

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

WRIT PETITION NO. 1875 OF 2012.

Quazi Reza-Ul-Hoque, J	Maersk Bangladesh Limited.Petitioner.
Abu Taher Md. Saifur Rahman, J		Vs
Judgment on 02.02.2015	Bangladesh and others.Respondents.

For the petitioner: Mr. Tanjib-ul Alam, with Ms. Tarana Afroze, Advocates

For the respondent No. 1: Mr. Forrukh Rahman, Advocate

For the respondent No. 6: Mr. Abdus Samad, with Mr. S.M. Shakhawat Hossain, Advocates.

Terms, Issues and Phrases:

Freight forwarders, freight brokerage, principal surplus freight, deduction of brokerage charge from freight charge, Shipper's Council of Bangladesh (SCB), "booking of cargo", "booked cargo", brokerage does not constitute 'levy' or 'tax'.

Decision:

Rule discharged.

Bangladesh Bank has rightly issued the order to keep 0.5% out of 1% realized freight brokerage charge for SCB which cannot be interfered with in writ jurisdiction....(Para 40).

Main Legal Issue:

Whether the Bangladesh Bank has legal authority to issue order to banks to keep 0.5% out of 1% realized freight brokerage charge for Shipper's Council of Bangladesh (SCB) or not.

Main Finding:

When Bangladesh Bank has asked the concerned schedule bank to keep such amount isolated for Shippers Council out of the Total realized 1% freight brokerage charge, the same act of Bangladesh Bank cannot be declared as without any lawful authority. In fact, Bangladesh Bank has rightly issued the order to keep 0.5% out of 1% realized freight brokerage charge isolated which cannot be interfered in writ jurisdiction....(Paragraph 40).

Constitution of People's Republic of Bangladesh: Article 102: Long time trade practice having the force of law cannot be challenged in writ jurisdiction:

As the collection of 1% freight brokerage developed out of trade practice the Government as the regulator of trade and business has the authority to issue circulars for proportionate disbursement of brokerage in the national interest as the brokerage is neither a levy nor a tax nor a duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature.....(Para 41).

Foreign Exchange Regulation Act, 1947: Sections 20 and 25: With the authority of the Government Bangladesh Bank may from time to time issue general and special guidelines or circulars:

Under Section 25 of the Foreign Exchange Regulation Act of 1947, the Government may from time to time give

to the Bangladesh Bank such general or special directions as it thinks fit, and the Bangladesh Bank shall in the exercise of the functions under this Act, comply with any such directions, as such, it was duty of Bangladesh Bank to comply with such direction and since it has been decided in Writ Petition Nos. 5544, 5545, 5546, 5547, 5548, 5549, 5551, 5567 all of 1996 reported in 13 BLD 209 that Government has power to regulate trade and business practice and shipping business is being controlled by the Department of Shipping. The decision dated 05.08.1984 of Ministry of Shipping was taken by the Government in public interest for prohibiting remittance of the 1% freight brokerage out of the country by the shipping agent/owners by showing incorrect expenditure in fictitious names by directing to pay 0.5% to the SCB which is rendering service to the shippers as well as ship owners and shipping agents. This was not additional levy or charge rather brokerage collected by the ship owners/agents from shippers and since the said judgment was upheld by the Appellate Division in civil Petition for Leave to Appeal Nos. 357 to 364 of 1999 vide Judgment dated 16.05.1999 and also held that collection of 1% freight brokerage developed out of trade practice. The Government as the regulator of trade and business has the authority to issue circular for proportionate disbursement of brokerage in the national interest as the brokerage is neither levy, tax, duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature. Brokerage itself is not the outcome of any law but of trade practice. Hence, question of delay is central in this case.....(Para 42).

Review Petition dismissed on the same point by the Appellate Division:

Review Petition before the Appellate Division being No. 46 of 1999, which was also dismissed by observing that-

As the collection of 1% freight brokerage developed out of trade practice the Government as the regulator of trade and business has the authority to issue circulars for proportionate disbursement of brokerage in the national interest as the brokerage is neither a levy nor a tax nor a duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature.....(Para 41).

JUDGMENT

QUAZI REZA-UL-HOQUE, J:

1. The instant Rule was issued on 27.02.2012 calling upon the respondents to show cause as to why the petitioner should not be allowed to remit to the principal surplus freight i.e. income after deducting (বায় অতিরিক্ত আয়) upon retaining 0.5% freight brokerage in a blocked account as per memo dated 09.10.2011 (annexure- J) and as to why the Circular bearing No. 1 dated 01.08.2011 (annexure- A) issued by the respondent No. 2 for remittance of surplus freight upon payment of 0.5% freight brokerage to SCB from the accounts of the petitioner contrary to annexure-J shall not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

R
sl
hu
01
in
N
ot
ar
on
pa
co
of
per
by

bre
jut
fre
me
As
bro
esta
to s
sect
prac
of s
the
ship
subs
train
to tl
freig
payr

4
brok
servi
meet
an
oper
of br
regar

2. The facts necessary for disposal of the Rule, as has been stated by the petitioner, in short, is that the petitioner aggrieved by and herein impugns the Circular No. 1 of 01.08.2011 (hereinafter referred to as "the impugned Circular") issued by the respondent No. 2 directing the respondent No. 3 and all other commercial banks in Bangladesh who are maintaining accounts of shipping agents on behalf of foreign shipping lines to make payment of Freight Brokerage @ 0.5% of the collected export freight of Shippers' Council of Bangladesh (SCB) for procuring prior permission of remittance of the surplus freight by the respondent No. 3 (Annexure-A).

