9 SCOB [2017] AD 70

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CIVIL PETITION FOR LEAVE TO APPEAL NO.1162 of 2013.
(From the judgment and order dated 03.04.2011 passed by a Division Bench of the High Court Division in Suo Moto Rule No. 19 of 2010).

President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) : ....Petitioner.

Versus

Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Bangladesh Secretariat, Dhaka and others. : ....Respondents.

For the Petitioner.	:	Mr. Rafique-Ul-Huq, Senior Advocate (with Mr. Quamrul Huq Siddique, Advocate), instructed by Mr. Bivash Chandra Biswas, Advocate-On-Record.
Respondents.	:	Not Represented.
Date of Hearing.	:	The 2nd June, 2016.

Joladhar Ain 2000(Act XXXVI of 2000)
Sections 5 and 8:
The BGMEA has constructed a fifteen storied commercial complex on the "Begun Bari Khal" and "Hatir jheel lake" which is natural waterbody (*cÖKwZK Rjvavi*) as has been specifically admitted in the schedule to the transfer deed, Annexure-K-2 as well as in the government record and in the Master Plan of the Dhaka City, as Lake/Jolashoy/Doba. As such from the above provision of law, the class or the nature and character of the same cannot be changed nor can be used in any other manner/purpose nor can the same be leased out, rented or transferred by anybody. The law further provides that any person changing the nature and character of such "Joladhar" (water body), in violation of section 5 of the said Act of 2000, shall be dealt with in accordance with law as provided in section 8. Since BGMEA has constructed the multi-storied commercial building upon the said waterbody in violation of the law such illegal construction/obstruction must be demolished for which the BGMEA or any other

person, notwithstanding anything contained in any other law, cannot claim any compensation as provided in Section 8(2) of the Joladhar Ain 2000. ...(Para 17)

Joladhar Ain 2000(Act XXXVI of 2000)
Sections 2(Cha), 3, 5 and 8:
And
Environment Conservation Act, 1995
Section 2(ka ka), 2(Ka), 6 (Uma) and 15:

We perused the Dhaka Metropolitan Development Plan, VOL-II Urban Area Plan (1995-2015) published in the Gazette notification vide SRO No. 91-AIN/1997 on 05.04.1997, commonly known as "Proposed Master Plan", wherein the "Begumbari Khal" has been recorded and recognized as a "Joladhar". Side by side the registered deed in favour of EPB executed by the Bangladesh Railway Annexure K-2, in its schedule clearly mentioned the transferred property as "Doba"-(waterbody) which attracts Section 2(Cha) of the "Joladhar Ain 2000" as well as section 2(ka ka) of the Environment Conservation Act. As such pursuant to the non-obstante clause incorporated in section 3 of the "Joladhar Ain 2000" as well as section 2Ka of the Environment Conservation Act 1995, both the laws shall prevail over any other law prevailing in the country for the time being in force. Thus the prohibition imposed by section 5 of the Joladhar Ain and section 6 (Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition shall be dealt with in accordance with section 8 of the "Joladhar Ain," as well as section 15 of the Environment Conservation Act 1995. In such view of the matter the transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation. ...(Para 19)

JUDGMENT

MIRZA HUSSAIN HAIDER, J:

1. This civil petition for leave to appeal is directed against the judgment and order dated 03.04.2011, passed by the High Court Division, in Suo Moto Rule No. 19 of 2010, making the Rule absolute.

2. Facts leading to filing of this Civil Petition for Leave to Appeal in brief, are:
A news item, published in an English Vernacular "the Daily New Age" on 02.10.2010, under the caption " No Plan to demolish unauthorized BGMEA Building soon" was brought to the notice of a Division Bench of the High Court Division which is constructed/erected on part of the "Begunbari Khal" and "Hatirjheel Lake", two natural water bodies, situated in their present location since time immemorial and remained undisturbed even after the construction of Tongi Diversion Road, and Panthapath in last four/five decades. The said two waterbodies are connected with the river Buriganga, through canals, which play a pivotal role, like many other water bodies in and around the historic Dhaka City, in keeping the capital safe from water logging and flood during heavy monsoon. Now the said two

Khal/lakes are the only living water-bodies in the memory of the inhabitants of Dhaka. It reveals from the materials on record that to protect the said two waterbodies from the grabbers, the Government took up a huge project involving more than TK. 1,480 crores, through the Rajdhani Unnayan Kartipakkhiya (RAJUK), long ago, and thereby save, restore and preserve the remnant of the Begumbari Khal and Hatirjheel Lake as much as possible; the said project, known as "Hatirjheel-Begunbari Project", consists of beautification of the same, providing water based amusement facilities and construction of circular roads in and around the said two lakes/waterbodies so that the city dwellers get a breathing place. But the Bangladesh Garments Manufacturers and Exporters Association(BGMEA) in the name of constructing its own office Complex joined the land grabbers and accordingly it managed permission from the Government as well as from the RAJUK to build a 15 storied building on the said waterbodies. Accordingly it constructed the said building defying all the laws of the land and thereby eclipsing the said waterbodies, and thereby restricting/depriving the people to have the full enjoyment of the facilities supposed to be provided in the said waterbodies under the project. The illegal construction was opposed by cross section of people including, environmental activists, Engineers, architects, physicians, educationists and general people who had been crying hard to save and protect the said waterbodies from the very beginning of the construction of the said BGMEA building.

