

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

Writ Petition No. 4737 of 2018

In THE MATTER OF:

An application under Article 102(1) and 102(2) (a) (i) and (ii) of the Constitution of the Peoples' Republic of Bangladesh, 1972.

-AND-

IN THE MATTER OF:

Unique Cement Industries Limited (UCIL), represented by its Managing Director, Head Office: Fresh Villa, House # 15, Road # 34, Gulshan-1, Dhaka-1212.

.....Petitioner.

-Versus-

1. Bangladesh Bank, represented by its Governor, Bangladesh Bank Bhaban, Motijheel C/A, Motijheel, Dhaka.

2. Governor, Bangladesh Bank, Bangladesh Bank Bhaban, Motijheel C/A, Motijheel, Dhaka.

3. General Manager, Financial Integrity & Customer Services Department, Bangladesh Bank, Head Office- 2nd Annex Building (17 Floor), Motijheel, Dhaka-1000.

4. Islami Bank Bangladesh Limited, Rajbari Branch, Rajbari.

5. Branch in Charge, Islami Bank Bangladesh Limited, Rajbari Branch, Rajbari.

6. M/S. Rabeya Traders, represented by its proprietor of Md. Omar Faruk of village-Mrigibazar, Police Station-Kalukhali, District-Rajbari.

.....Respondents.

And

Mr. Murad Reza, Senior Advocate
with

Mr. Md. Hasan Rajib Prodhan,
Advocate

.....For the Petitioner.

Mr. Dihider Masum Kabir,
D.A.G.with
Mr. A.M. Jamiul Hoque (Faisal),
A.A.G. with
Ms. Sabikun Nahar, A.A.G.with
Mr. Ali Asgar Fakir, A.A.G with
Mr. Mohammad Alam Khan, A.A.G.
Mr. Sovan Mahmud, A.A.G.

.....For the Appellant-government

Mr. Syed Hasan Zobair, Advocate
..... For the Respondent Nos.01
& 02.

Mr. S M Tariqul Islam, Senior
Advocate with
Mr. Muhammad Ali Akkas Chowdhury,
Advocate

.....For the Respondent
Nos.04 & 05.

Heard on: 09.01.2025, 30.01.2025,
13.02.2025, 20.02.2025, 13.03.2025,
24.04.2025 and
Judgment on: 08.05.2025.

Present:

Mr. Justice Md. Jahangir Hossain
and
Mr. Justice Yousuf Abdullah Suman

Yousuf Abdullah Suman, J:

In this writ petition the petitioner, Unique Cement Industries Limited, prayed for a direction upon the respondent nos.1 and 2, Bangladesh Bank, under sections 45 and 49 of the Bank Companies Act 1991 to direct the respondent nos.4 & 5, Islami Bank Bangladesh Limited, for encashment of a Bank Guarantee issued by Islami Bank on behalf of the respondent no.6, M/s Rabeya Traders, in favour of the instant petitioner- the beneficiary of the said

Bank Guarantee, and a Rule *Nisi* was issued to that effect by this Division on 08.04.2018.

The facts of the case in brief are that, the petitioner is a cement producing and selling company carrying its business at home and abroad through dealership. The respondent no.6, M/s Rabeya Traders, obtained such dealership from the petitioner, and as a condition under the dealership, the respondent no.6 submitted a Bank Guarantee being no.12 dated 19.04.2015 for an amount of TK.50,000,00/ (fifty lakh) issued by the respondent nos.4 & 5 Bank in favour of the petitioner which was valid for one year till 18.04.2016 (Annexure-A to the writ petition). The respondent no.6 subsequently failed, as claimed by the petitioner, to pay the dues to the petitioner, and the petitioner hence made a demand to the respondent nos.4 & 5 Bank for encashment of the said Bank Guarantee on 20.12.2015 within its validity period (Annexure- H to the Supplementary Affidavit). A few days later on 29.12.2015, in furtherance to a purported negotiation between the parties, the petitioner placed a revised demand to the respondent nos.4 & 5 Bank in place of its original Bank Guarantee of fifty lakh (Annexure- L-3 to the Affidavit-in-Opposition filed by the respondent nos.4 & 5). The negotiations failed. The respondent nos.4 & 5 Bank, however, did not encash the said Bank Guarantee in favour of the petitioner. A few days later, the respondent no.6 instituted a suit being Title Suit No.1 of 2016 in the learned Joint District Judge Court, 1st Court, Rajbari praying for an injunction upon the encashment of the said Bank Guarantee on 10.01.2016. The prayer was rejected. Being aggrieved by, the respondent no.6