3. During the pre-independence era, break bulk slipping (predominantly of jute and jute goods export), there was prevalence of freight brokers who were all required to be the members of Chittagong Freight Broker Association. A freight broker was paid 1% brokerage for services, if any, could be established to have been provided by a broker to shipping line in respect of export bookings secured. In the post liberation period, the practice of employing a broker for the purpose of securing export booking has decreased to the point of becoming obsolete. Instead, the shipping lines through their own agents and subsidiaries in Bangladesh equipped with trained staffs who promote sales and services to the customers directly. In the absence of freight brokers, the practice of brokerage payment discontinued.

4. Despite the discontinuance of brokerage services and payment for such services, the proforma respondent No. 4 in a meeting held on 28.02.1981 decided to impose an obligation upon the shipping lines operating in Bangladesh to continue deduction of brokerage commission at the rate of 1% regardless of the existing, as well as, needs of

any freight brokers in the trade. In the said meeting it was further decided that the Ministry would decide later as of the mechanism for brokerage payment as well as the beneficiary of such brokerage amount. The meeting also requested the respondent No. 1 to ensure that while remitting freight for the shipping line the brokerage commission is being deducted from collected freight with view to keep the same in Bangladesh. After lapse for almost 4 years, the proforma-respondent No.4 issued a Circular dated 13.08.1984 directing the shipping agents to pay 0.5% of the brokerage commission, out of the 1% deducted from freight on export in case of non-jute and non-traditional goods, (hereinafter referred to as "the freight") to the Shippers' Council of Bangladesh (SCB) without any consultation with the shipping lines or their agents and without consideration of the fact that brokerage had to be for services in respect of booking or the booked cargo. In accordance with the decision of the Ministry of Shipping held on 28.02.1981 and the circular issued by the respondent No. 4 dated 13.08.1984, the Bangladesh Bank inserted a provision in the Guidelines for Foreign Exchange requiring the Authorized Dealers to ensure retaining brokerage in Bangladesh before remit the freight to their principal. The petitioner has been acting in compliance with the relevant provisions of the foreign Exchange Guidelines and did not ever remitted any amount in violation of the Foreign Exchange Guidelines (Annexure- B & BI).

5. The circular with regard to the deduction of brokerage charges @ 0.5% of the freight to be paid to the SCB was met with vehement opposition from the shipping agents particularly in view of the fact that no service was required to be procured by the shipping

lines from the SCB so as to entitle it to the payment or 0.5% brokerage of the freight.

6. The shipping agents continued to agitate the irrationality and non-justifiability of deduction of the brokerage charges @ 0.5% to be paid to SCB before the relevant authorities but the authorities did not pay any heed to the complaints raised by the shipping lines/shipping agents against the brokerage charges @ 0.5%.

7. Having no other resort and being aggrieved with the imposition of an unwarranted burden of paying 0.5% of the freight to SCB in the circumstances that the shipping lines/main line operators and their agents did not procure any service from SCB, a number of shipping lines/shipping agents filed a writ petitions before this Court challenging the power of the Executive Authority to promulgate a Circular requiring deduction of brokerage charges to be paid to SCB. The writ petitions were followed by Civil Petition for Leave to Appeal No.357-364 of 1999 whereby the Appellate Division of the Supreme Court of Bangladesh in its judgment clearly stated that the imposition of brokerage was to ensure that those who are "rendering services for booked cargo" receive the payment and the "brokerage" do not constitute "levy or tax", as such, if the SCB were to avail the brokerage it must establish that it had provided services to the plaintiff in respect of "booking of cargo" or in respect of "booked cargo" in consideration of which it could make its demand.

8. The judgment of the Appellate Division of the Supreme Court of Bangladesh above clearly indicated that the "brokerage" in question, not falling within the purview of "levy or tax", can be paid only in consideration and on account of rendering

services for booked cargo, as such, in the circumstances that the petitioner has not received any services from SCB for booked cargo or otherwise and that SCB has not supplied the petitioner with any particulars of supplying services, the petitioner was under no obligation to make payment @0.5% of the freight as "brokerage" to SCB. Indeed, the petitioner never paid any brokerage fees to SCB and there had not been any demand from SCB either with supporting document containing evidence of providing brokerage service to the petitioner. Therefore, in any case, the demand of SCB is barred by limitation.

9. Despite the claimed "brokerage charges" were of the nature of "service charge" in respect of booked cargo and thus to be payable against to delivery of service only, SCB in connivance with the respondent No. 2 continued to pursue the deduction and payment of the "brokerage charges" at the claimed rate without requiring them to supply any proof of providing "service". When called upon by the plaintiff to provide evidence and the particulars of rendering services, the SCB took the avenue of illegally pursuing the respondent No. 1 and 2 to exert pressure on the petitioner and other local agents of the main line operators by using their office and the power of controlling foreign exchange and regulatory authority over the banks of the petitioner and other local agents of the main line operators. In such a process, the SCB managed to procure a letter dated 27. 11.2007 issued by the Assistant Secretary, Foreign Exchange Policy Department, Bangladesh Bank, Head Office, addressed to the Authorized Dealers (nominated bank) of shipping agents directing them to keep the so-called brokerage monies in a blocked account (annexure-C).