3. Under such circumstances, the said Division Bench of the High Court Division issued a Suo Moto Rule on 03.10.2010 calling upon (1) the Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public works, (2) Chairman, Rajdhani Unnayan Kartripakkha (RAJUK), (3) President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA), Hatirjheel, Dhaka, (4) Authorized Officer (Building Construction) RAJUK, Dhaka, (5) Deputy Commissioner, Dhaka and (6) Commissioner, Dhaka Metropolitan Police, to show cause as to why "they should not be directed to take necessary and appropriate steps in accordance with law to demolish the BGMEA Building located at Hatirjheel, Dhaka, being an unauthorized construction, and as to why they should not be directed to take appropriate steps against the concerned officials for failing to discharge their respective duties in accordance with law and/ or pass such other or further order or orders as to this Court may seem fit and proper."

4. The Rule being served upon the aforesaid respondents, only the BGMEA entered appearance and contested the Rule by filing affidavit in opposition stating inter alia that an application was tabled before the Authorized Officer of the RAJUK seeking approval of the plan to erect a 15 storied building on 0.66 acre of land at 23/1 Panthapath Link Road at Kawran Bazar Area, Dhaka which is owned by the said respondent as being an allottee of the Export Promotion Bureau (EPB). Accordingly an approval of site plan of BGMEA for the construction of a multistoried building complex was issued under the signature of the Secretary, RAJUK on 14.07.2003 pursuant to a decision taken in a general meeting of RAJUK subject to certain conditions. The RAJUK thereafter by another letter dated 20.08.2006 asked the BGMEA to remove the unauthorized constructions/structures from the place which were suppose to be kept vacant and also directed BGMEA to pay a sum of TK. 12,50,000/- as penalty for commencing construction of the work before procuring approval. It is stated that the building was ultimately constructed on the said allotted land after obtaining lawful approval from the RAJUK and all other authorities. The said respondent claims that the construction has been done wholly in accordance with the Building Construction Act, 1952 without any objection from any quarter and no other authority raised any aspersion as to violation of any law in constructing the said building.

5. By filing a supplementary affidavit in opposition the BGMEA stated that initially 0.66 acre of land from several plots of mouzas Boromoghbazar and Begunbari was allotted pursuant to an agreement between BGMEA and EPB dated 07.05.2001. Clause 2 of the said agreement stipulates that in the event of any dispute on the title of the land, the responsibility shall lie on the EPB. However, the BGMEA was handed over possession of 0.63 acre of land from CS Plots No. 208 and 209 and 0.03 acre of land from CS Plot No. 105 and the building has been constructed on the aforesaid 0.63 acre of land on Plots No. 208 and 209 leaving 0.241 acres on the northern side vacant which was contiguous to CS Plot No. 105 on which Begunbari canal/lake is situated. It is further stated that the aforesaid land along with many other lands initially belonged to the Bangladesh Railway out of which 5.555 acres of land were transferred to EPB by the Government of Bangladesh represented by the General Manager Bangladesh Railway vide registered deed dated 17.12.2006 out of which only 0.66 acre of land has been allotted to BGMEA by the EPB. The BGMEA paid full consideration money amounting to TK.43,56,86,274.00 to the EPB in installments. Thus the BGMEA has full right, title, interest and possession in the land in question whereupon after obtaining required permissions/approvals from all concerned authorities, including RAJUK, constructed the said 15 storied building according to the approved plan. As such there is no illegality.

6. When the Rule was made ready, the said Bench of the High Court Division requested a number of Government, Semi Government, Autonomous and private bodies related and concerned with environmental and other laws of the land, to assist the Court. Amongst them the Bangladesh Environmental Lawyers' Association (BELA)filed certain documents for consideration of the Court in respect of the land in question as well as construction of the said building by the BGMEA. It appears from the said documents that total 40 kathas of land were purportedly sold to the Export Promotion Bureau(EPB) out of which the EPB allotted a portion of the same to BGMEA directing to exclude 2.8 kathas from construction as the same would adversely impede implementation of the "Hatirjheel Begunbari Project" as well as Begunbari canal. The said quantum of excluded land was subsequently reduced to 2.41 kathas for the purpose of protecting the said canal and the project. It further appears from those papers that merely a land use permit was accorded to the BGMEA for construction but it was never accorded with actual permission for construction nor the building construction plan was ever approved by the RAJUK under the Building Construction Act 1952 and rules framed thereunder in 1996. It further appears that the Building Construction Committee of RAJUK in its meeting dated 14.7.2003 resolved to conditionally approve the plan submitted by BGMEA but as a matter of fact no approval letter has been issued because of persistent failure of the BGMEA to fulfill the conditions attached. The BGMEA did not pay any heed to the directions of the RAJUK requiring to refrain from any construction work before obtaining final approval. Admittedly the RAJUK imposed penalty for unauthorized construction violating the law as well as the land use permission and thereby BGMEA was compelled to demolish the illegal construction prior to final approval. However, from the papers and documents of the concerned authorities BELA and other experts contended that the BGMEA not only deviated from the plan but also continued with the unauthorized construction beyond the sanction of law. Hence they prayed for passing appropriate direction to demolish the said unauthorized construction of BGMEA.

