

Present:
Mr. Justice Obaidul Hassan
And
Justice Krishna Debnath

CRIMINAL REVISION NO.2569 OF 2016

IN THE MATTER OF:

Moudud Ahmed, son of late Maulana
Momtazuddin Ahmad **Petitioner.**

-Versus-

The State and others

..... **Opposite parties.**

Mr. Moudud Ahmed, Senior advocate
(In person) with Mr. Syed Md. Tazrul
Hossain, Advocate & Mr. Abdullah Al
Mahmud, Advocate

.....For the Petitioner.

Mr. Mahabubey Alam, Attorney
General with Mr. Md. Jahangir Alam,
Deputy Attorney General, Mr. Md.
Jashim Uddin, Assistant Attorney
General & Mr. Md. Shafquat Hussain,
Assistant Attorney General

..... For the opposite parties no.1 & 3-5

Mr. Md. Khurshid Alam Khan,
AdvocateFor the opposite no.2-
ACC

*Heard on 02.03.2017,04.03.2017,12.03.2017,
13.03.2017,14.03.2017,19.03.2017& 21.03.2017*

And

Judgment on 12.04.2017

Obaidul Hassan, J.

The instant Rule was issued calling upon the
opposite parties No.1 and 2 to show cause as to why the
order No.25 dated 16.08.2016 passed by the learned
Special Judge, 9th Court, Dhaka in Special Case No.16 of

2008 corresponding to Metropolitan Special Case No.58 of 2008 and ACC G.R. No.161 of 2007 arising out of Tejgaon Police Station Case No.20 dated 10.12.2007 read with section 109 of the Penal Code, now pending in the Court of Special Judge, 9th Court, Dhaka rejecting the applications filed by the petitioner under sections 344 and 94 of the Code of Criminal Procedure should not be set aside, and/or such other or further order of orders passed as to this Court may seem fit and proper.

The prosecution case, in brief, is that the accused petitioner in connivance with other accused persons as mentioned in the First Information Report (FIR) acted illegally to benefit himself or to benefit others by giving opinion as the Law Minister to include Chatak (East) Gas Field as Marginal/abandoned gas field and without any tender acted to favour NIKO Resources BD. Limited to extract gas from the aforesaid gas field. Accordingly one Md. Mahbubul Alam, Assistant Director (inquiry and investigation -2) Anti-Corruption Commission, Head Office Dhaka lodged the FIR with Tejgaon Police Station

being Tejgaon Police Station Case NO. 20 dated 09.12.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code implicating the accused petitioner along with 4 others.

Thereafter, the investigation officer submitted charge sheet being Charge Sheet No.156 dated 05.05.2008 under section 5(2) of the Prevention of Corruption Act, 1947 read with section 409/109 of the Penal Code.

On 07.05.2008 the learned Judge of the Special Court No. 9 took cognizance of the case, but subsequently due to an order of stay dated 09.07.2008 passed by the Hon'ble High Court Division in Writ Petition No.4982 of 2008, proceedings of the case could not proceed further.

Once the matter was disposed of on 18.06.2015 by the Hon'ble High Court Division, the proceedings of this case resumed and thereafter on 16.08.2016 the petitioner filed two separate applications; one for adjournment of the proceedings of the case under section 344 of the Code of Criminal Procedure and the other for production of

documents under Section 94 of the Code of Criminal Procedure stating that:

The instant proceeding is directed for an alleged commission of the offence of corruption in executing the Memorandum of Understanding (MOU), Joint Venture Agreement (JVA) and the Gas Purchase and Sale Agreement (GPSA) dated 27.12.2006, executed between Bangladesh Petroleum Exploration and Production Company Limited (BAPEX) and NIKO resources (Bangladesh) Ltd. (NIKO).

In the meantime, NIKO as well as the Government of Bangladesh have also brought the said issues, including the issue of corruption before the Tribunal of International Centre for Settlement of Investment Disputes (ICSID Tribunal) in Case Nos. ARB/10/11 and ARB/10/18, and the said proceedings on this matter is still pending before ICSID Tribunal. Since Bangladesh is a signatory of the Convention on the Settlement of Investment

Disputes and ratified the same the decision given by the ICSID Tribunal has a binding effect upon the government of Bangladesh and all its entities.