10. The shipping lines and their agents including the petitioner continued to voice their opposition to the claimed brokerage charges against the relevant authorities and accordingly, a meeting was held in respect of the payment of the 0.5% Brokerage Charge in favour of SCB on 05.10.2005 *inter alla* between the Secretaries of the Ministry of Finance; Ministry of Law, Justice and Parliamentary Affairs; Ministry of Commerce; Chairman of National Board of Revenue, Governor of the respondent No.1 Chairman of the SCB; and Chairman of the Shipping Agents Association. In the said meeting it was pointed out that the SCB never does the function of brokerage and does not give any brokerage service to the shipping companies so as to be eligible to the payment of 0.5% of the freight as brokerage charges. After discussion of all the aspects of the matter, it was decided in the said meeting that:

- (a) The SCB and Bangladesh Shipping agent will sit together to discuss about the issues of services provided by SCB and the freight brokerage payable by the shipping agents and notify the Ministry of Shipping of their respective opinions for resolving the said issues; and
- (b) A Meeting headed by the Secretary of the Ministry is necessary to examine the matter of payment of 0.5% Freight Brokerage Charge to SCB as well as the services alleged to be provided by SCB (annexure-D)

11. On 20.02.2011 the respondent 3 has, by its Memo bearing No. RMT/Maersk /46/11, forwarded to the petitioner a Memo bearing reference No. FEOD (Remi-3)/77/185

(Bibidha)/2011-156 dated 10.02.2011 issued by the respondent No. 2 whereby the respondent No. 3 was asked by the respondent No. 2 to submit up-to-date status of the SCB Brokerage Blocked Account evidencing deposit of 0.5% from the petitioner's Bank Accounts for payment of the same to SCB. With a view to comply with the instruction issued by the respondent No. 2 in its Memo dated 10.02.2011, the respondent Nos. 4 and 3 instructed the petitioner to open a blocked account by transferring funds to cover Brokerage Charges @ 0.5% of the freight on account of SCB despite that neither of the respondents delivered the petitioner with any details as to the particulars of "brokerage" service supplied by SCB to the petitioner (annexure- E & EI).

12. In response to the said letter I dated 20.02.2011 issued by the respondent No. 4 and 3 and the Memo issued by the respondent No.2 dated 10.02.2011, the petitioner had served a Notice Demanding Justice dated 13.04.2011 upon the respondent No.2 elaborating the illegality of claim to brokerage Charges (annexure- C).

13. The respondent No. 2 paid no heed to the Notice Demanding Justice dated 13.04.2011 served on it by the petitioner and proceeded to issue Circular No.1 dated 01.08.2011 ("the impugned Circular") on the deduction and payment of brokerage charges @ 0.5 on account of SCB.

14. In the said Circular dated 01.08.2011 the ADs which included the respondent No. 3 instructing to do the followings:

- (ka) The branches of the ADs shall remit the surplus freight after expenditure to the Principals upon being satisfied as to the payment of 0.5% freight

brokerages to the SCB as shown in the Expenditure Statement (Schedule IV of Bangladesh Bank format) submitted by the shipping company/shipping agent. Besides, while submitting the quarterly Income-Expenditure Statement to the Bangladesh Bank for post facto examination, the AD shall submit documents supporting payment of Freight Brokerage to SCB.

(kha) If any of the branches of the concerned AD have already remitted the surplus freight to the Non-Resident Principals of the Shipping Agents without deducting the 0.5% Freight Brokerage charge, then the entire remaining dues shall be adjusted from the next quarterly return and the same shall be paid to the Shippers Council of Bangladesh.

(ga) The ADs preserving the Freight Brokerage amount @ 0.5 payable to Shippers Council of Bangladesh in a blocked account shall submit the necessary documents to the Foreign Exchange Operation Department for procuring prior permission for payment of the said amount and after transferring the up-to-date Freight Brokerage Charge to the SCB's authorized account, inform the Bangladesh Bank with document evidencing payment to SCB.

15. On 17.08.2011, the respondent No.3 forwarded the Circular No.1 of 01.08.2011 to the petitioner under its letter bearing No.G/RMT/Maersk-SCB/216/2011; Later the respondent No.4 in view of ensuring their compliance with the circular dated 01.08.2011 issued by the respondent No.2 vide its letter

No. G/RMT/Maersk-SCB/230/2011 dated 14.09.2011 informed the petitioner of its decision to proceed with submission of papers for procuring approval from the respondent No.2 to transfer funds to the account of SCB on account of brokerage charges @ 0.5% in compliance with the instruction No. (Ga) in the said Circular stated above (annexure-G & G 1).

16. The unjustified efforts of the respondent No. 2 and SCB to extract money from the shipping lines/agents without any consideration in return culminated in the Circular dated 01.08.2011 issued by the respondent No. 2 and response to the impugned Circular No. I dated 01.08.2011, the petitioner had served a notice demanding justice upon the respondent No. 2 on 25.09.2011 elaborating the illegality of the said Circular and requested the respondent No. 2 to withdraw the Circular. But the respondent No. 2 did not make any response to the said Notice Demanding Justice (annexure-H).

17. Eventually, after a long gap of 6 years from the earlier meeting, another meeting was held on 05.09.2011 between *inter alia*, the Governor of the respondent No. 1, the Chairman of Chittagong Port Authority, representatives/agents of shipping lines, under the chairmanship of the Minister of Ministry of Shipping in respect of the 'brokerage charges' and justifiability of the deduction and payment thereof to SCB.

18. In the said meeting dated 05.09.2011; the Minister opined that it would not be logical for the shipping agents to make payment of brokerage charges without receiving any service from SCB. In the said meeting it was resolved that a Committee shall be formed for determining *inter alia* the following:

0
F
S
r
l
l
t
t

- (a) justification of the payment of Brokerage fee by the Main Line Operators to SCB in the changed contest of the business;
- (b) whether the mainline operators receive any service from SCB;
- (c) the areas the money paid has been spent so far;
- (d) the amount of money deposited with the respondent No. 1 on this fund and how the money received is to be utilized;
- (e) if there is any practice in the neighboring countries of the payment of freight brokerage to shippers council (annexure-I).