7. The RAJUK also filed its own and independent pleading by way of affidavit in opposition stating that the BGMEA constructed the building in question upon violating the Building Construction Act 1952 as well as "*gnvbMix , wefvMxq kni I †Rjv kn‡ii GjvKv mn †`‡ki mKj †cŠi GjvKvi †Ljvi gvV , Db¥y³ ¯'vb, D`¨vY Ges cÖvK…wZK Rjvavi msiÿ‡bi Rb¨ cÖYxZ AvBb*", (Act XXXVI of 2000). RAJUK further stated that 0.66 acre of land out of 6.12 acres was proposed

to be leased out to BGMEA by EPB pursuant to the nod of the Ministry of Commerce. Accordingly, the EPB executed a deed extending permission to BGMEA only to use the land, attaching stipulation therein that it would be open to BGMEA to take necessary plan to construct a multistoried building wherein the RAJUK took objection to the use of 5.23 kathas of land as the same was linked with the proposed Hatirjheel-Begunbari project for development of the lake. But eventually RAJUK agreed to accede to the proposition that 2.41 kathas of land could be arranged for the development of the proposed project. However, RAJUK emphasized that the BGMEA could not acquire any title over the land by virtue of the said agreement.

8. On this backdrops the said Division Bench of the High Court Division directed the Deputy Commissioner, Dhaka, to depute an official with all relevant papers relating to the Begunbari canel as well as the Hatirjheel-Begunbari project to consider whether the BGMEA had title over the said land to construct such multistoried structure in violation of different laws of the land, which overshadowed the question of approval given by different authorities. In compliance thereof, the Deputy Commissioner, Dhaka, turned up with volume of dockets retained by the District Administration Office. When the same were placed before the High Court Division none of the parties, including BGMEA, raised any objection as to the authenticity of any of those documents.

9. Under such circumstances upon hearing a good number of experts including the learned Attorney General, and others as amici curiea and upon considering all the documents placed before it and considering the facts and circumstances and the connected laws of the land made the said Suo Moto Rule absolute by judgment and order dated 03.04.2011, holding that the 15 storied building constructed by BGMEA has been done on the water body illegally which is contrary to the master plan as well as the development plan of the Dhaka City in violation of Act XXXVI of 2000 and such construction cannot be allowed to remain in its position. Accordingly, the authority concerned was directed to demolish the said unauthorized building within 90 days. The High Court Division further held that 'the money invested by the BGMEA in the construction of the said building can never be a ground to allow it to stay upright'. Thus it has ordered that 'the BGMEA must return the money to those who bought flats/spaces in the said unauthorized building, as those transactions stand vitiated, within 12 months from the date of receipt of the claim. The flats/spaces buyers, can however, not, claim interest, because, they are guilty of contributory negligence as they had actual or constructive knowledge about BGMEA's bareness of title and the illegality as to the construction of the said building'.

10. Being aggrieved by and dissatisfied with the said judgment and order of the High Court Division the President, BGMEA filed this civil petition for leave to appeal before this Division and obtained order of stay from the learned Judge in Chamber.

11. Mr. Rafique-ul Haque, the learned Senior Counsel appearing with Mr. Quamrul Huq Siddique, learned Counsel, on behalf of the petitioner extraneously submits that the BGMEA had nothing to do with the transfer of the land in question as the Export Promotion Bureau(EPB), pursuant to the approval of the Government through the Ministry of Commerce, allotted the said land in favour of the BGMEA for constructing its office building and accordingly an agreement between EPB and BGMEA was executed on 7.5.2001, pursuant to which, the BGMEA upon obtaining clearance from all concerned authorities obtained the plan approved by the RAJUK and constructed the said building on the said piece of land by investing more than several crores of taka within the knowledge of everybody and

as such the impugned judgment and order of the High Court Division directing to demolish the said building is without lawful authority and of no legal effect. He next submits that h by investing huge amount of money the BGMEA has constructed the said building and many office spaces/flats have been sold to several other persons who are running their business/offices for more than a decade. As such demolition of the said building will not only act harshly upon the petitioner but also equally affect the flats/office space owners. He submits that the petitioner will get the benefit of section 43 of the Transfer of Property Act if the transfer by EPB appears to be fraudulent or otherwise nor the transfer of the said land to BGMEA shall be invalidated/affected under section 53C of the Transfer of Property Act or Section 52A of the Registration Act as the agreement dated 7.5.2001 is not a deed of conveyance purporting to transfer the title of the said land and the construction of the office building of the BGMEA is, of course, for public purpose as the members of the Association employed more than 45 lacs of workers. Thus demolition of the said building will affect more than 4/5 crores of people of the country resulting in reduction of the GDP to a great extent. He next submits that the finding of the High Court Division that 'the BGMEA and the Export Promotion Bureau made a conspiracy to illegally grab the Government's land' is not based on any material on record; rather the Government, through the Ministry of Commerce, decided to allot the land in question in favour of the BGMEA in 1988. He further submits that since the BGMEA has paid fine, ten times of the prescribed fees, to the RAJUK under Section 3B(5)(d) of the Building Construction Act, 1952 the BGMEA is entitled to receive the approval of the plan. The learned Counsel further submits that after the land being allotted to the BGMEA and the construction being started upon complying with all the directives of the RAJUK and for a single violation the BGMEA having paid penalty to the RAJUK and thereafter the plan having been approved by the RAJUK consequently the construction being completed in accordance with the approved plan there is no violation of section 3 and as such the order of demolishing the said building for alleged unauthorized construction is not tenable in law. Lastly, it is submitted that since the BGMEA does not fall within the criteria of Section 3B(5) of the Building Construction Act, who would be directed to dismantle/demolish the said building and since necessary fees/fines/penalties has already been paid by the BGMEA there is no scope of passing any order of demolishing the building under Section 3B(5) of the Building Construction Act. Thus the High Court Division failed to appreciate that the land in question was neither in the Begunbari Khal nor a wetland (Jaladhar), nor the building has been constructed illegally upon obstructing the Hatirjheel Project, and as such erred in directing to demolish the said building. Hence, the impugned judgment and order is liable to be set aside.