In a latest order dated 19.07.2016, the ICSID Tribunal has assumed the jurisdiction to decide on the issue of corruption and passed an order in the following terms:

“For the reasons set out above the Tribunals now grant in substance the relief requested but do so in the form not of a provisional measure but in the following decision. The Tribunals:

1. Declare that the Tribunals have sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it, notably
 - a) The validity of the JVA and the GSPA, including all questions relating to the avoidance of these agreements on grounds of corruption;
 - b) The liability of Niko under the JVA for the blow-outs occurred in the course of its activity in the Chattak field and the quantum of the damage for which it may be responsible in case such liability were found to exist:

- c) The payment obligations of Petrobangla towards Niko under the GSPA for gas delivered, the jurisdiction for injunctions seeking to prevent such payments and to retract such injunctions.:
- d) 2. Order BAPEX and Petrobangla
- e) A) to intervene with all courts and other authorities in Bangladesh that are or may be concerned with issues identified above under (1) to bring to their attention the exclusive jurisdiction of the Tribunal in respect of these issues and the international obligations of the State of Bangladesh resulting there from under the ICSID Convention and
- f) B) to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with this order.“

The Court below after hearing the above mentioned applications filed by petitioner was pleased to reject them without assigning any reason whatsoever vide order No.25 dated 16.08.2016.

The petitioner stated that all disputes regarding and arising out of investments made in contacting countries

by nationals of other countries are regulated by the “Convention of Settlement of Investment disputes between States and Nationals of other States (ICSID)” if submitted to it. Bangladesh has signed the convention on 20.11.1979 and the same has been ratified on 27.03.1980.

It is also stated that when dispute arose between the Government of Bangladesh and NIKO Resources Limited, NIKO Resources Ltd. Initiated Proceedings before ICSID Tribunal against two statutory entities of the government of Bangladesh namely Bangladesh Petroleum Exploration and Production Company Limited (“BAPEX”) and Bangladesh Oil, Gas and Mineral Corporation (“PETROBANGLA”) being ICSID Cases NOs. ARB/10/11 and ARB/10/18 and accordingly Government of Bangladesh Through BAPEX and PETROBANGLA appeared before the Tribunal and currently are contesting the contentious issues before the Tribunal. In the proceedings before the ICSID Tribunal one of the major grounds taken by the government of Bangladesh through BAPEX and PETROBANGLA, is that

NIKO obtained the contracts namely the Memorandum of Understanding (“MOU”) and the Joint Venture Agreement (“JVA”) followed by the Gas Purchase and Sale Agreement (“GPSA”) by corrupt means and therefore, NIKO has no case to sustain their claims under those contracts before the ICSID Tribunal.

It is also stated that when the issue of alleged corruption was raised in that proceeding, the Tribunal passed an order on 19.07.2016 declaring that it will have exclusive jurisdiction with respect to all matters which have been validly brought before it, including avoidance of agreements on grounds of corruption.

Mr. Moudud Ahmed, the petitioner appeared in the case in person. He submitted that in the proceedings before the ICSID Tribunal one of the major grounds taken by the government of Bangladesh through BAPEX and PETROBANGLA, is that NIKO obtained the contracts namely the Memorandum of Understanding (MOU) and the Joint Venture Agreement (JVA) followed by the Gas Purchase and Sale Agreement(GPSA) by corrupt means

and therefore, NIKO has no case to sustain their claims under those contracts before the ICSID Tribunal. He also submitted that Bangladesh being a contracting state of the ICSID, it is bound by the decisions of ICSID Tribunals; when an international Tribunal is currently examining the allegation of corruption in the Joint Venture Agreement and Gas Purchase and Sale Agreement, which is also the subject matter of the present proceedings, it is desirable not to violate any decision of the said International Tribunal and as such the impugned order to the extent of rejection of the applications filed by the petitioner under Section 344 and Section 94 of the Code of Criminal Procedure is liable to be set aside. It is further submitted by Mr. Moudud Ahmed that for ends of justice proceedings of the present case should be adjourned till a final decision is reached by the Tribunal on the issue of corruption, otherwise for violation of the direction given by the ICSID Tribunal will make the government of Bangladesh liable for all the consequences. Such a denial will also seriously jeopardize its position before the

