

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 3877 of 2009
with
Writ Petition No. 3904 of 2009

IN THE MATTER OF:

An application under Article 102(2) of the
Constitution of the People's Republic of
Bangladesh.

AND

IN THE MATTER OF:

Energy Prima Limited

.....Petitioner

-Versus-

People's Republic of Bangladesh and others

.....Respondents

Mr. Ahsanul Karim, Advocate with
Mr. Khairul Alam Chowdhury, Advocate
Mr. Tanveer Hossain Khan, Advocate
Mr. Shamim Ahmed Mehedi, Advocate
.....For the petitioner

Mr. Tofailur Rahman, Advocate with
Ms. Umme Salma, Advocate

.....For the respondent No. 2-4.
(In writ petition No. 3904 of 2009)

Mr. Rajik Al Jalil, D.A.G.

.....For the respondent No.2-4
(In writ petition No. 3877 of 2009)

Heard on: 11.07.12, 15.07.12,
22.07.12, 23.07.12, 26.07.12 and
Judgment on: 29.07.2012.

Present:

Mr. Justice Md. Ashfaquul Islam

And

Mr. Justice Md. Ashraful Kamal

Md. Ashraful Kamal, J:

Since in these Writ Petitions there involved a common question of
fact and law, those are heard and disposed of by this judgment.

In Writ Petition No. 3877 of 2009 Rule was issued calling upon the respondents to show cause as to why the deduction of Advance Income Tax (AIT) @ 4% by the respondent Nos. 1-4 from the monthly Rental and Energy Payment bill (Annexure-E & E-1) of the petitioner under Contract No.09689 dated 16.01.2008 executed by and between the respondent No.2 and the petitioner for 50 MW Power Plant at Shahjibazar (wrongly written as Kumargaon) Sylhet, should not be declared to have been passed without lawful authority and is of no legal effect and also to show cause as to why the respondents shall not be directed to refund USD 1,57,892.24 (U.S. Dollar one lac fifty seven thousand eight hundred ninety two and cent twenty four) deducted as Advance Income Tax (AIT) @ 4% from the Monthly Rental and Energy Payment of the petitioner under the said Contract No. 09689 dated 16.01.2008 and/or pass such other or further order or orders as to this Court may seem fit and proper.

In both the Petitions Rule were issued in common terms where only the contract and refund amounts are different being Contract No. 09690 in respect of 50MW Power Plant at Kumargaon, Sylhet and refund of USD 2,61,667.82 (US Dollar two lacs sixty one thousand six hundred and sixty seven cents eighty two).

The brief facts necessary for disposal of these writ petitions are as follows:

The petitioner is doing the business of generating and selling of electricity on rental basis or under IPP, BOO & BOT basis by setting by power plant in Bangladesh. The Government of Bangladesh in order to meet the electricity crisis decided to purchase electric power and energy from the

Company on rental basis under the existing Private Sector Power Generation Policy of Bangladesh- 1996 (Revised in 2004). The Government of Bangladesh created and set up a Power Cell under the Ministry of Energy & mineral Resources (MEMR) in 1995. The power Cell has a mandate to lead private power development, recommend power sector reforms & restructuring, conduct study on tariffs and formulation of a regulatory framework for the power sector. The Power Cell shall facilitate all stages of promotion, development, implementation, commissioning and operations of private power generation projects and suitably address the concerns of project sponsors. It will also assist project sponsors to secure necessary consents and permits from GOB where such consents and permits would be needed. Under the existing Policy the Fiscal facilities including tax exemption for the private power generator company are available. The Petitioner is a private power generating company and it is a 'Rental Power Company' like other private power generating company the petitioner is also entitled to enjoy the fiscal facilities as envisaged in the said Policy.

That the Power Cell as constituted under the said Power Policy through the Respondent No. 2 i.e. Bangladesh Power Development Board (BPDB) invited tender for design, finance, insure, build, own, operate and maintenance of 50 MW power Plant project on rental basis at Kumargaon and Shahjibazar, Sylhet and accordingly the Petitioner as a Joint Venture Consortium participated in the said Tender successfully and entered into a Contract bearing Nos. 09689(for Shahjibazar) and 09690(for Kumargaon) dated 16.01.2008 with the BPDB. Under the said Contracts dated 16.01.2008, the Petitioner is under legal obligation to sell electricity capacity

and energy output of the facility of BPDB in accordance with the terms and conditions set forth in the Contracts.