12. From the facts as stated above and on consideration of the materials on record it appears that the BGMEA claimed that in 1988 the Government of Bangladesh decided to construct World Trade Centre. Accordingly, 6.12 acres of land situated on six different mouzas namely, (1) Rajar Bagh (2) Shahar Khilgaon (3) Boro Moghbazar (4) Begun Bari (5) Bagh Noadda and (6) Kawran, which were originally acquired for the Railway Department vide LA Case No. 16/59-60 along with many other lands, were decided to be transferred to the Ministry of Commerce. Subsequently, the Ministry of Commerce through Export Promotion Bureau decided to allot some of the said 6.12 acres of land to BGMEA for constructing its Office Complex. Thereafter on 17.12.2006 a deed of conveyance was executed and registered by the Bangladesh Railway in favour of the Export Promotion Bureau (EPB), wherein 5.55 acres of land, instead of 6.12 acres covering the aforesaid mouzas, which is admittedly "Doba" (Jolashoy), was handed over to the Export Promotion Bureau for which consideration money was to be paid in five installments. Interestingly, from the record it appears that five years earlier to the said transfer and handing over possession of

the said land, the Export Promotion Bureau, on 7.5.2001 entered into an agreement with BGMEA to hand over possession of 0.66 acre of land out of the said 5.55 acres. So it is clear that Export Promotion Bureau did not have any right, title, interest and possession over the property in question before the transfer of the same by the Bangladesh Railway on 17.12.2006. Thus a question arises as to how the Export Promotion Bureau could enter into an agreement with BGMEA and hand over possession of the same in favour of BGMEA before it could have acquired any right, title, interest and possession of its own. Moreover, from Annexure- K-2, the registered deed of transfer dated 17.12.2006 by Railway to EPB, it appears that in the schedule the land/property transferred to BGMEA has been described as 'Doba'. The term "†Wvev" (Doba) means "Joladhar", (water body), the nature and character of which cannot be changed into any other class or such water body cannot be transferred, let out or used in any other manner as provided in section 5 of "Joladhar Ain" (Act XXXVI of 2000) as well as in section 6 Uma of the Bangladesh Poribesh Shongrokkhon Ain 1995". Thus the so called transfer cannot, under any circumstances, be protected under any law not even under Sections 43 or 53C of the Transfer of Property Act as well as under section 52A of the Registration Act, as claimed by Mr. Huq. Thus we express our great anxiety as to how the "Doba" (waterbody) could be transferred/allotted to BGMEA for constructing a 15 storied building upon changing its nature and character in violation of the abovenoted laws, moreso when admittedly the Export Promotion Bureau did not obtain any right, title, interest or possession of the same.

13. On consideration of the materials on record and the chronology of facts as stated above, it is clear that admittedly BGMEA constructed the building on a place which is covered by CS Plot No. 208 of Mouza Boro Mogh Bazar; CS Plot No. 1 of Mouza "Baag Noadda" and CS Plot No. 105 of Mouza "Begunbari", which, admittedly, have been classified as "Doba" means "Jolashoy" (Rjvkq) as apparent from the schedule of the EPB's registered transfer deed dated 17.12.2006. Under Section 2(Cha) of the "gnvbMix, wefvMxq kni I †Rjv kn‡ii GjvKvmn †`‡ki mKj †cŠi GjvKvi †Ljvi gvV, Db¥y³ ¯'vb, D`¨vY Ges cÖvK…wZK Rjvavi msi¶‡bi Rb¨ cÖYxZ AvBb", (Act XXXVI of 2000)(in short "Joladhar Ain", 2000) a "Jolashoy" (Rjvkq) falls within the definition of "Prakkitik Joladhar" (cÖvK…wZK Rjvavi) which retains rain water and/ or other water. Any transfer of such Jaladhar or any change of its nature, creating obstruction/ construction of any sort on such "Joladhar" (water body) is prohibition under Section 5 of the "Joladhar Ain 2000" and section 8 of the said Ain deals with punishment for creating such obstruction or changing the nature and character of such water body and/or for violation of the said law which is a special law with a non-obstante clause in section 3. Section 2(cha), 3, 5 and 8 of the said Ain of 2000 read as follows:

"2 | msÁv |- wel q ev cÖm‡½i cwicš' †Kvb wKQy bv _vK‡j, GB AvB‡b

....