Tribunal. He also submits that the application for adjournment under section 344 of the Code of criminal Procedure filed by the petitioner was done with the intention to save the government of Bangladesh from being humiliated in an International Tribunal for not complying with its order and pay a hefty penalty causing a great damage to the image and goodwill of Bangladesh in the World Community. Mr. Moudud also submitted that the petitioner filed the application under section 94 of the Code of criminal Procedure to ask the government to produce the relevant documents to determine the authority about the jurisdiction of the ICSID Tribunal. This will enable the court to come to a rightful conclusion on the jurisdiction of the Tribunal. He further submitted that the Court below while passing the impugned order failed to apply its judicial mind and passed a mechanical non-speaking order and as such the impugned order to the extent of rejection of the applications filed by the petitioner under section 344 and section 94 of the Code of Criminal Procedure is not sustainable in law. Mr.

Moudud also submitted that the points involved in this matter are of great public importance and in public interest it has to be decided whether non-compliance of the order passed by the ICSID Tribunal will subject the government and its entitles namely BAPEX and PETROBANGLA guilty of many offence under the ICSID Convention and whether adjournment of the proceedings will be justified in view of the decision given by the ICSID Tribunal. He further submitted that the instant criminal proceedings have been brought against the petitioner and others on the allegation of corruption committed in execution of the Joint Venture Agreement (JVA) dated 16.10.2003 with NIKO and in the proceedings before the ICSID Tribunals the claim of the respondents (BAPEX and PETROBANGLA) is that the JVA and the (Gas Purchase and Sale Agreement) GPSA have been procured through corruption. Moreover, one of the points to be decided by the Tribunals is whether the JVA Between BAPEX and NIKO, dated 16.10.2003 can be avoided on the ground of corruption as apparent from the paragraph

1 of the decision dated 19.07.2016. therefore, it is crystal clear that the instant criminal proceedings are based on the self same allegation of corruption on which the Tribunals assumed exclusive jurisdiction.

Mr. Moudud Ahmed also submits that on a careful reading of the decision dated 19.07.2016 given by the ICSID Tribunals and in particular paragraphs no. 11,12,14,15,17,18 and 19 it will be apparent that the said decision was given by the Tribunals considering the fundamental misunderstanding of the scope and implication of the Tribunals jurisdiction by the respondents (BAPEX and PETROBANGLA) and to clarify the same. In paragraph no.11 the Tribunal observed that: "The Tribunals concluded that they did not have jurisdiction *ratione personae* over the Government. They do, however, have exclusive jurisdiction over the subject matter of these two agreement, including provisional measures. On the basis of the ICSID Convention, this exclusive jurisdiction *ratione material* binds the People's Republic of Bangladesh and all its organs, including the

courts.” Moreover, in paragraph No.12 the Tribunal said that “..... in making their decision involving other parties, the courts of Bangladesh, however, are bound to conform to and implement the decisions rendered by these Tribunals that are within the competence of these Tribunals. This Means, for instance, that it is for these Tribunals, and the Tribunals alone, to decide whether the JVA and the GPSA were procured by corruption”. Thus, in order not to subvert the international obligations assumed by Bangladesh by virtue of its decision to become a party to the ICSID Convention, the instant proceedings against the petitioner on the allegation of corruption may be postponed till the final decision made by the Tribunals. He also submits that from paragraph 20 of the decision of the Tribunals dated 19.07.2016 that the Tribunals have sole and exclusive subject matter jurisdiction with respect to, amongst others, the validity of the JVA and the GSPA, including all questions relating to the avoidance of these agreement on grounds of corruption and the Tribunals also ordered BAPEX and

PETROBANGLA to intervene with all courts and other authorities in Bangladesh that are or may be concerned with such issues and also to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with this order. Hence, any further proceedings of the instant criminal case based on the allegation of corruption in executing JVA and GPSA will not only violate the decision of the Tribunals but Bangladesh will be in breach of its international obligations assumed by virtue of its decision to become a party to the ICSID Convention which may highly prejudice the reputation and interest of the country in the international arena. The present criminal proceedings have been initiated on the self same allegation of corruption committed by the petitioner and others in executing the JVA and the GPSA which is now within the seizing of the ICSID Tribunals and the Tribunals assumed exclusive jurisdiction to decide the issue of corruption. Moreover, Bangladesh being a signatory to the ICSID Convention and having had ratified the same on