According to Article 13.1 of the Contract dated: 16.01.2008, the respondent No. 2 shall pay to the Petitioner the tariff payment for each month for dependable capacity and net energy output. The Petitioner submits invoice on monthly basis and after verifying the same the respondent No. 2 pays the monthly bill to the Petitioner by way of letter of credit in US Dollar.

As per Article 17 of the said Contracts BPDB shall be responsible for payment of income taxes, other taxes, VAT, duties, levies, all other charges imposed or incurred inside Bangladesh for the importation of plant/equipment before Commercial Operation Date and for operation throughout the contract period. In this regard, the Rental Power Company shall submit to BPDB Bank certified copy of Pro-forma Invoice, Bill of Lading, Letter of Credit, Packing List, Original Invoice etc. The Rental Power Company shall submit an undertaking provided in schedule 9 for importation of materials. The Rental Power Company shall be entitled to import & re- export required machinery, equipment etc as per prevailing import -export policy of Bangladesh. And the Government of Bangladesh, Ministry of Finance on 26.05.1999 issued a S.R.O bearing No. 114-Ain/99 exempting the private power generation company from all income taxes under Income Tax Ordinance, 1984.

The petitioner after fulfilling all the terms and conditions as set out in the said Contract No 09690 dated 16.01.2008 started the commercial operation of the Kumargaon Rental Power Plant on 22.07.2008 and has been

supplying energy to the BPDB. Thereafter, the petitioner submitted monthly bills for the month of July-2008, August-2008, September- 2008, October-2008, November-2008, December-2008, January-2009, February-2009, March-2009, to the respondent No. 2 against available Dependable Capacity and net Energy Output Generation and Supply as per Article 13 of the said Contract. But the respondent No. 2, deducted an amount of USD 2,61,667.82 (US Dollar two lac sixty one thousand six hundred sixty seven and Cents eighty two) from the said Rental and Energy Payment bills of the petitioner as 4% Advance Income Tax (AIT) in violation of the said S.R.O and Contract as well. Thereafter, Petitioner submitted Rental and Energy payment bill for the month of April 2009 to the BPDB after supply of the energy and available Dependable Capacity and the Respondent No. 2 as usual has taken all steps to deduct @ 4% AIT from the said bill despite repeated requests. Then, the petitioner raised objection about the said deduction of the AIT from the Rental and Energy payment Bill. Accordingly, on 06.10.2008 petitioner wrote a letter to the respondent No. 4 to refund the deducted AIT amount.

As per Contract No. 09689 dated 16.01.2008 petitioner started the commercial date of operation of the Shahjibazar Rental Power Plant on 12.11.2008 and has been supplying energy to the BPDB. Thereafter, the petitioner submitted monthly bills for the month of November-2008, December-2008, January-2009, February-2009, March-2009 to the respondent No. 2 against available Dependable Capacity and net Energy Output Generation and Supply as per Article 13 of the said Contract. But the respondent No. 2, deducted an amount of USD 1,57,892.24 (US Dollar one

lac fifty seven thousand eight hundred ninety two and Cents twenty four) from the said Rental and Energy Payment bills of the petitioner as 4% Advance Income Tax (AIT) in violation of the said S.R.O and Contract as well. Thereafter, petitioner submitted Rental and Energy payment bill for the month of April 2009 to the BPDB after supply of the energy and available Dependable Capacity and the respondent No. 2 as usual has taken all steps to deduct @ 4% AIT from the said bill despite repeated requests. Then, the petitioner raised objection about the said deduction of the AIT from the Rental and Energy payment Bill. Accordingly, on 06.10.2008 petitioner wrote a letter to the respondent No. 4 to refund the deducted AIT amount.