P) "cÖvK…wZK Rjvavi" A_© b`x, Lvj, wej, `xwN, SY©ev Rjvkq wnmv‡e gv÷vi cøv‡b wPwýZ ev miKvi, ¯'vbxq miKvi ev †Kvb ms¯'v KZ©„K miKvwi †M‡R‡U cÖÁvcb Øviv ,eb¨v cÖevn GjvKv wnmv‡e †NvwlZ †Kvb RvqMv Ges mjj cvwb Ges e„wói cvwb avi Y K‡i Ggb †Kvb fywgI Gi AšÍf©y³ n‡e;"

"3 | AvB‡bi cÖvavb¨ |- AvcvZZt ej er Ab¨ †Kvb AvB‡b hvnv wKQyB _vKzK bv †Kb, GB AvBb I Z`axb cÖYxZ wewai weavbvejx Kvh©Ki _vwK‡e |"

"5| †Ljvi gvV, Db¥y³ ¯'vb, D`¨vb I cÖvK…wZK Rjvav‡ii †kªYx cwieZ©‡b evav-wb‡la |- GB AvB‡bi weavb Abyhvqx e¨ZxZ, †Ljvi gvV, Db¥y³ ¯'vb, D`¨vb Ges cÖvK…wZK Rjvavi wnmv‡e wPwýZ RvqMvi †kYx cwieZ©b Kiv hv‡e bv ev D³ iƒc RvqMv Ab¨ †Kvbfv‡e e¨envi Kiv hv‡e bv ev Abyiƒc e¨envi‡ii Rb¨ fvov, BRviv ev Ab¨ †Kvbfv‡e n¯ÍvšÍi Kiv hv‡e bv|

e¨vL¨v: GB avivi D‡Ï k¨ ci-YK‡í †Kvb D`¨v‡bi †gŠwjK ˆewkó¨ bó nq Giƒc Zvi e„¶ivwR wbab‡K D`¨vbwU †kªYx cwieZ©‡bi iƒc MY¨ Kiv n‡e|"

"8| kw¯—; BZ¨vw`|- (1) †Kvb e¨w³ GB AvBb †Kvb weavb j•Nb Ki‡j wZwb AbwaK 5 ermi Kviv`‡Û ev AbwaK 50(cÂvk) nvRvi UvKv A_©`‡Û A_ev Dfq `‡Û `Ûbxq n‡eb|

(2) avi 5 Gi weavb j•Nb K‡i hw` †Kvb RvqMvq ev RvqMvi Ask‡k‡li †kYx cwieZ©b Kiv nq, Zv nB‡j mswkó KZ…©c¶ †bvwUk Øviv Rwgi gvwj‡K A_ev weavb j•NbKvix e¨w³‡K †bvwU‡k DwjøwLZ RvqMvi †kYx cwieZ©‡bi Kv‡R evav cÖvb Ki‡Z cvwi‡e Ges wbawiZ c×wZ‡Z Abbyg¨`Z wbgv©Kvh© †f‡½ †dwj‡e ev wb‡`©k w`‡Z cvwi‡e Ges Ab¨‡Kvb AvB‡bi hvnv wKQzB _vKzK bv †Kb, D³iƒc †f‡½ †djvi Rb¨ †Kvb ¶wZc~iY cÖ`q nB‡e bv|

(3) GB AvB‡bi weavb j•Nb K‡i hw` †Kvb wbgv©Kvh© m¤úbœ ev AvsWkKfv‡e ˆZwi n‡q _v‡K †mB mKj AeKvVv‡gv Av`vj‡Zi Av‡`‡k msw¯ó KZ…©c‡¶i eive‡i ev‡RqvB n‡e"|

14. On the other hand section 2(Ka Ka), (Cha), 6 Umma and 12 of ÔÔevsjv‡`k cwi‡ek msi¶Y AvBb 1995" (the Environment Conservation Act 1995) read as follows:

ÔÔ 2| msÁv|- welq A_ev cÖms‡½i cwicš'x †Kvb wKQy bv _vwK‡j GB AvBb,

(KK) ÔÔRjvavi ÕÕ A_© b`x, Lvj, wej, nvIo, evIo, `xwN, cyKzi, SY©v ev Rjvkq wnmv‡e mi Kvwi fzwg †iK‡W© wPwýZ fzwg ev miKvi, ¯'vbxq miKvi ev miKvwi †Kvb ms¯'v KZ…©K miKvwi †M‡R‡U cÖÁvcb Øviv †NvwlZ †Kvb Rjvfzwg, eb¨v cÖevn GjvKv, mjj cvwb I ewói cvwb avi Y K‡i Ggb †Kvb fzwg|

(P) ÔÔcwi‡ek msi¶YÕÕ A_© cwi‡e‡ki wewfbœ Dcv`v‡b ¸bMZ I cwigvb MZ gvb Dbœqb Ges ¸bMZ I cwigvbMZ gv‡bi AebwZ †iva ÕÕ;

6O| Rjvavi m¤úwK©Z evav- wb‡la|- AvcvZZt ejer Ab¨ †Kvb AvB‡b hvnv wKQzB _vKzK bv †Kb, Rjvavi wn‡m‡e wPwýZ RvqMv fivU ev Ab¨ †Kvb fv‡e †kYx cwieZ©b Kiv hvB‡e bv

Z‡e kZ©_v‡K †h, Acwinvh© RvZxq ¯^v‡_© Awa`ß‡ii QvocÎ MÖnYµ‡g Rjvavi m¤úwK©Z evav-wb‡la wkw_j Kiv hvB‡Z cv‡i|

ÔÔ 12| cwi‡ek MZ QvocÎ| - gnvcwiPvj‡Ki wbKU nB‡Z, weavb Øviv wbawiZ c×wZ‡Z, cwi‡e‡kMZ QvocÎ e¨wZ‡i‡K †Kvb GjvKvq †Kvb wkí cÖwZôvb ¯'vcb ev cÖKí MÖnY Kiv hvB‡e bv;

Z‡e kZ©_v‡K †h miKvi KZ…©K mgq mgq ÎZ`y‡Ï‡k¨ wbawiZ †kYxi wkí cÖwZôvb ev cÖK‡íi †¶‡Î GB avivi †Kvb wKQyB cÖ‡hvR¨ n‡e bv|"

15. Section 12 has been amended in 2010 upon incorporating a few sub sections but the mandatory provision of obtaining Environment clearance certificate has not been touched.