filed a First Miscellaneous Appeal being Civil Rule No.08 (FM) of 2016 (arising out of FMAT No.19 of 2016) in this Division and obtained an order of injunction on 18.01.2016 upon the encashment of the said Bank Guarantee (Annexure- I to the Supplementary Affidavit). The petitioner's second demand for encashment of the said Bank Guarantee dated 21.01.2016 was thus rejected by the respondent nos.4 & 5 Bank on the ground of this order of injunction on 27.01.2016. The said Bank Guarantee was expired on 18.04.2016. The aforesaid Title Suit No.1 of 2016 of the learned Joint District Judge Court, 1st Court, Rajbari was, however, withdrawn by the respondent no.6 on 25.04.2016. The aforesaid FMAT No.19 of 2016 was also dismissed by this Division as being not pressed and the connected Rule was discharged resulting in the order of injunction vacated on 03.05.2016. The respondent nos.4 & 5 Bank, however, refused to encash the said Bank Guarantee, at this time, on the ground of its being expired, and cancelled the said Bank Guarantee on 09.05.2016. The respondent no.6 filed another civil suit being no.55 of 2016 on 09.08.2016 for declaration of the demand for encashment of said Bank Guarantee illegal even after cancellation of the same by the respondent nos.4 & 5 Bank on 09.05.2016 - the latest position of which is unfounded in records. The petitioner therefore made two representations on 19.06.2016 and 19.09.2016 to the respondent nos.1 & 2, Bangladesh Bank, praying for a direction upon the respondent nos.4 & 5 Bank, for encashment of the said Bank Guarantee in favour of the petitioner *vide* Annexure-C and F to the writ petition respectively. The respondent nos.1 & 2, however, failed to take any effective move for

encashment of the said Bank Guarantee till date. Hence the case.

Mr. Murad Reza, the learned senior counsel appearing for the petitioner, submits that, the petitioner placed the demand for encashment of the said Bank Guarantee No.12 dated 19.04.2015 in time on 20.12.2015 whereas the expiry date was on 18.04.2016; and when a Bank Guarantee is placed in time for encashment, the issuing bank has no legal right to refuse payment unless they have an issue of fraud. He refers *Uttara Bank vs. Macneil and Kilburn* [1981] 33 DLR (AD) 298 wherein it was held that “*the contract to pay to the seller is absolutely obligatory. No direction upon the bank to withhold payment can be passed – only exception is in case of fraud of which the bank has notice*”. As to the order of injunction on the said Bank Guarantee granted by this Division, the learned senior counsel submits that, the decision is erroneous and conflicting to the settled principles of law established by our jurisdiction as was held in *Nuvista Pharma vs. NBR* [2013] 65 DLR (AD) 302 that “*injunction on the Bank Guarantee cannot sustain in view of the decision of the case of Uttara Bank vs. Macneil and Kilburn reported in 33 DLR (AD) 298 wherein it has been held that there cannot be any injunction whatsoever upon any Bank Guarantee*”. He further submits that respondent nos.1 & 2, Bangladesh Bank, has statutory duties to direct the respondent nos.4 & 5, Islami Bank Bangladesh Limited, for encashment of the said Bank Guarantee in favour of the petitioner under Section 45 and 49 of the Bank Companies Act, 1991. In relation to this, he refers the cases of *ASF Rahman vs. Bangladesh Bank* [2000] 52 DLR (AD) 61, *JIT Knit Composite vs. Government of Bangladesh*

[2013] 18 BLC 480, *Delta Spinners vs. Bangladesh Bank* [2015] 20 BLC 339 wherein it has consistently been held that the Bank Companies Act, 1991 clearly invest Bangladesh Bank with a strong regulatory power over the functioning and business of banking companies. In addition, he refers the ICC Uniform Rules for Demand Guarantee (URDG 758) and submits that the instant Bank Guarantee comes within the purview of Article 2 of the same which defines a 'Guarantee' as any signed undertaking, however named or described, providing for payment on presentation of a complying demand. The learned senior counsel therefore prays for the *Rule* to be absolute.

