision. This is a self-restrained restriction of the High Court Division.

In the case of Chairman, Anti Corruption Commission and another vs. Enayetur Rahman and others reported in 64 DLR (AD) 14 as regards

the consequence of alternative remedy our Apex Court observed in the following terms;

“This Court on repeated occasions argued that Article 102 (2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extraordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations that is to say where vires of a statute are in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102 (2) of the Constitution.”

As regards the maintainability of writ of mandamus Supreme Court of India in the case of A.V. Venkateswaran Vs. Ramchand Sobhraj Wadhvani and others, reported in AIR 1961 SC 1506=1962 SCR(1) 753 it has been held that:

“normally a writ of mandamus is not issued if other remedies are available. There would be a stronger reason for following this rule where the obligation sought to be enforced by the writ is created by a statute and that statute itself provides the remedy for its breach. It should be the duty of the courts to see that the statutory provisions are observed and, therefore, that the statutory authorities are given the opportunity

to decide the question which the statute requires them to decide.”

On a laborious scrutiny of the decisions referred hereinabove by the learned Advocate for the petitioner, it reveals that those decisions have been made under the trade marks law of the concerned jurisdiction in properly instituted suits filed by the plaintiff before the trial Court which cannot be relied on by this Court in exercising the jurisdiction under Article 102 of the Constitution. In the case of Abu Talha vs Bangladesh, reported in 20 BLC (HC) 508 the customs authority directed the petitioner (importer) to submit the intellectual certificate from the country of origin and on the failure of the petitioner to submit the certificate, the customs authority did not release the imported goods. From the given facts of the referred case, it appears that the customs authorities are well aware of the conditions imposed in Section 15 of the Customs Act, 1969. Therefore, it cannot be held that the customs authorities are sleeping over the matter. Rather they are taking action on the failure of the importer on non-compliance with the conditions as mentioned in Section 15(d)(e)(g) and (h) of the Customs Act, 1969.

This writ petition has been filed in the form of mandamus praying for a direction upon respondents Nos. 1 to 6 not to allow import or release the goods in question and further direction upon respondents Nos. 7 to 57 not to allow opening letter of credit by any importer to import the goods in question.

Mandamus is a Latin word which means “We command”. Mandamus is issued to keep public authorities within the limit of their jurisdiction while exercising public functions. It is called a ‘wakening call’ and it awakes the sleeping authorities to perform their duty. It is a judicial remedy in the form of an order of the Court to the government or public authority or Court below to do specific act which they are duty bound to do under the statutory provision of law. Any person who has an interest in the performance of the duty by the authority and they have refused to do the duty following law despite demand in writing are entitled to seek remedy in the form of mandamus.

In John Shortt's book 'Information, Mandamus and Prohibition' page 256 the author has expressed his view regarding mandamus in the following terms;

"If the duty be of a judicial character a mandamus will be granted only where there is a refusal to perform it in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the Court will only insist that the person who is the judge shall act as such; but it will not dictate in any way what his judgment should be. If, however, the public act to be performed is of a purely ministerial kind, the Court will by mandamus compel the specific act to be done in the manner which to it seems lawful."

In Halsbury's law of England, Fourth Edition, Volume 1, Paragraph 89 as regards the nature of mandamus it has been opined as under;

"is to remedy defects of justice and accordingly it will issue, to the end, that justice may be done, in all cases where there is a specific legal right and no specific legal remedy to enforcing that right and it may issue in cases where although there is an alternative legal remedy yet that made of redress is less convenient beneficial and effectual."

In Black's law dictionary, Ninth Edition the term Mandamus has been explained in the following term ;

"A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act."

In Wharton's Law Lexicon, 15th Edition, 2009, 'Mandamus, has been interpreted as under;

"A high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the King's

name from the King's Bench Division of the High Court only, and addressed to any person, corporation, or inferior court of judicature requiring them to do something therein specified, which appertains to their office, and which the court holds to be consonant to right and justice. It is used principally for public purposes, and to enforce performance of public duties. It enforces, however, some private rights when they are withheld by public officers."

In the *Administrative Law* (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion has been expressed:

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

In de Smith, Woolf and Jowell's *Judicial Review of Administrative Action*, 5th Edn., after detailed discussion, the learned author has summarized the term 'mandamus' with the following propositions:

“(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.

(2) The principles of judicial review *prima facie* govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function.

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.”

In the case of Talekhal Progressive Fisherman Co-operative Society Ltd. vs. Bangladesh, reported in 1981 BLD (AD) 103 it has been held that;

"In order to entitle a person to ask for performance of any public duty by mandamus it is necessary to show that he has a legal right for claiming such performance apart from the fact that he is interested in the performance of the duty."

In the case of National Engineers vs. Ministry of Defense reported in 44 DLR (AD) 179 our Apex Court held as under:

"In order to enforce the performance by public bodies of any public duty by mandamus, the applicant must have a specific legal right to insist upon such performance".