19. On the basis of the said Meeting dated 05.09.2011 headed by the Minister, the proforma respondent No. 5, Department of Shipping vide its memo dated 09.10.2011 requested the Governor of the respondent No. 1 to put on hold the payment of the Brokerage fee and keep the same in a Blocked Account until a decision is made in this regard by the Government and instructed the respondent No.1 to refrain from making any payment out of the brokerage charges deposited in the blocked account (annexure-J).

20. Despite that the respondent No. 1 has been instructed by the respondent No.5 to put on hold the deposit made on account of brokerage charges to SCB and refrain from making any payment out of the same. The respondent No.2 refused to accept the quarterly disbursement and collection statements ("Statements") of the petitioner for non-submission of evidence in support of

payment of brokerage charges @ 0.5% to SCB which has been brought to the attention of the petitioner by the respondent No.3 vide its letter dated 08.02.2012. Consequently, the petitioner is now illegally and in contrary to the provisions contained in the foreign exchange guidelines restrained from remitting any surplus freight through respondent No.3 in favour of its principal for the alleged non-compliance with the impugned circular (annexure- K).

21. The respondent No. 1 contested the Rule by filing affidavit-in-opposition contending *inter alia* that the meeting held at the Ministry of Shipping dated 21.09.2011 did not make any decision to put on hold the payment of the Brokerage charges and keep the same in a blocked account until a decision is made in this regard. Rather the decision of that meeting were to form a committee and a number of Terms of Reference were fixed for that committee. The Department of Shipping, respondent No. 5 has issued the memo dated 09.10.2011, without the decision of that meeting.

22. It is further stated as follows:

- (a) That under Section 25 of the Foreign Exchange Regulation Act of 1947, the Government may from time to time give to the Bangladesh Bank such general or special directions as it thinks fit, and the Bangladesh Bank shall in the exercise of the functions under this Act, comply with any such directions. Hence, it was duty of Bangladesh Bank to comply with such direction.
- (b) That as per notification of Ministry of Ports, Shipping and L.W.T. No.1-12/83-SH/7982(20) dated 13.08.1984,

0.50% of basis freight on account of non-jute and non-traditional items of export from Bangladesh shall be paid to Shipper's Council of Bangladesh (Hereinafter referred to as "SCB") by all shipping agents/ship owners. In the above mentioned, notification Bangladesh Bank has been requested to monitor the regular payment of 0.5% freighter brokerage to the SCB. For implementation of this Government order, Bangladesh Bank had circulated directives to the Banks and shipping agents to pay the said brokerage to SCB. According to the said Bangladesh Bank Circular No. ECP(INV)741c/109-A/85 dated 16.01.1985, Guidelines for Foreign Exchange Transaction 96 (GFET 96) Vol.1, Chapter- 16, Para-2(B) which has been revised as Guidelines for Foreign Exchange Transactions 2009 (GFET2009) Vol. 1, Chapter-10, Para-2(B), Chapter-16, Para-2(B) and circular No.13 dated 02.02.2002, it is made mandatory for shipping lines/agents working in Bangladesh to show in the quarterly statements 0.50% of their basic freight as local expense, which is payable to SCB as freight brokerage on account of service charges. According to said Guideline Vol. 1, Chapter-16, Para-2(B)(vi) bill/voucher in support of expenses shown in disbursement statement for all expenses of Taka 2500 or more per item are required to be submitted to Bangladesh Bank (annexure- H).

(c) That further as per Section 5 of Foreign Exchange Regulation Act, 1947 there are general restriction on payment to non-residents unless authorized. As per Chapter 10 and

para-2B of the said Guideline, the shipping companies/agents are required to submit application to AD for remittance of surplus earning. The AD is required to examine that 0.50% of brokerage charge are paid to the SCB. As per Section 20(3) of the said Act of 1947, Bangladesh Bank has power to issue direction for securing compliance with the provision of Act, 1947 rules, order etc. made there under. Accordingly, the impugned circular has been issued lawfully.

(d) That it has been decided in Writ Petition No. 5544, 5545, 5546, 5547, 5548, 5549, 5551, 5567 all of 1996 reported in 13 BLD 209 that Government has power to regulate trade and business practice and shopping business is being controlled by the Department of Shipping. The decision dated 05.08.1984 of Ministry of Shipping was taken by the Government in public interest for prohibiting remittance of the 1% freight brokerage out of the country by the shipping agent/owners by showing incorrect expenditure in fictitious names by directing to pay 0.5% to the SCB, which is rendering service to the shippers as well as ship owners and shipping agents. This was not additional levy or charge rather brokerage collected by the ship owners/agents from shippers (annexure- III & III (a)).

(e) That it has also been decided in the same judgment that deduction of brokerage charge by the shipping companies has been made into trade practice. Making payment to Shipper's Council is also made into a trade

practice since long. The petitions in the said writ petition were barred by inordinate delay and leaches.