27.03.1980, as part of its international obligation under the Convention, is bound to comply with the order or decision given by the Tribunals and as such considering the national interest of the country in the international area the instant criminal proceedings against the petitioner may be postponed till the final decision given by the Tribunals on the issue of corruption in executing the JVA and the GPSA. Mr. Moudud also submits that under section 344 of the Code of Criminal Procedure the Court has the power to postpone any criminal proceedings on the ground of any reasonable cause. International obligations of the country under the ICSID Convention is of paramount national importance and any measures taken to prevent any breach of such obligation can be treated as a reasonable cause and as such the present criminal proceedings can be postponed to avoid any possible breach of international obligations of the country under the ICSID Convention. Because it has to be decided first that the JVA and the GPSA was procured through corruption and only then the question of liability

for the same whether civil or criminal will arise. Since the Tribunals have assumed exclusive jurisdiction over the claim of corruption, they will decide whether the JVA and GPSA was procured through corruption. Therefore, during pendency of the matter before the Tribunals any finding or decision given by the Courts in Bangladesh on the self same allegation of corruption, if conflicts with the decision to be given by the Tribunals may seriously prejudice the national interest of the country and as such considering the national interest it will be reasonable to postpone the instant criminal proceedings till the final decision given by the Tribunals.

Mr. Md. Khurshid Alam Khan, the learned advocate appearing on behalf of the opposite party No.2, the Anti Corruption Commission (ACC) has filed a counter affidavit. He stated that the informant Durnity Daman Commission found allegation against the accused petitioner that he, in connivance with other accused persons as mentioned in the FIR, acted illegally for benefit of himself and others by giving opinion as he then Law

Minister to include Chatak (East) Gas Field as marginal/abandoned gas field and without any tender acted in favour of NIKO Resources Bd. Limited to extract gas from the aforesaid gas field. That having prima facie case against the accused persons named in the FIR, the informant lodged the instant case. The International Convention for Settlement of Investment Disputes (ICSID) Tribunal has no jurisdiction over any criminal or civil proceedings. The ICSID Tribunal only deals with the disputes arising directly out of investment. The Tribunal has no jurisdiction over the Criminal Proceeding pending before the Court of Bangladesh against a person individual and as such there is no bar to proceed with the criminal case in the court of Bangladesh against the persons individual for allegation of corruption. He also stated that the criminal case initiated against accused petitioner and others in the Court of Bangladesh, and subject matter of the dispute now pending before the ICSID Tribunal are not identical; rather Arbitration Proceeding before the said Tribunal has been started to

determine the claim arising out of an international dispute between NIKO, BAPEX and Petrobangla and this Criminal Court in Bangladesh will determine as to whether there is any criminal offence in the transaction in the process of awarding the contract to NIKO. That as regards to statements made in paragraph No.7.3 of the revisional application Mr. Khurshed Alam stated that the accused petitioner would like to delay the criminal case initiated against him and others and hence filed this application under sections 344 and 94 of the Code of Criminal Procedure. He further stated that the allegation of corruption has been brought in the instant criminal case against the accused petitioner and the court of Bangladesh will decide on the said allegation after taking evidence at time of trial. ICSID Tribunal does not have criminal jurisdiction regarding the corruption of the accused petitioner. Any observation by the Tribunal on the accused Petitioner's corruption is not binding upon the Criminal Courts of Bangladesh. He further stated that by signing the convention of settlement, Bangladesh has

agreed to implement the award of the Tribunal but ICSID Tribunal cannot override the independent courts of sovereign country, that is, Bangladesh and the Courts of Bangladesh are not under the jurisdiction of ICSID Tribunal and by signing the convention, Bangladesh has not surrendered the jurisdiction of their courts to ICSID Tribunal. It is also stated that whatever objection has been raised before the ICSID Tribunal, by that, our criminal court has not lost its power and jurisdiction of the instant case. The Tribunal explained that this right of exclusivity relates to the resolution of investment disputes only and does not include or extend to criminal proceedings which deals with criminal liability and not with investment disputes. As a result, in principle, the criminal proceedings commenced by way of the complaints do not address the investment dispute before the Tribunal and therefore, do not threaten the exclusivity of the ICSID proceedings. Mr. Khurshed Alam Khan submitted that the ICSID Tribunal only has authority over the parties before them but do not have authority over the third