As regards the scope of issuance of the writ of mandamus our Apex Court in the case of Government of Bangladesh vs. Md. Abdul Hye and others passed in CPLA No. 2310 of 2018 opined in the following terms;

“The High Court Division exercising its jurisdiction under Article 102 has power to issue a writ of mandamus or in the nature of mandamus where the Government or a public authority has failed to exercise or has wrongly exercised discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant consideration. In all such cases, the High Court Division can issue writ of mandamus and give directions to compel performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority. In appropriate cases, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the Government or the public

authority should have passed, had it properly and lawfully exercised its jurisdiction”

In the case of *Queen vs. Guardians of the Lewisham Union*, reported in (1897) 1 QB 498 it has been observed that;

"This court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its reference had a legal right to insist upon such performance."

In *R.V. Metropolitan Police Commissioner*(1968) 1 All ER 763/(1968) QB 118 indicating the duty of the Commissioner of Police and the mandamus, Lord Denning stated thus: (All ER P. 769).

"I have no hesitation, however in holding that, like every constable in the land, he should be, and is, independent of the executive, He is not subject to the orders of the Secretary of State,... I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."..... "A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it

seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney General; or by the prerogative order of mandamus."

In the case of *Alvi Spinning Mills Ltd. vs. Government of Bangladesh*, reported in 66 DLR(2014) 558 para 55 and 56 his Lordship Md. Ashfaque Islam, J. opined in the following terms;

"It is a well-settled principle of law that in order to get a Rule of mandamus the petitioner must show that his claim is rooted in the statute or statutory Rule. So it is always required that the applicant for a mandamus should have a legal right to enforce the performance of those duties..... a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the public bodies and there is a failure on the part of those public bodies to discharge their statutory obligations. The paramount function of a writ is to compel performance of public duties prescribed by statute and to keep public bodies exercising public functions within the limits of their jurisdiction. Therefore, mandamus may issue to compel the public bodies to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

In the case of *Rai Shibendra Bahadur vs. The governing Body of the Nalanda College* reported in AIR 1962 SC 1210, the Supreme Court of India has held that;

"Mandamus may be issued to compel the authorities to do something provided the statute imposes a legal duty and the aggrieved party had the legal right under the statute to enforce its performance"

In the case of Binny Ltd. and others vs Sadasivan and others reported in AIR 2005 SC 3202 para 10 regarding the issuance of the writ of mandamus, the Supreme Court of India opined in the following terms;

“The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities.”

Now next question has arisen as to how this Court will decide whether a particular imported consignment is a parallel brand of Unilever Bangladesh or not. Having produced a few products of Unilever Bangladesh, Unilever PLC, London and allegedly counterfeit of those products before this Court learned Advocate Mr Fida M Kamal has tried to impress upon us that due to inaction of the customs authority dishonest importers are illegally importing the counterfeit products of Unilever PLC, London for which the interest of the petitioner, as well as the interest of the consumers at large, are adversely affected. Therefore, an appropriate order is required to be passed by this Court directing the customs authority not to allow import or release the counterfeit goods or branded goods of the petitioner company.

At the time of opening the Letter of credit, it is not practically possible for respondent Nos. 7 to 57 to identify the products which are parallel goods or counterfeit products of Unilever PLC. It is the customs authority that can examine the consignment and take the decision as to whether the particular imported consignment is parallel goods or counterfeit products of Unilever, PLC, London. Therefore if the petitioner has definite information that any respondent or anyone is importing parallel goods or counterfeit products of Unilever PLC, London in violation of the conditions imposed in Section 15 of the Customs Act, 1969 he is at liberty to file an application to customs authority regarding specific consignment.

In the above backdrop of the matter, we are of the view that this writ petition has been filed relying on the highly contentious issue. A contentious issue is one that different people interpret the issue differently. Therefore, it is a controversial or disputed matter. Under Article 102 (2)(a)(i) of the Constitution on the application of any aggrieved person this court is empowered to pass an order directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do. This power of the High Court Division is discretionary. Exercising jurisdiction under Article 102 of the Constitution this Court is not legally empowered to adjudicate any disputed or contentious matter and this Court is loath to embark upon an enquiry into the disputed question of fact.

No direction can be passed considering the anticipation of any person. It has already been held that in section 15 of the Customs Act, 1969 there is no wholesale restriction on importation of parallel goods. Therefore, there is no obligation on the part of the respondents to restrain any person from importing parallel goods or to restrain any person from opening letter of credit regarding importation of parallel goods of Unilever Bangladesh Ltd. Any person (s) is entitle to import parallel goods subject to compliance of the conditions imposed in Section

15(d)(e)(g) and (h) of the Customs Act, 1969. But on that score question of taking prior permission of the petitioner is irrelevant being bereft of any legal approval.

In view of the findings, observation and proposition as discussed herein above, we are of the view that the writ petition is not maintainable in law.

We do not find any merit in the Rule.

In the result, the Rule is discharged.

However, there will be no order as to costs.

Md. Ashfaqu Islam, J.

I agree.

Md. Ashraf Kamal, J.

I agree.