- (f) That the said judgment was upheld by the Appellate Division in Civil Petition for Leave to Appeal Nos. 357 to 364 of 1999 vide Judgment dated 16.05.1999 and also held that collection of 1% freight brokerage developed out of trade practice. The Government as the regulator of trade and business has the authority to issue circular for proportionate disbursement of brokerage in the national interest as the brokerage is neither levy, tax, duty, nor any charge. No legislation is necessary to regulate a trade practice of this nature. Brokerage itself is not the outcome of any law but of trade practice. Hence, question of delay is central in this case (annexure- IV).
- (g) That same has been applied in Writ Petition No. 8299 of 2008 and it was further held that the fact that the amount 0.5% does not belong to the petitioner which has been decided by the Appellate Division as such when Bangladesh Bank has asked the concerned schedule bank to keep such amount isolated for Shippers Council out of the total realized 1% freight brokerage charge, the same act of Bangladesh Bank cannot be declared as without any lawful authority. In fact, Bangladesh Bank has rightly issued the order to keep 0.5% out of 1% realized freight brokerage charge isolated which cannot be interfered in writ jurisdiction (annexure- V).

23. The respondent No. 6 contested the Rule by filing affidavit-in-opposition contending *inter alia* that the respondent No. 4

did not impose any extra obligation upon the shipping lines than the existing one rather the respondent No. 4 directed to make payment of 0.5% of brokerage commission out of 1% collected freight on export to the respondent No.6. The respondent No. 4 has also requested the Bangladesh Bank to monitor the payment of regular payment of 0.5% freight brokerage to the respondent No. 6 and as per said decision the shipping lines started payment of 0.5% freight brokerage to the respondent No.6. The Bangladesh Bank has the authority to monitor such payment under Foreign Exchange Regulation Act, 1947.

24. The Shipping Lines made payment towards the respondent No. 6 as per circular of the respondent No. 4 being No. 1-12/83/SH/7887(13) dated 13.08.1984 but all on a sudden some other shipping lines filed a writ petition before this Court challenging the said circular of the respondent No. 4 being Writ Petition No. 5545-5567 of 1996 wherein the Court made an observation that realization of 1% freight charge schedule to be paid to the Ship Owners Associations to the petitioners company out of which 0.5% is payable to the Shippers Council i.e. respondent No.6. The said judgment of this Court has been affirmed by the Appellate Division in Civil Petition for Leave to Appeal No.357-364 of 1999. The High Court Division and the Appellate Division of the Supreme Court of Bangladesh on both occasions affirmed the decision issued by the Ministry of Shipping and BIWTA vide Memo No.1-12/83/SH/7887(13) dated 13.08.1984 as being good and Rule issued therein was discharged. The petitioner and other shipping lines preferred Review Petition before the Appellate Division being No.46 of 1999, which was also dismissed. The Appellate Division made observation that-

"As the collection of 1% freight brokerage developed out of trade practice the Government as the regulator of trade and business has the authority to issue circulars for proportionate disbursement of brokerage in the national interest as the brokerage is neither a levy nor a tax nor a duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature."

25. The petitioner never denied the fact that they are not realizing 1% freight brokerage but the petitioner is not agreeing to pay the share out of 1% to the respondent No.6. In fact the amount to the extent 0.5% does not belong to the petitioner which has been decided by the Appellate Division and as such when Bangladesh Bank has asked the concerned schedule bank to keep such amount isolated for respondent No.6 out of total realized 1% freight brokerage charge, the same act of Bangladesh Bank cannot be declared as without lawful authority. The petitioner misinterpreted the judgment of the Appellate Division passed in Civil Petition for Leave to Appeal No. 357-364 of 1999.

26. The meeting held at the Ministry of Shipping dated 21.09.2011 did not make any decision to put on hold the payment of the Brokerage charges and keep the same in a blocked account until a decision is made in this regard rather the decision of that meeting was to form a Committee a number of Terms of Reference were fixed for that Committee. The Department of Shipping, respondent No.5 has been issued the memo dated 09.10.2011 without the decision of that meeting.

27. The respondent No. 5 did not instruct the respondent No. 1 to put on hold the deposit made on account of brokerage charges

to respondent No. 6 and refrain from making any payment out of the same. The Bangladesh Bank i.e. the respondent No. 1 had the authority to regulate Foreign Exchange under Foreign Exchange Regulation Act, 1947 which has already been decided in Writ Petition No. 8299 of 2008 filed by the other shipping line namely Peninsular Shipping Services Ltd. in the said writ petition the Court observed *inter alia* that-

On the face of the above decision of our Apex Court the petitioner has not denied about the realization of 1% freight brokerage but he does not agree to pay the share of respondent No. 4 rather asked him to go to the civil court to realize the amount due to the petitioner as freight brokerage charge. In fact, the amount to the extent 0.5% does not belong to the petitioner which has been decided by the Appellate Division as such when Bangladesh Bank has asked the concerned schedule Bank to keep such amount isolated for respondent No. 4 out of total realized 1% freight brokerage charge the same act of respondent No. 3 cannot be declared as without any lawful authority. In fact, to realize the Bangladesh Bank has rightly issued the order to respondent No.5 to keep the 0.5% amount out of 1% realized freight brokerage 'charge isolated which cannot be interfered in writ jurisdiction; Moreover, no Rules is also found to have been issued in aspect also.