parties. Neither Mr. Moudud Ahmed nor the Durnity Daman Commission are parties to the relevant arbitration agreement, thus the exclusivity of ICSID arbitration does not extend to the present case or prevent Bangladesh Courts from exercising their jurisdiction over criminal cases with regard to third parties and as such the Rule is liable to be discharged. It is further submitted that ICSID Tribunal is not a Criminal Court. The said Tribunal will decide the claim of NIKO for supplying gas on the other hand the issue in the instant criminal proceedings is, whether there was any corruption in granting lease to NIKO or not and the allegation brought in the Criminal Court is to be decided on taking orally and documentarily evidence so on the plea of pendency of the claim of NIKO before the ICSID Tribunal, the instant criminal case cannot be postponed nor the opposite parties can be directed to proceed their as mentioned by the accused petitioner in his application filed under section 94 of the Cr. P.C. Bangladesh, as a contracting state to the ICSID Convention, has certain obligations. The main obligation

is to enforce the pecuniary obligations of an ICSID award as if it were a final decision of its Courts. In this case, there is no award yet. The ICSID Tribunal has jurisdiction only over the parties before them (Petrobangla, BAPEX, and NIKO) but do not have authority over third parties (Mr. Moudud, the ACC, the State of Bangladesh, or the Court of Bangladesh.) The Bangladesh Court are not prevented from exercising their Civil and Criminal jurisdiction with regard to its citizen. Hence, the Rule is liable to be discharged. He stated that if it is decided by the ICSID Tribunal that there was no corruption, NIKO is entitled to get money from the Opposite Parties that finding will not be binding upon the criminal court of our country because even if any finding is arrived to that effect by ICSID Tribunal that finding will be made in Civil dispute in respect of claim of NIKO. He submitted that the allegation of corruption made against the accused in the instant case will be decided in Criminal Proceeding and secondly our criminal courts are not under control and jurisdiction of the ICSID Tribunal.

The continuation of the present criminal proceedings would not in any way contravene any award or direction if any, by the ICSID Tribunal. On the contrary, the ICSID Tribunals by their Procedural Order NO. 15 dated 7 October 2016 has already clarified that the “**Tribunals are not like a criminal Court tasked with punishing acts of corruption as such**”. That jurisdiction can only be performed by the Bangladesh Court in the present case and as such the Rule is liable to be discharged. Mr. Khorshid Alam Khan also submitted that the accused petitioner filed an application under section 344 only for prolonging the criminal case and delay disposal of the same and it has been done for his own interest. The Bangladesh courts are established to prevent the misuse of law and the Courts have jurisdiction and power to conduct trial of any citizen over an allegation of corruption and other criminal allegations. No International Court or Tribunal have jurisdiction to interfere with such kind of proceedings against a person individuals. The instant criminal cases against the

petitioner would not violate any international legal obligations of Bangladesh. On the contrary, the continuous delay in disposing the pending criminal cases caused by the persistent dilatory tactics employed by the petitioner, in bad faith, would have a detrimental effect on the image of Bangladesh as a country which persecutes corrupt offenders in compliance of its international obligation to fight corruption and hence, the Rule is liable to be discharged. It is further submitted that section 344 of the Code of Criminal Procedure deals with the power to postpone or adjourn Proceedings. Section 344 provides that if, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the court may, if it thinks fit by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody. Section 94 of the Code of Criminal Procedure deals with the summons

to produce document or other thing, Sections 344 and 94 of the Code of Criminal Procedure have no manner of application in this Case but the petitioner filed the instant revisional application before this Hon'ble Court only to delay the proceeding of Special case No. 16 of 2008 and hence, the Rule is liable to be discharged.