Mr. S M Tariqul Islam, the learned senior counsel appearing for the respondent nos.4 & 5 Bank, on the other hand, submits that, though the petitioner placed its first demand in time on 20.12.2015 for encashment of the said Bank Guarantee, 9 (nine) days later it submitted another revised demand on 29.12.2015 requesting to issue a new Bank Guarantee for 25 (twenty five) lakh and a payment order for 19 (nineteen) lakh in place of the encashment of the original Bank Guarantee of 50 (fifty) lakh (Annexure- L3 to the Affidavit-in-Opposition filed by the respondent nos.4 & 5). He therefore suggested a negotiation between the parties as to the payment dues under the Bank Guarantee, and submitted that the petitioner itself prevented the instant respondents for not making the payment under the said Bank Guarantee *vide* Annexure-L3, mentioned above, adding that the petitioner never submitted the original Bank Guarantee to them while requesting for its encashment. He further submits that, on 18.01.2016 this Division granted an

order of injunction upon the encashment of the said Bank Guarantee and hence the respondent nos.4 & 5 Bank could not make the payment. The Guarantee however expired on 18.04.2016 during the order of injunction being in force. The respondent nos.4 & 5 Bank therefore could not encash the said Bank Guarantee during its validity period, and after its expiry the respondents had no other options but to cancel the said Bank Guarantee and they did so on 9.5.2016, he submits. The learned senior counsel finally submits that, this case is burdened by disputed question of facts and therefore not maintainable in writ jurisdiction.

Learned counsel Mr. Syed Hasan Zobair appeared for the respondent nos.1 & 2, Bangladesh Bank. Filing an affidavit in opposition, the learned counsel submits that, since the matter was subjudice due to the order of injunction granted by this Division, Bangladesh Bank had no scope to give any decisions during the period of injunction. Subsequently on 01.08.2016, after the expiry of the period of said order of injunction, the bank, however, instructed the respondent nos.4 & 5 Bank to take effective initiatives to resolve the matter in issue *vide* Annexure-D to the writ petition. He therefore submits that, Bangladesh Bank has discharged its duty under the law, and thus the Rule be discharged as having no merit. The learned counsel, however, also submitted that, the respondent Bangladesh Bank would remain abide by the verdict of this Hon'ble Court. In addition, upon a query made by this Court, he asserted that a Bank Guarantee is payable immediately.

Learned Deputy Attorney General, Mr. Dihider Masum Kabir, also placed a written submission before us arguing that the cancellation of Bank Guarantee by Islami Bank is unlawful, and that a bank guarantee must be honoured if presented in due time for encashment unless any fraud or misrepresentation is found. Learned DAG therefore submits that Islami Bank misused their powers with *malafide* intention and as such a direction may be given to Bangladesh Bank to settle the issue as per law, i.e., under section 45 of the Bank Companies Act, 1991.

We have gone through the writ petition as well as the supplementary affidavit filed by the petitioner, two affidavits in oppositions filed by the respondent nos. 1 & 2 - Bangladesh Bank, and the respondent nos. 4 & 5 - Islami Bank Bangladesh, and also two written submissions placed before us by the learned counsel for the petitioner and the learned Deputy Attorney General. We have also given our anxious consideration to the submissions made by all the parties involved herein.

It is admitted that the demand for encashment of the Bank Guarantee being no.12 dated 19.04.2015 for an amount of TK.50,000,00/ (fifty lakh) was placed by the petitioner before the issuing bank, Islami Bank Bangladesh Limited, in time on 20.12.2015 whereas the expiry date was 18.04.2016 (Annexure-L to the Affidavit in Opposition filed by the respondent nos.4 & 5). Islami Bank, the respondent nos.4 & 5, received this letter of demand on 24.12.2015 requesting them to encash the said Bank Guarantee within 7 (seven) days from the date of its receipt. 5 (five) days thereafter on 29.12.2015, Islami Bank received a revised demand in

place of the original Bank Guarantee of 50 (fifty) lakh. The fresh demand, however, maintained a reservation clause stating *“This is without any prejudice to our encashment letter mentioned above”* i.e., the original demand letter dated 20.12.2015 (Annexure-L3 to the Affidavit in Opposition filed by the respondent nos.4 & 5). The original demand therefore remains valid for all material time. The order of injunction was granted on 18.01.2016. The respondent nos.4 & 5 Bank thus had around 28 (twenty eight) days in hands to honour the said Bank Guarantee before the order of injunction was granted- whereas a Bank Guarantee is payable on demand. Clause (1) of the said Bank Guarantee reads as follows: *“1. To make unconditional payment of Tk.50,00,000/- (Fifty lac) only to you & your demand without any question and without any reference whatsoever of our client.”*

As to the issue of granting injunction by this Division upon the encashment of the said Bank Guarantee, we find that this decision of granting injunction is not compatible with the settled principles as to the granting of injunction upon Letter of Credits and/or Bank Guarantees consistently followed by our apex court in a number of cases, including, *Uttara Bank vs. Macneil and Kilburn* [1981] 33 DLR (AD) 298, *Smart Apparels vs. Hanvit Bank Kuni Bong Branch* [2005] 57 DLR (AD) 194, *Nuvista Pharma vs. NBR* [2013] 65 DLR (AD) 302. In *Nuvista Pharma*, referred above, it was held that, *“injunction on the Bank Guarantee cannot sustain in view of the decision of the case of Uttara Bank vs. Macneil and Kilburn reported in 33 DLR (AD) 298 wherein it has been held that there cannot be any*

injunction whatsoever upon any Bank Guarantee". Recently a larger Bench of this Division followed the same principles in First Miscellaneous Appeal No.242 of 2021 with Civil Rule No.202 (FM) of 2021 in an unreported case of *Meejab Limited vs. AA Knitspin Limited* decided on 16.07.2024. We are therefore of the view that the decision of granting injunction by this Division was not an informed decision.