It is further stated that:

- (a) The Government of Bangladesh, Director General, Department of Shipping vide circular No. 1-12/83-

SH/7982 dated 13.08.1994 made a specific mandatory order for payment of 0.5% freight brokerage to the respondent No.6 thereafter the above circular was modified by circular No. 1-12/83-SH/117 dated 20.09.1984 issued by Ministry of Shipping, Government of Bangladesh and directed to pay 0.5% of basic net freight on account of jute yarn and jute carpets manufacturer in private sector in Bangladesh. That the Government has taken the decision in public interest for preventing remittance of entire 1% freight brokerage out of the country, the shipping lines tried to remit the entire 1% freight brokerage out of country showing incorrect expenditure of the same in fictitious name and as such the Government of Bangladesh requested Bangladesh Bank, the controller of Foreign Exchange to monitor the regular payment of 0.5% freight brokerage to the SCB by the steamer agent including BSC i.e. Bangladesh Shipping Corporation, the Bangladesh Bank by circular No.3 dated 26.12.1981 had drawn attention of shipping Companies/Shipping Agents towards earlier SPA Circular No.1 of 1981 and directed to follow the guide line in connection with freight brokerage.

- (b) In the year 1996 the petitioner and 7 major Foreign Shipping Lines operating in Bangladesh filed Writ Petitions on 08.12.1996 challenging the Government Order dated 13.08.1984 and 02.07.1996

regarding payment of freight brokerage to the respondent and this Court on hearing the parties by judgment dated 01.03.1999 dismissed the petitions and rule was discharged. The petitioners being aggrieved filed Civil Petition for Leave to Appeal No. 357-364 of 1999 before the Appellate Division and the Appellate Division on hearing was pleased to dismiss all the Civil Petition for Leave to Appeal by judgment dated 16.05.1999. The petitioners of the said Civil Petition for Leave to Appeal filed review petition being No. 46 of 1999 before the Appellate Division the Supreme Court, which was also rejected on 7th May, 2000. Despite the decision of the Appellate Division the petitioner and some other shipping lines refrained themselves from making payment to the respondent rather they are filing one after another litigation in respect of payment 0.5% freight brokerage to the respondent No. 6 with intention to emit 1% collated foreign brokerage as trade practice in foreign currency to their principal.

- (c) Under Section 25 of the Foreign Exchange Regulation Act of 1947, the Government may from time to time give to the Bangladesh Bank such general or special directions as it thinks fit, and the Bangladesh Bank shall in the exercise of the functions under this Act, comply with any such directions. Hence, it was duty of Bangladesh Bank to comply with such direction.

- (d) As per notification of Ministry of Ports, Shipping and L.W.T. No.1-12/83-SH/7982(20) dated 13.08.1984, 0.50% of basis freight on account of non-jute and non-traditional items of export from Bangladesh shall be paid to Shipper's Council of Bangladesh by all shipping agents/ship owners. In the above mentioned, notification Bangladesh Bank has been requested to monitor the regular payment of 0.50% freighter brokerage to the SCB. For implementation of this Government order, Bangladesh Bank had circulated directives to the Banks and shipping agents to pay the said brokerage to SCB and according to the Bangladesh Bank Circular No. ECP(INV)741c/109-A/85 dated 16.01.1985 Guidelines for Foreign Exchange Transaction 96 (GFET 96) Vol.1, Chapter-16, Para-2(B) which has been revised as Guidelines for Foreign Exchange Transactions 2009 (GFET2009) Vol. I, Chapter-10, Para-2(B), Chapter-16, Para-2(B) and FE circular No.13 dated 02.02.2002, and it is made mandatory for shipping lines/agents working in Bangladesh to show in the quarterly statements 0.50% of their basic freight as local expense which is payable to SCB as freight brokerage on account of service charges. According to said Guideline Vol.1, Chapter-16, Para-2(B)(vi) bill/voucher in support of expenses shown in disbursement statement for all expenses of Taka 2,500 or more per item are required to be submitted to the Bangladesh Bank.
- (e) As per Section 5 of Foreign Exchange Regulation Act, 1947 there are general restrictions on payment to non-residents unless authorized. As per Chapter 10 and para-2B of the said Guideline the shipping companies/agents are required to submit application to AD for remittance of surplus earning. The AD is required to examine that 0.50% of brokerage charge are paid to the SCB. As per Section 20(3) of the said Act of 1947, Bangladesh Bank has power to issue direction for securing compliance with the provision of Act, 1947, rules, order etc. made there under. Accordingly, the impugned circular has been issued lawfully.
- (f) It has been decided in Writ Petition No.5544, 5545, 5546, 5547, 5548, 5549, 5551, 5567 all of 1996 reported in 13 BLD 209 that Government has power to regulate trade and business Practice and shopping business is being controlled by the Department of Shipping. The decision dated 05.08.1984 of Ministry of shipping was taken by the Government in public interest for prohibiting remittance of the 1% freight brokerage out of the country by the shipping agent/owners by showing incorrect expenditure in fictitious names by directing to pay 0.5% to the SCB which is rendering service to the shippers as well as ship owners and shipping agents. This

was not additional levy or charge rather brokerage collected by the ship owners/agents from shippers.

(g) It has also been decided in the same judgment that deduction of brokerage charge by the shipping companies has been made into trade practice. Making payment to Shipper's Council is also made into a trade practice since long. The petitions in the said writ petition were barred due inordinate delay and leaches.

(h) The said judgment was upheld by the Appellate Division in Civil Petition for Leave to Appeal Nos. 357 to 364 of 1999 vide Judgment dated 16.05.1999 and also held that collection of 1% freight brokerage developed out of trade practice. The Government as the regulator of trade and business has the authority to issue circular for proportionate disbursement of brokerage in the national interest as the brokerage is neither levy, tax, duty, nor any other charge. No legislation is necessary to regulate a trade practice of this nature. Brokerage itself is not the outcome of any law but of trade practice. Hence, question of delay is central in this case.