Mr. Md. Khurshid Alam Khan also stated that the object of section 344 of the Code of Criminal Procedure is to avoid hardship of the parties and witnesses. A postponement sine die is not in accordance with the provisions of this section. There is no hard and fast rule that a criminal case should be stayed pending the disposal of an arbitration proceedings in relation to the distinct subject matter. Each case must be decided upon its own facts. Question of saying further proceedings should always be decided by the facts, circumstances and nature of criminal case and arbitration proceedings pending between the parties. Stay of Criminal Proceeding for indefinite period pending decision of the arbitration proceedings is undesirable. Criminal case is not stayed on

fancy desire of accused petitioner. An adjournment or postponement of a criminal case for an indefinite period is not in accordance with the provision of section 344 or any other provision of the Code of Criminal Procedure. Pending the decision of arbitration proceedings, no stay for an indefinite period or sine die can be given in respect of criminal proceeding. Its application must depend on the merits of each case. Each case must be decided upon its own facts and circumstances. This is not a fit case to invoke section 344 of the Code of Criminal Procedure.

We have gone through the application and the affidavit in opposition filed by the opposite party No.2-ACC as well as the relevant laws. We have considered the submissions advanced by the learned advocates for both the sides. It appears that the ACC has lodged an FIR alleging that the accused petitioner with intent to illegally to benefit himself or to benefit others by giving opinion as the Law Minister to include Chatak (East) Gas Field as marginal/abandoned gas field and without any tender acted to favour NIKO Resources BD. Limited to extract

gas from the aforesaid gas field. After investigation police submitted charge sheet under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409/109 of the Penal Code recommending prosecution. The Judge of the Special Court No.9, Dhaka took cognizance of the offence. On 16.08.2016 the petitioner filed two separate applications - one seeking adjournment of the proceedings of the case under section 344 of the Code of Criminal Procedure and another one is for production of documents under section 94 of the Code of Criminal Procedure. The Court below by its order dated 16.08.2016 rejected the prayers of the petitioner. Being aggrieved by this rejection order the petitioner has come up with this present application under section 435 read with 439 of the Code of Criminal Procedure.

Now, we are to decide whether any application can be entertained under section 344 of the Code of Criminal Procedure while arbitration proceeding is pending before an International Tribunal. It is admitted that the proceeding before the International Tribunal namely

International Centre for Settlement of Investment Disputes (ICSID) has been initiated by NIKO and in the arbitration proceeding BAPEX and PETROBANGLA are the parties. But neither the Government of Bangladesh nor Mr. Moudud Ahmed nor the Anti Corruption Commission has been made a party in the said proceeding. It is a pertinent question as to whether any observation given by any International Tribunal is binding upon the Courts of Bangladesh. In this regard Mr. Mahbubey Alam, the learned Attorney General appearing in this case on behalf of the opposite parties No.1 and 3-5 submits that Bangladesh is a sovereign country and its Courts are competently independent in discharging their judicial function. No observation of any International Tribunal has any binding effect upon the Courts of Bangladesh. He further submits that since the ICSID itself has mentioned that the Tribunal has no right to settle the criminal dispute including the corruption, the very question raised by the ACC against the petitioner cannot be decided by the said Tribunal. Since the ACC

has brought the allegation of corruption against the petitioner it is to be decided by the Courts of this country. There is no any scope to postpone or adjourn the proceeding going on in the Courts of this country under its own/and for the reasons of pendency of the arbitration proceeding before the Tribunal (ICSID).

Mr. Md. Khurshid Alam Khan, learned advocate endorsed the submissions of Mr. Mahbubey Alam, the learned Attorney General for Bangladesh.

Let us see what sections 344 and 94 says. The contents of sections 94 of the Code of Criminal Procedure run as follows:

(1) Whether any Court, of ..., any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the persons in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Provided that no such officer shall issue any such order requiring the production of any document or other thing which is a in the custody of a bank or banker as defined in the Bankers' Books Evidence Act, 1891 (XVIII of 1891), and relates, or might disclose any information which relates, to the bank account of any persons except.-

(a) for the purpose of investigating an offence under sections 403,406,408 and 409 and sections 421 to 424 (both inclusive) and sections 465 to 477A (both inclusive) of the [Penal Code], with the prior permission in writing of a Sessions Judge; and

(b) in other cases, with the prior permission in writing of the High Court Division.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Evidence Act, 1872, section 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities."

The contents of section 344 of the Code of Criminal Procedure runs as follows:

(1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the

commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than High Court Division shall be in writing signed by the presiding Judge or Magistrate.