16. On the other hand under Rule 7 of the ÔÔcwi‡ek msi¶Y wewagvjv 1997ÕÕ (Environment Conservation Rules 1997) all industries/establishments and projects have been classified into four categories, considering the graveness of such establishment/project's impact on the environment. The projects having/causing minimum impact on the environment have been classified in "Green" class and projects having/causing more serious impact have been classified gradually in Orange- Ka, Orange-Kha and Red class considering the graveness of impact on environment. In schedule 1 (Prepared under Rule 7(2) of the said Rules) commercial establishment/project has been categorized/classified in "Orange Kha" class for which, there is mandatory requirement of obtaining, the Site Clearance Certificate at the very first step and then the Environment Clearance Certificate as provided in Rule 7(4). Rule 7(4) of the said Rules of 1997 reads as follows:

ÔÔ 7| (4) Kgjv - K, Kgjv L Ges jvj †kYx fz³ cÖ¯—veZ wkí cÖwZôvb I cÖK‡íi †¶‡Î me©cÖ_g Ae¯'vbMZ Ges Zrci cwi‡ek MZ QvocÎ cÖvb Kiv nB‡e|

Z‡e kZ©_v‡K †h, †Kvb wkí cÖwZôvb ev cÖK‡íi Av‡e`b µ‡g Ges gnvcwiPvjK hw` Dch³ g‡b K‡ib, Zvnv nB‡j wZwb D³ wkí cÖwZôvb ev cÖKí‡K Ae¯'vb MZ QvocÎ cÖvb e¨wZ‡i‡K mivmwi cwi‡ek MZ QvocÎ cÖvb Kwi‡Z cvwi‡eb|"

17. From the facts stated above admittedly the BGMEA has constructed a fifteen storied commercial complex on the "Begun Bari Khal" and "Hatir jheel lake" which is natural

waterbody (*cÖvK…wZK Rjvavi*) as has been specifically admitted in the schedule to the transfer deed, Annexure-K-2 as well as in the government record and in the Master Plan of the Dhaka City, as Lake/Jolashoy/Doba. As such from the above provision of law, the class or the nature and character of the same cannot be changed nor can be used in any other manner/purpose nor can the same be leased out, rented or transferred by any body. The law further provides that any person changing the nature and character of such "Joladhar" (water body), in violation of section 5 of the said Act of 2000, shall be dealt with in accordance with law as provided in section 8. Since BGMEA has constructed the multi-storied commercial building upon the said waterbody in violation of the law such illegal construction/obstruction must be demolished for which the BGMEA or any other person, notwithstanding anything contained in any other law, cannot claim any compensation as provided in Section 8(2) of the Joladhar Ain 2000. On the other hand the non-obstante clause of section 6 Uma of the Environment Conservation Act also provides clear prohibition in such construction/erection of any building on the waterbody (*cÖvK…wZK Rjvavi*). In the case of Union of India and others Vs. Kamath Holiday Resort Pvt. Ltd (AIR 1996 SC 1040) some land of reserved forest area were leased out to set up a "snack bar" and a restaurant to cater to the needs of the tourists visiting the forest which was objected to by the Conservator of Forest, as the same would affect the forest. The Supreme Court of India, relying on section 2 of the Forest Act 1980, observed that 'the Conservator of Forest was legal inasmuch as there was restriction on the de-reservation of forest or use of forest land for non forest purpose'. However, relying on section 3 of the said Act the Supreme Court made a balance between the environment and necessity/demand of other use of the forest. But in our country there is no such provision of balancing in either of the aforesaid laws. Rather the Environment Conservation Act of 1995, in proviso to section 12 has given exemption to the government for setting up specific class of industrial establishments/projects. The BGMEA building is neither a specified class of industrial establishment nor a government project, rather it is wholly a commercial establishment for the benefit of the BGMEA, a private body.

18. In respect of making construction on low lying areas which protects the Dhaka City during heavy rain or flood from being totally submerged, a project named as "Modhumoti Model Town", a new proposed township has been declared to be illegal. The earth filling and initial construction work of the said project has been declared to be in violation of the Environmental and other laws of the land by the Appellate Division of the Supreme Court of Bangladesh(65 DLR(AD)181 Metro Makers and Developers Ltd Vs. BELA). So any project undertaken in violation of any law can never get the approval. In the aforesaid case, the apex Court held "the object of Joladhar Ain is to protect "Prakkitik Joladhar" mainly for the purpose of proper drainage of flood and rain water in the Dhaka City and under the law conversion of Prakkitik Joladhar to undertake a project cannot be allowed as that would not be consistent with the purpose of law…."