Mr. Ahsanul Karim, learned advocate appearing for the petitioner in both the writ petitions submits that the petitioner being a private power generation company is exempt from income tax under the Income Tax ordinance-1984 for a period of 15 years from the date of commercial production i.e. from 22.07.2008(for Kumargaon) and 12.11.2008(for Shahjibazar) as per S.R.O No. 114-Ain/99 dated: 26.05.1999, therefore, the deduction of Advance Income Tax (AIT) from the monthly Rental and Energy Payment bill of the petitioner is without lawful authority and is of no legal effect. He further submits that Article 17 of the said Contracts specifically provides that the Respondent No. 2 shall be responsible for payment of income taxes and other taxes for operation of the Power Plant during the Contract period, therefore, deduction of the Advance Income Tax from the monthly rental and energy bill or the petitioner is without jurisdiction.

Mr. Karim also argued that the respondent No. 2 (BPDB) is not the authority to deduct or impose income tax upon the petitioner under the law and as such deduction of AIT @ 4 % from the monthly rental and energy payment bill of the petitioner by the respondent No. 2-4 is without lawful authority and is of no legal effect. Moreover, under the same international tender and tender documents and draft agreement, another rental power company namely Aggreko International Projects Limited has been enjoying the AIT exemption facility but the petitioner being under the equal footing and having been awarded under the same terms and conditions of the Tender and even after being recommended by the Power Cell in not enjoying the AIT exemption facility which is highly discriminatory and arbitrary exercise of power of the respondents.

Mr. Karim further submits that the aforesaid contracts were executed between the parties on 16.01.2008 and the law enabling the respondents to impose or deduct the Advance Income Tax came into force on July 01, 2009 by virtue of insertion of section 52N of the income Tax Ordinance, 1984. So, the contracts in question were entered into prior to the law for deducting the Advance Income Tax. The petitioner having participated in the bid relying that the PDB would pay income tax, clause 5.1 of the policy having stipulated that private power companies will be exempted from the income tax and the said S.R.O having exempted all private power generation company from paying income tax and there being no law as on the day of contract authorising any deduction, the petitioner acquired a vested right which cannot be taken away by subsequent amendment of law. Under the said S.R.O and stipulation of contract the petitioner is exempted from paying

tax. Even if the PDB is held authorised to deduct at source the income tax authority is bound to refund the same under section 163 of the Income Tax Ordinance.

Finally, Mr. Karim submits that issues agitated by the petitioner are not subject to arbitration and the issues raised in the writ petition are not between the parties alone and this writ petition has not filed to enforce any breach of contract but involves a different issue which is extraneous to the contract.

Mr. Razik-Al-Jalil, the learned Deputy Attorney General appearing for the respondent Nos. 2-4 of the writ petition No. 3877 of 2009 by filing affidavit in opposition at first raises the issue of maintainability of the writ petition itself on the ground that since there is an Arbitration clause in the contracts dated 16.01.2008, the Writ petition is not maintainable as the petitioner has come before this court without availing of the alternative remedy as agreed by parties.

He further submits that when the private sector power generation policy of Bangladesh 1996 (Revised in 2011) was made, the concept of purchase electric power and energy on rental basis was not in existence. Next, he submits that the rental basis power station is established for a particular period and the exemption from corporate income tax for a period of 15 years is given for Independent Power Project (IPP) only, which is established permanently. Therefore, the petitioner being a power supply company on rental basis are not entitled to enjoy the fiscal facilities as envisaged in the said policy.

Mr. Jalil further submits that in 2008 the rental power company started production of power in Bangladesh and then the Hon'ble president by promulgating an ordinance in 2008 inserted the section 52 N by Ordinance No. XIII of 2008 on 15.04.2008 amended the Income Tax ordinance 1984 providing for advance income tax by the rental power generation company and subsequently it was confirmed by parliament by Act No. 11/09. The petitioner knowing fully well was making payment advance income tax as per law. He further submits that an unreported judgment of this Hon'ble Court passed in Writ Petition No. 1185 of 2009, whereupon - the Hon'ble High Court Division clearly stated that the rental power generation company are bound to pay advance income tax as per section 52 N of Income Tax Ordinance. As such it is the legal duty of the respondent to deduct 4% as advance income tax while payment of the bill of Rental Power Company for supplying powers on rental basis.