***Explanation-**If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."*

From plain reading of section 94 of the Code of Criminal Procedure it is clear that this section has given a power to the Court to summon any person to produce documents if it is necessary or required for the Court for investigation, inquiry or trial. This power is absolutely discretionary in nature, for the reason that before the judge makes an order for the production of any

document he must judicially consider whether the production of the document sought for is at all necessary or relevant for the purpose of the trial.

The trial Court by its order dated 16.08.2016 rejected the application filed under section 94 of the Code of Criminal Procedure reason being to determine whether corruption was committed by the petitioner in giving work to NIKO through JVA & GPSA the documents namely Vienna Convention on law of Treaties, 1969, Convention on settlement of investment disputes between States and Nationals of other States, 1966, Rule of Procedure for Arbitration Proceedings, List of Contracting States and other signatories of the convention as of April 12, 2016.

All papers and documents relating to or connected with the proceedings now pending before the ICSID Tribunal are not at all necessary according to the trial Court. Though the order does not appear to be an elaborate one but the gist of the order demonstrate that

those documents were not necessary for the Court to arrive at a correct decision.

According to section 344 of the Code of Criminal Procedure, for any reasonable cause if it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial the Court may if it thinks just by order in writing, stating the reasons thereof, from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. It appears that "the power of court to adjourn is entirely a judicial discretion. Adjournments should not be made except upon strong and reasonable grounds. It is most inexpedient for a sessions trial to be adjourned. Judges should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of securing justice. It is thus totally a judicial discretion of the court to adjourn the inquiry or trial. But this discretion is to be exercised only if there is reasonable cause for the adjournment. If the Concerned judge is revealed to have exercised proper judicial discretion in

refusing adjournment a case, the High Court will not interfere with it. When a judge is of opinion that a party before him is unnecessarily wasting time and protracting the case, he has a discretion to refuse adjournment. Further, a postponement *sine die* does not go with the intend of provisions of this section. The correct method for the court is to postpone the case, not *sine die*, but for a fixed and definite period pending the disposal of the connected case arising out of selfsame fact. An adjournment *sine die* means an indefinite adjournment and cannot possibly be upheld. The Code does not contemplate adjournments of criminal cases *sine die*. It is settled proposition of law that pendency of criminal matters would not be an impediment to proceed with civil suits. The criminal court would deal with the offence punishable under the relevant Act. On the other hand, the courts rarely stay the criminal cases and only when compelling circumstances require the exercise of such power.

Section 344 empowers the criminal court to adjourn an inquiry or trial for any reasonable cause and the institution of a civil suit between the same parties and in respect of the same property may be considered as a reasonable cause for which criminal proceedings may be stayed. Ordinarily criminal proceedings should not be started when the same question is also involved in a pending civil litigation. But, however, is not a rule of law but a rule dictated by prudence based on justification and its application must depend on the merits of each case. It is not invariable rule that there cannot be any parallel proceedings on the same facts in the criminal and civil courts. There is no hard and fast rule that a criminal case should be kept stayed pending the disposal of a civil suit in relation to the same subject matter. Each case must be decided upon its own facts and under the respective law. And the institution of a civil suit is not always a valid ground for adjourning a criminal prosecution, although the issues and evidence in the two cases may practically be the same. But finally it is highly undesirable that the

same dispute should be allowed to be fought out simultaneously in the civil and criminal courts; and so the criminal proceedings should be stayed pending the decision of the civil suit.”

In the case in hand what we find? we find that there has been arbitration proceeding before ICSID an International Tribunal. It is true that Bangladesh is a signatory of the Convention 1966. The Tribunal is the creation of the said convention. NIKO has preferred the arbitration proceeding before the said Tribunal claiming his bill from BAPEX and PETROBANGLA under the GPSA. The GPSA was done following JVA, when NIKO invoked the jurisdiction of ICSID, BAPEX and PETROBANGLA became party to the arbitration, but the Government of Bangladesh or ACC or Md. Moudud Ahmed or anyone else other than BAPEX and BEPROBANGLA is not a party to this arbitration proceeding. ICSID will settle the financial dispute between NIKO, BAPEX and PETROBANGLA. Finally it will fix the liability and will settle the financial claim of

the parties. There is no any definite time when this arbitration proceeding will reach to its finality.