19. In the present case admittedly the "Begunbari Khal" and the "Hatirjheel" are natural waterbodies ("Prakkitik Joladhar"), as the same has been included in the Dhaka Metropolitan Development Plan, Vol-II (Urban area plan (1995-2005) which drains $\frac{1}{3}$ of the Dhaka city's storm and waste water side by side retains the rain water and the same is to provide the water based recreational opportunities in a fairly location. So implementation of any commercial building changing the nature and character of the said waterbodies ("Prakkitik Joladhar") in violation of "Joladhar Ain" is completely without lawful authority. Such construction is in violation of the mandatory provision of the said law as well as of the Environment Conservation Act 1995. Moreover, in similarity with section 2(Cha) of the "Joladhar Ain"

section 2(ka ka) of the Environment Conservation Act 1995 has also defined "Joladhar" as ÔÔRjvaviÕÕ A_©b`x, Lvj, wej, nvIo, evIo, `xwN, cyKzi, SYv© ev Rjvkq wnmv‡e miKvwi fywg †iK‡W© wPwýZ fywg ev miKvi, ¯'vbxq miKvi ev miKvwi †Kvb ms¯'v KZ…©K miKvwi †M‡R‡U cÖÁvcb Øviv †NvwlZ †Kvb Rjvfywg, eb¨v cÖevn GjvKv, mjj cvwb I euniversity cvwb aviY K‡i Ggb †Kvb fywg | So the aforesaid two laws have spelt out that any area/place marked/recognized/recorded as "Joladhar" in any gazette notification published by the government fall within the definition of "Joladhar". In this regard we perused the Dhaka Metropolitan Development Plan, VOL-II Urban Area Plan (1995-2015) published in the Gazette notification vide SRO No. 91-AIN/1997 on 05.04.1997, commonly known as "Proposed Master Plan", wherein the "Begumbari Khal" has been recorded and recognized as a "Joladhar". Side by side the registered deed in favour of EPB executed by the Bangladesh Railway Annexure K-2, in its schedule clearly mentioned the transferred property as "Doba"-(waterbody) which attracts Section 2(Cha) of the "Joladhar Ain 2000" as well as section 2(ka ka) of the Environment Conservation Act. As such pursuant to the non-obstante clause incorporated in section 3 of the "Joladhar Ain 2000" as well as section 2Ka of the Environment Conservation Act 1995, both the laws shall prevail over any other law prevailing in the country for the time being in force. Thus the prohibition imposed by section 5 of the Joladhar Ain and section 6(Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition shall be dealt with in accordance with section 8 of the "Joladhar Ain," as well as section 15 of the Environment Conservation Act 1995. In such view of the matter the transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation.

20. On the second count, when a property is transferred, two laws, namely, the Transfer of Property Act, 1882 and the Registration Act, 1908 come into operation to validitate such transfer. Transfer, under the Transfer of Property Act, includes transfer of title, transfer of interest and transfer of possession. But when the transferor has not acquired any right, title, interest and possession in any property and got his name recorded in the government record under section 143 of the State Acquisition and Tenancy Act 1950, he can never sell or lease out such property in any manner, through deed of sale/lease agreement/sale agreement as provided in section 53C of the Transfer of Property Act and also under section 52 of the Registration Act. In the present case admittedly the Export Promotion Bureau did not acquire any right, title, interest or possession, on the property in question before 17.12.2006 and having not gotten its name recorded in the record pursuant to such transfer, the alleged transfer by the EPB, through agreement dated 7.5.2001 in favour of BGMEA, which is five years prior to the EPB's acquisition of title, if any, is not at all a valid transfer in the eye of law. Thus the Export Promotion Bureau had no right/authority to transfer/allot or handover possession of the property in question in favour of the BGMEA or any other person/authority before any title being vested upon it. The agreement dated 7.5.2001, on the basis of which the BGMEA constructed the commercial complex building, itself is a nullity and no right, not to speak of title or interest, ever accrued upon the BGMEA as the agreement was entered into before EPB obtained right, title and interest on the property in question. Such transfer/allotment is void under the aforesaid two laws. As such, when the transfer/allotment itself is without lawful authority rather void, obtaining no objection/clearance certificate from any authority or approval of the plan from the RAJUK will not cure the illegality. Moreso, when admittedly, the construction of the BGMEA commercial building in question has been completed before the transfer was made by the Bangladesh Railway to the Export Promotion

Bureau the construction of the BGMEA commercial building complex on the said land is not only unauthorized but also illegal and void which cannot be cured under any law as claimed by Mr. Hoque under the principle that illegality committed at the very inception cannot be cured by any subsequent action whether valid or not.

21. On the other hand since the Export Promotion Bureau did not acquire any title on the property in question, which are natural waterbodies, before 17.12.2006, which is again not a valid transfer in accordance with section 53C of the Transfer of Property Act 1982 as well as section 52 of the Registration Act 1908, and also under section 5 of the Joladhar Ain, 2000, the purported transfer/allotment of the same pursuant to certain memos issued by the Ministry and by an unregistered agreement by EPB in 2001 is totally a vacuous move which was neither a sale nor a lease within the meaning of the aforesaid two laws. As such the construction on such natural waterbodies/property by BGMEA, a private organization without having any legal/valid right, title on the same, is not only illegal but is the result of pernicious acts of inexonerable fraud and deceit.