(i) The same view was taken in Writ Petition No. 8299 of 2008 and it was further held that the fact the amount 0.5% does not belong to the petitioner which has been decided by the Appellate Division as such when Bangladesh Bank has asked the concerned schedule bank

to keep such amount isolated for Shippers Council out of the total realized 1% freight brokerage charge, the same act of Bangladesh Bank cannot be declared as without any lawful authority. In fact, Bangladesh Bank has rightly issued the order to keep 0.5% out of 1% realized freight brokerage charge isolated which cannot be interfered in writ jurisdiction.

28. Mr. Tanjib-ul Alam, the learned Advocate appearing for the petitioner submitted that the impugned circular in effect directed the petitioner to make payment of brokerage charges @ 0.5% of the freight to the respondent No. 3 is unlawful and is of no legal effect inasmuch in all the meetings held so far on the justifiability of payment of 0.5% of the freight to SCB, it has been conceded by the relevant authorities that the payment of brokerage charges is not tenable in the absence of providing service by SCB and that there has been change in context of doing business with a need brokerage services from the freight brokers. As such, the respondent No. 2 instruction upon the respondent No. 3 in the impugned Circular to make payment of brokerage charges @ 0.5% of the freight to SCB without receipt of any evidence as to supply to brokerage services to the petitioner by SCB or requiring prior approval of the petitioner confirming their receipt of service from SCB, manifests *mala fide* intention on part of the respondent No. 2 to extract money in favour of SCB from the petitioner without any legal authority and renders the circular illegal and unsustainable. He further submitted that the impugned Circular in effect directed the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB is unlawful and is of no legal effect inasmuch the definite instruction by the respondent No.

2 upon the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB without receipt of any evidence as to the supply of brokerage services amounts to acting contrary to the interpretation of the "brokerage charges" as has been observed by the Appellate Division in Civil Petition for Leave to Appeal No. 357-364 of 1999, whereby the Appellate Division of the Supreme Court of Bangladesh clearly stated that the brokerage charges are to be paid only for "rendering services for booked cargo" as the same do not fall within the category of levy or tax.

29. He again submitted that the impugned Circular in effect directing the petitioner to make payment of brokerage charges 0.5% of the freight to SCB is *ex facie* illegal, without lawful authority and is of no legal effect inasmuch as issuing the impugned circular, the respondent No. 2 failed to take into account that both the Circular dated 14.08.1984 issued by the Ministry of Shipping and Guidelines for Foreign Exchange Transaction, 2009 issued by the respondent No. 1, jointly authorizing deduction of 0.5% of freight for payment of brokerage to SCB suffers from enormous confusion as to the scope of their applicability as both specify deduction @ 0.5% of freight on account of brokerage charges for SCB only in the case of export of "non-jute and non-traditional goods" without providing any definition or clarification of the term "non-traditional goods", so as to render the instruction by the respondent No. 2 upon the petitioner to pay brokerage @ 0.5% of the freight to SCB regardless of the nature of the goods carried by it or If the Bills of Landing issued by it, illegal and unenforceable.

30. He further submitted that the impugned Circular in effect Directing the petitioner to make payment of brokerage

charges @ 0.5% of the freight to SCB is *ex facie* illegal, without lawful authority and is of no legal effect inasmuch the respondent No. 2 in issuing and maintaining the said instruction in force and acting on it by refusing to accept the statements not producing the evidence in support of such payments, in circumstances that it has unequivocally been instructed by the Department of shipping to retain the amount on account of brokerage charges in the blocked account without making payment to any party the respondent No. 2 is acting beyond its jurisdiction and as such a direction is *ultra vires* to the provisions of the Bangladesh Bank Order, 1972.

31. Mr. Alam, further pointed out that the impugned Circular in effect directing the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB is *ex facie* illegal, without lawful authority and is of no legal effect and is *ex-facie* illegal in the circumstances that the respondent Nos. 1 and 2 have been instructed by the department of Shipping to retain the amount on account of brokerage charges in the blocked account and not to make any payment to any party out of the brokerage charges so as to render the instructions of Circular No. 1 dated 01.08.11 for making payment of brokerage charges to SCB inoperative as there is an apparent contradictions between the instructions issued by the Department of Shipping and the respondent No. 2 bearing the possibility of chaotic uncertainty as regards the payment of brokerage charges to SCB:

32. He further submitted that the impugned Circular in effect directing the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB is *ex facie* illegal, without lawful authority and is of no legal effect and of no legal inasmuch the issuance of the impugned orders amounted to

capricious and arbitrary exercise of powers by the respondent Nos. 1 & 2 being an unjustifiable attempt to extract money from the petitioner and restrain it from remitting surplus freight to its principal without assigning any justifiable and discernible reason.

33. He again submitted that the impugned Circular in effect directing the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB as a pre-condition for allowing remittance of freight is *ex-facie* illegal, without lawful authority and is of no legal effect is *ex-facie* void illegal, without lawful authority and is of no legal effect inasmuch as the instruction in effect amounted to regulation of payment of brokerage charges to SCB by the respondent No. 2 overstepping into the jurisdiction of the executive authority, i.e. Ministry of Shipping and Department of Shipping, taking the issuance and continuation of the impugned circular by the respondent Nos. 1 & 2 beyond its authority and jurisdiction.

34. He further agitated that the impugned Circular in effect directing the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB is *ex-facie* illegal, without lawful authority and is of no legal effect inasmuch the respondent Nos. 1 & 2 did not comply with the Rules of natural justice as it failed to give impartial consideration to the petitioner's legitimate expectations of being liable to the payment of brokerage charges only upon receipt of services from SCB in accordance with the declaration made by the Supreme Court of Bangladesh.