Mr. Jalil also submits that as per clause 17 of the agreement, BPDB shall be responsible for payment of income taxes other taxes, vat, duties levies all other charge imposed or incurred inside Bangladesh for the importation of plant/equipment before commercial operation date and spare parts for operation throughout the contract period. Nowhere in the contracts stated that the BPDB is responsible to pay advance income tax against the payment of their bill. Accordingly BPDB is paying 2.50% import duty on the bill of rental payment and deduct on 4% advance income tax against payment of their bill as per section 52N of the Income tax ordinance and Rule 16 of the Income tax Rule. In this connection it may be mentioned that the existing private sector power generation policy of Bangladesh 1999

(Revised in 2004) or SRO dated 26.05.1994 issued on the basis of the said policy and are not applicable to the petitioner rental company.

Finally, Mr. Jalil submits that Private Sector Power Generation policy of Bangladesh 1996 is applicable for Independent Power Producing only not for Rental Basis company under clause 3.2 and clause 4.5 of Power Generation policy the Power Generation Company on IPP basis are exempted for income Tax for 15 years. But the Rental Power Company cannot get the benefit of Private Sector Power Generation Policy of Bangladesh 1996. Provision lay down in Section. 52 N of the Income Tax Ordinance, 1984 is applicable for Rental Power Company which is quoted below;

*‘52N. Collection of tax on account of rental Power:-
Notwithstanding anything contained in this ordinance.
Bangladesh Power Development Board, at the time of
payment to any rental power company on account of
purchase of rental power from that company, shall collect,
deduct or pay tax on the said payment for a term not
exceeding three years from the date of its operation in
Bangladesh at the rate of 4% (four percent) which shall be
treated as final discharge of tax liability of the rental power
company regarding the sale of such rental power’*

Therefore, the BPDB lawfully deducted 4% as advance income tax from the bill of the writ petitioner for supplying of power to BPDB on rental basis and the instant writ petition is not maintainable and is liable to be discharged.

We have considered the submissions made by the learned advocate appearing for the petitioner as well as learned advocates appearing for the respective respondents.

The point arises for consideration in these writ petitions is whether the writ petitions filed by the petitioner for the issuance of a mandamus restraining the BPDB from deducting Advance Income Tax (AIT) at the rate of 4% from the monthly rental and energy payment bill of the petitioner under the contracts is maintainable.

Similar contracts were entered into between the same petitioner in both the writ petitions and the BPDB for different power plants. Clause 19.2 of the terms of both the contracts reads as follows:

“19.2 Resolution of Dispute

(a)BPDB and the Company shall use their best efforts to settle amicably all dispute arising out of or in connection with this contract or its interpretation

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

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

The language of the clause 19.2 makes it very clear that in the event of dispute arising out of contract; it is referable to the arbitrator. Whether a dispute has arisen out of the contract, the pleadings of the parties assume significance and a cursory glance on the same unfolds that the petitioner claims relief on the basis of recitals of the agreement whereas the respondents deny his entitlement on the strength of the very terms and conditions of the agreement pressed into a service by the petitioner. It is appropriate to notice that the case in hand does not represent a situation where petitioner relies on one set of conditions and the respondents on a different one but fact of the matter is that both the parties rely upon a set of conditions contained in contracts dated 16.01.2008. In essence, the rights and obligations of the parties are sought to be worked out in the light of the terms of the agreement, thus the controversy centres around the interpretation of the terms and conditions of the contract which are binding on the parties and as a matter of fact by medium of their pleadings they have reiterated such binding. In this backdrop the petitioner is not entitled to invoke the jurisdiction of this court under article 102 of the Constitution, for, such course will tantamount to saying good bye to the terms of the agreement which cannot be permitted in view of the candid admission of the parties, evidencing the fact that their relationship is governed by the agreement.

As per the contract between the petitioner and the BPDB, for resolving disputes arbitration is provided. Such 'Arbitration' will be governed by the provisions of the Arbitration Act, 2001 or any statutory amendments or re-enactment thereof. Petitioner having agreed by signing

the said contract, is bound to raise any dispute for arbitration and the 'Arbitrator' can very well go into all aspects, particularly in the facts pleaded by the petitioners viz., the deduction of Advance Income Tax (AIT) @ 4% by the respondents Nos. 1-4 from the monthly rental and energy payment bill of the petitioner under contracts No. 09689 and 09690 dated 16.01.2008 and the respondents to refund the deducted Advance Income Tax (AIT) to the petitioner, which may be raised for consideration and an appropriate decision can be arrived at.