Since the dispute is not between ACC and Mr. Moudud Ahmed pending before ICSID Tribunal or before any other Court of the country the Court below did not feel it necessary to entertain the application under section 344 of the Code of Criminal Procedure filed by the petitioner. It is well settled principle that the Court can exercise its discretion under section 344 of the Code of Criminal Procedure when any other proceeding between the same parties regarding the same disputes is pending before any Court of the country, but there is nothing to show that there is any other proceeding pending before any Court between the same petitioner regarding the same subject matter.

It is also not clear that when the arbitration proceeding pending before ICSID will reach to its finality. Even if the pendency of the arbitration proceeding before ICSID is considered as a reasonable ground the criminal proceeding going on in one Court cannot be stayed *sine*

die. Thus, the Court below did not consider that the pendency of the arbitration proceeding before ICSID is a reasonable ground for allowing the application under section 344 of the Code of Criminal Procedure to postponed/adjourned the proceeding before it.

The ICSID Tribunal by its order no.15 dated 07.10.2016 has clarified that “ Tribunals were not like a criminal Court tasked with punishing acts of corruption neither can adjudicate the criminal act of the petitioner as alleged by the ACC nor it can adjudicate any criminal act done by anyone else other than the petitioner. It is not within their jurisdiction.

It is to be noted that the ICSID, an International Tribunal is not a forum having jurisdiction to prosecute try and punish a criminal act constituting the offence of ‘corruption’ occurred in the territory of sovereign Bangladesh. Only the court of law formed under the law of our own is authorized to convict a person for an act committed in violation of a law in force in the territory of

Bangladesh at the time of commission of the act for which he or she is arraigned.

Admittedly, the petitioner is not a party to the dispute pending in the ICSID. This Tribunal's power to determine its jurisdiction in dealing with the matter arbitration dispute is not questioned. But the arbitration proceeding pending for adjudication in the ICSID does not involve determination of liability for any criminal act occurred in the sovereign geographical area of Bangladesh which is punishable under its own law. In the arbitration proceedings pending in the said Tribunal only the financial claim and liability of the parties therein is to be resolved, not the criminal liability of the present petitioner or of anyone, party to the said proceeding.

Thus, merely for the reason that Bangladesh is a signatory of the Convention of 1966 under which the ICSID has been operating it cannot be said that the petitioner who has been arraigned in our own Court of law for a criminal act constituting the offence of 'corruption' shall be prejudiced if the proceedings going

on in our Court is not kept postponed and adjourned till decision of the ICSID in connection with the said arbitration proceeding. The Court below does not appear to have acted illegally in rejecting the application under section 344 of the Code of Criminal Procedure seeking postponement and adjournment pending arbitration proceeding in the ICSID.

Besides, in no way the decision of the said International Tribunal dealing with the said arbitration dispute shall have impact upon the proceedings pending in our court to negate the allegation of 'corruption' as the same does not have any binding force upon the legal institution of Bangladesh dealing with criminal proceedings.

In exercise of judicial discretion as provided in section 344 of the Code of Criminal Procedure court may pass an order postponing and adjourning the proceedings if it considers it just for securing ends of justice, but of course not for an indefinite period and for no valid reason as well. The disposal of proceedings involving

arraignment of 'corruption' punishable under our own law must be given precedence over the arbitration proceedings pending in an International Tribunal-ICSID which is not authorized to adjudicate any form of criminal act even it arises out of self-same occurrence.

The Court below rightly refused to consider the application under section 94 of the Code of Criminal Procedure seeking production of documents related to the arbitration proceedings pending in the ICSID, by its order dated 16.08.2016. Obviously those documents were related to the proceedings pending there but the same, as it patently appears, are not at all indispensable and basic for determining criminal liability of the petitioner in the proceedings going on in our own court of law. Essence of Court's order also demonstrates it, and thus, it does not suffer from any illegality.

The criminal act of the petitioner and other as alleged by the ACC must be adjudicated by a Court of competent authority of the country, since charge sheet has been submitted in this case. We do not find any

illegality in the order passed by the Special Judge, 9th Court, Dhaka in Special Case No.16 of 2008, thus the Rule is **discharged**.

The order of stay granted earlier is hereby vacated. The concerned Court is directed to proceed with the trial in accordance with law.

Let a copy of this judgment be communicated at once.

Krishna Debnath, J.

I agree.