35. Mr. Alam, again submitted that the impugned Circular in effect directing the petitioner to make payment of brokerage charges @ 0.5% of the freight to SCB is *ex-*

facie illegal, without lawful authority and is of no legal effect inasmuch the respondent Nos. 1 and 2 failed to give a fair hearing to the petitioner before giving departmental directions against it under the impugned Circular.

36. He at the end submitted that the impugned orders are without any lawful authority and of no legal effect inasmuch as the respondent Nos. 1 and 2's exercise of the discretion amounted to depriving the petitioner of his fundamental rights guaranteed by Articles 27, 31, 40 and 42 of the Constitution.

37. Mr. Abdus Samad, the learned Advocate appearing for the respondent No. 6; submitted that the impugned circulars was issued in compliance with the Government policy, which was made in compliance with the national policy, convention on a code of conduct for liner conferences of United Nations. The said convention was to make to curb the monopoly of the vessel operating carriers operating on a particular route providing liner services for carriage of cargo (Known as liner conference) based on such freight rate etc. as fixed by themselves. The convention addresses as follows: the special needs and problems of the developing countries with respect to the activities of liner conferences, balance of interests between supplier and users of the liner shipping services; remove discrimination; ensuring the conference holding meaningful consultation with shipper's organization; shipper's representative and shippers on the matter of common interest.

38. On perusal of the submission of the learned Advocates of all the sides, the writ petition, affidavit-in-oppositions and the annexed documents, it is also very pertinent to

note that it has been decided in Writ Petition Nos. 5544, 5545, 5546, 5547, 5548, 5549, 5551, 5567 all of 1996 reported in 13 BLD 209 that Government has power to regulate trade and business practice and shipping business is being controlled by the Department of Shipping. The decision dated 05.08.1984 of Ministry of Shipping was taken by the Government in public interest for prohibiting remittance of the 1% freight brokerage out of the country by the shipping agent/owners directing to pay 0.5% to the SCB, which is rendering service to the shippers as well as ship owners and shipping agents. This is not an additional levy or charge rather brokerage collected by the ship owners/agents from shippers.

39. It has also been decided in the same judgment that deduction of brokerage charge by the shipping companies has been made into trade practice and such payment to Shipper's Council is long standing trade practice. And the said judgment was upheld by the Appellate Division in Civil Petition for Leave to Appeal Nos. 357 to 364 of 1999 vide Judgment dated 16.05.1999 and also held that collection of 1% freight brokerage developed is a trade practice. The Government as the regulator of trade and business has the authority to issue circular for proportionate disbursement of brokerage in the national interest as the brokerage is neither levy, tax, duty, nor any charge. No legislation is necessary to regulate a trade practice of this nature. Brokerage itself is not the outcome of any law but of trade practice.

40. That same observation has been followed in Writ Petition No. 8299 of 2008 and it was further held that the disputed 0.5% does not belong to the petitioner which has been decided by the Appellate Division, as such when Bangladesh Bank has asked the

concerned schedule bank to keep such amount isolated for Shippers Council out of the Total realized 1% freight brokerage charge, the same act of Bangladesh Bank cannot be declared as without any lawful authority. In fact, Bangladesh Bank has rightly issued the order to keep 0.5% out of 1% realized freight brokerage charge isolated which cannot be interfered in writ jurisdiction.

41. The Appellate Division of the Supreme Court of Bangladesh on both occasions affirmed the decision issued by the Ministry of Shipping and BIWTA vide Memo No. 1-12/83/SH/7887(13) dated 13.08.1984 as being good and Rule issued therein was discharged. The petitioner and other shipping lines preferred Review Petition before the Appellate Division being No. 46 of 1999, which was also dismissed by observing that-

As the collection of 1% freight brokerage developed out of trade practice the Government as the regulator of trade and business has the authority to issue circulars for proportionate disbursement of brokerage in the national interest as the brokerage is neither a levy nor a tax nor a duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature.

42. Under Section 25 of the Foreign Exchange Regulation Act of 1947, the Government may from time to time give to the Bangladesh Bank such general or special directions as it thinks fit, and the Bangladesh Bank shall in the exercise of the functions under this Act, comply with any such directions, as such, it was duty of Bangladesh Bank to comply with such direction and since it has been decided in Writ Petition Nos. 5544, 5545, 5546, 5547, 5548, 5549, 5551, 5567 all

of 1996 reported in 13 BLD 209 that Government has power to regulate trade and business practice and shipping business is being controlled by the Department of Shipping. The decision dated 05.08.1984 of Ministry of Shipping was taken by the Government in public interest for prohibiting remittance of the 1% freight brokerage out of the country by the shipping agent/owners by showing incorrect expenditure in fictitious names by directing to pay 0.5% to the SCB which is rendering service to the shippers as well as ship owners and shipping agents. This was not additional levy or charge rather brokerage collected by the ship owners/agents from shippers and since the said judgment was upheld by the Appellate Division in civil Petition for Leave to Appeal Nos. 357 to 364 of 1999 vide Judgment dated 16.05.1999 and also held that collection of 1% freight brokerage developed out of trade practice. The Government as the regulator of trade and business has the authority to issue circular for proportionate disbursement of brokerage in the national interest as the brokerage is neither levy, tax, duty nor any other charge. No legislation is necessary to regulate a trade practice of this nature. Brokerage itself is not the outcome of any law but of trade practice. Hence, question of delay is central in this case.

43. And therefore, it is quite clear that the issue in fact has been decided long ago by this Court, as well as, by the Appellate Division, as such, we do not find any merit in the Rule.

44. In the result, the Rule is discharged.