Here it is beneficial to refer to the judicial pronouncement of the Supreme Court of India in State of U.P. v. Bridge & Roof Co. (India) Ltd. reported in AIR 1996 SC 3515 at 3520. In para (21), it was observed;

“ 21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contain a clause providing inter-alia for settlement of disputes by reference to arbitration (Clause 67 of the Contract). The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article wasn't meant to supplant the existing remedies at law but only to supplement them in certain well recognised

situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction was misconceived for the reasons mentioned supra.”

In (2007) 14 SCC 680; (2007)4 ALR 74 (SC) (Empire Jute Company Limited v. Jute Corporation of India Limited) in paragraph 18 it is held thus;

“18. The power of judicial review vested in the superior courts undoubtedly has wide amplitude but the same should not be exercised when there exists an arbitration clause. The Division Bench of the High Court took recourse to the arbitration agreement in regard to one part of the dispute but proceeded to determine the other part itself. It could have refused to exercise its jurisdiction leaving the parties to avail their own remedies under the agreement but if it was of the opinion that the dispute between the parties being covered by the arbitration clause should be referred to arbitration, it should not have proceeded to determine a part of the dispute itself.”

In yet another case, the apex court of India in the decision reported in (2010) 11 SCC 186 (Central Bank of India v, Devi Ispat Ltd.) held that mandamus can be issued by the High Court under Article 226 of the Constitution, if a legal right exist and corresponding legal duty is liable to be

performed by the State or its instrumentality. In paragraph 28 the Supreme Court held thus;

“28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power.”

Recently, in the decision reported in (2011) 2 SCC 782 (Kanaiyalal Lalchand Sachdey v. State of Maharashtra) the apex court of India held thus;

“In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd.,

Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)”

Our Appellate Division in Bangladesh Telecom (Pvt.) Ltd. vs BTTB reported in 48 DLR (AD) (1996) Page 20 Para 18 held thus;

“18. With regard to the availability of arbitration and civil suit as an alternative remedy, Article 102 of the Constitution Provides that if there is ‘no other equally efficacious remedy’ ‘provided by law’ then the Writ jurisdiction of the High Court Division may be invoked. ‘Provided by law’ means a remedy provided in the statute in invocation of which the impugned order was passed. The Telegraph Act, 1885 does not provide for any appeal or review against the order of cancellation of licence. The Provision for arbitration is term and condition of the licence and clause 18 of the Agreement Provides for arbitration if there is any disagreement or dispute regarding the subject matter covered by the agreement. As the conditions of the agreement stood merged with the licence the arbitration clause may be invoked if there was disagreement or dispute regarding the subject matter covered by the licence, but when the licence itself is cancelled under section 8 the efficacious remedy, if any, must be provided in the Telegraph Act itself so as to disentitle the licensee to invoke the writ jurisdiction without exhausting the remedy. The Telegraph Act does not do so.”

In the present case, clause 19.2 of the contracts dated 16.01.2008 entered into between the petitioner and the BPDB contains an arbitration clause stating that the arbitration shall be conducted in accordance with the Arbitration Act (Act No. 1 of 2001) of Bangladesh as at present in force and the place of arbitration shall be in Dhaka, Bangladesh, therefore, section 7 of the Arbitration Act, 2001 restricts judicial intervention in matters covered by arbitration agreement. Petitioner is trying to interpret the contract in the writ petitions which is impermissible, particularly when the petitioner is having a remedy to go for arbitration under the contract signed by the petitioner. Petitioner having signed contract with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions.

In light of the above findings, we are of the firm view that these writ petitions are not maintainable and the petitioner has to go for arbitration in terms of clause 19.2 of the contracts, if he has any grievance. Since the writ petitions are dismissed only on the ground of maintainability, the observations made herein shall not be construed giving any finding in favour of either party.

In the result, both the Rules are discharged. The ad-interim order granted earlier by this court are hereby vacated accordingly. There is no order as to costs.

Communicate this judgment at once.

Md. Ashfaqul Islam, J:

I agree.