22. Again from Annexure-C-7 dated 07.01.2003 (Annexed to the writ petition) it appears that the office of the Deputy Director of the Department of Environment, issued the same captioned as "Ae¯'vbMZ QvocÎ" meaning "site clearance certificate" not "cwi‡ekMZ QvocÎ" meaning "Environmental clearance certificate" which is required to be obtained from the Director General of the Department of Environment after the conditions contained in the "Ae¯'vbMZ QvocÎ" are fulfilled for the purpose of constructing any structure/ building/establishment or any industrial/commercial establishment or a project on any land within Bangladesh as per section 12 of the Environment Conservation Act 1995 read with Rule 7(4) of the Environment Conservation Rules 1997. From the language of Section 12 of the Environment Conservation Act 1995 it is clear that no construction of any project can be undertaken without obtaining the Environment Clearance Certificate "(cwi‡ekMZ QvocÎ)" from the Director General of Environment not 'site clearance certificate'(Ae¯'vbMZ QvocÎ), which is rather one of the preconditions to obtain the Environment clearance certificate. Reading Rule 7(4) of the Environmental Conservation Rules 1997 it appears that "Ae¯'vbMZ QvocÎ" (site clearance certificate) is required to be obtained in respect of industrial/commercial establishment/project which are classified/categorized in class Orange 'Ka' Orage-Kha and Red.' Under schedule-I,(prepared under Rule 7(2) of the aforesaid Rules of 1997) Hotel, multistoried commercial/apartment building have been classified/categorized in class "Orange Kha" which requires site clearance certificate before obtaining Environment Clearance Certificate. The petitioner's building admittedly being a fifteen storied commercial building requires both "Ae¯'vbMZ QvocÎ" as well as "cwi‡ek MZ QvocÎ" which the petitioner failed /did not care to obtain as per requirement of law. In the absence of any environment clearance certificate(cwi‡ek MZ QvocÎ) obtained from or issued by the Director General of the Department of Environment, no commercial establishment/project can be set up or built as provided in Section 12 read with Rule 7(4) as quoted before.

23. Admittedly, the petitioner's project does not fall within the criteria of the proviso of Section 12 and the petitioner also did not produce any paper to take benefit of the said proviso. As such the construction of the commercial building complex of the BGMEA, on the water body/reservoir(Joladhar) which never belonged to the petitioner, at any point of time, is completely illegal and such construction is violative of Section 5 of the "Joladhar" Ain, 2000" as well as Sections "6 Uma" and 12 of the Environment Conservation Act 1995.

24. Apart from the illegality of transfer by EPB and construction of the BGMEA building on the said transferred water body, as stated above, the construction of the said building is also illegal for being violative of section 3 of the Building Construction Act 1952 as well as Rules framed thereunder. Section 3 of the Building Construction Act, 1952 imposed restriction, with non-obstante clause, on construction or re-construction of any building etc. without obtaining previous sanction/approval of the authorized officer of RAJUK. Rule 3(I) of the Building Construction Rules, 1996 contemplates filing of application in prescribed form for obtaining prior sanction/approval from the Authorized Officer. Prescribed Form has been defined in Rule 2(cha) of the said Rules which has been described in schedule 1 to the said Rules. On perusal of schedule 1 it appears that along with the particulars of the land, proof of ownership of the land is required to be submitted. Schedule 1, serial 3(*R)*, reads as follow:

> "*(R) Av‡e`bKvix / Av‡e`bKvixMY wK m‡Î mvB‡Ui Rwg AR©b Kwiqv‡Qb (gvwj Kvbvi cÖgvYcÎ `wLj Kwi‡Z nB‡e)*"

25. So, the proof of ownership/title of the applicant over the land in question is a mandatory requirement to obtain sanction of plan from the RAJUK. Earlier we have already found that the EPB did not acquire title, whatsoever, before handing over the possession of land in question to the BGMEA in 2001 nor it got its name mutated in the record of rights, thus there is a question of vesting title on the BGMEA. As such it has/had no scope of submitting the title documents along with the plan. So there is no scope for the RAJUK to approve or sanction the building construction plan, and RAJUK in its affidavit stated that it did not finally approve the plan. In this score also the BGMEA building/office Complex has been constructed in violation of the Building Construction Act, 1952.

26. Considering all these aspects we do not find any reason to interfere with the impugned judgment and order of the High Court Division which is well reasoned and based on proper appreciation of facts and circumstances as well as the law. As such we have no hesitation to hold that the BGMEA building complex has been constructed by the petitioner illegally in violation of all the laws of the land which cannot stay upright rather the same deserves to be demolished at once. Thus the contention of Mr. Rafiqul Huq that the defect in title or in constructing the said building can be cured under section 43 of the Transfer of Property Act, or section 3B(5)(d) of the Building Construction Act 1952 or under any other law, is not at all sustainable.

27. Accordingly we do not find any merit in this civil petition. Hence, the civil petition for leave to appeal is dismissed.

28. The petitioner is directed to demolish the building namely, "BGMEA Complex" situated on the water body of "Begunbari khal" and "Hatirjheel lake" at once, at its own costs, in default the RAJUK is directed to demolish the same within 90 days from the date of receipt of this judgment and realize the entire demolition costs from the petitioner, BGMEA.

29. However other operative parts of the impugned judgment and order are maintained.

30. Let a copy of this order be communicated to RAJUK at once for taking appropriate steps.