As to the issue of disputes and negotiations between the petitioner and the respondent no.6- the supplier and customer respectively- raised and suggested by the learned counsel appearing for the respondent nos.4 & 5, we hold that in *Edward Engineering vs. Barclays Bank* [1978] LLR Vol.1. 166, referred and approved by our apex court in *Uttara Bank vs. Macneil and Kilburn*, referred above, Lord Denning M.R. observed that, "*It is not concerned in the least with the relations between the supplier and customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice*". It is nobody's case herein that there is any fraud of which the bank got notice. Further, if the customer, respondent no.6 herein, has any grievances in law the same can be remedied by bringing an appropriate action for compensations or damages. In the light of the above, we do not find any reason as to why Islami Bank Bangladesh, the

respondent nos.4 & 5, shall be entitled to refuse the payment under the said Bank Guarantee.

Now, whether Bangladesh Bank, the respondent nos.1 & 2, have authority to give directions upon the respondent nos.4 & 5, Islami Bank, for encashment of the said Bank Guarantee in favour of the petitioner under Section 45 and 49 of the Bank Companies Act, 1991? The relevant parts of these two sections are reproduced herein below.

45. Power of Bangladesh Bank to give directions

(1) If Bangladesh Bank is satisfied to the effect that-

(Ka) ...

(Kha) ...

(Ga) for preventing activities detrimental to the interest of the depositors of any bank company or prejudicial to the interest of the bank company; or

(Gha) for securing the proper management of any bank company, it is necessary to issue directions to the bank companies generally or to any bank company in particular, it may issue such directions as it deems fit; and the bank company concerned shall be bound to comply with such direction.

49. Further powers and functions of Bangladesh Bank

(1) Bangladesh Bank may-

(Ka) ...

(Kha) require bank companies generally or any bank company in particular, to refrain from taking any specific action in relation to any particular matter concerning their or its business, or to take such action in relation thereto;

It is evident from the above referred text that Bangladesh Bank has sufficient authority to give mandatory directions upon the bank companies under Section 45, and under Section 49 it has power to issue directions both in the nature of prohibition and mandamus.

Further, in *ASF Rahman vs. Bangladesh Bank* [2000] 52 DLR (AD) 61, B B Roy Choudhury, J held that, “Section 45(1)(Ga)(Gha) and section 49(Kha) of the Bank Companies Act clearly invest Bangladesh Bank with a strong regulatory power over the functioning and business of banking companies”. This decision has been followed in *JIT Knit Composite vs. Government of Bangladesh* [2013] 18 BLC 480 with the following findings: “we are of the view that the ends of justice would be best served if a direction has been [is] given upon the respondent no.2, Bangladesh Bank to give a decision upon the application dated 22.07.2012 (Annexure-L) filed by the petitioner positively in terms of sections 45(1)(Ga)(Gha) and 49(Kha) of the Bank Companies Act, 1991”. In addition, in *Delta Spinners vs. Bangladesh Bank* [2015] 20 BLC 339, it was held that “it has now become the obligation of the Bangladesh Bank to take appropriate actions against concerned L/C issuing banks for their illegal role in stopping re-imbursement against those L/C”.

Thus, the law and the corresponding judicial rulings confirm that Bangladesh Bank has sufficient authority, if not a duty or obligation, to give directions upon bank companies generally or to any bank company in particular.

In addition, under Uniform Rules for Demand Guarantees (URGD 758) issued by the International Chamber of Commerce (ICC), the instant Bank Guarantee is in alignment with the demand guarantee defined in Article 2 of the ICC URGD 758. Further, under Article 16 of Uniform Customs and Practice (UCP 600) a bank under the law and banking practice is bound to make payment or re-imburement in respect of the accepted bill once they are accepted by the issuing banks, and once such acceptance is given, the matter is closed and the concerned banks are precluded from raising any issue thereafter (*Delta Spinners vs. Bangladesh Bank*, referred above).

In the light of the above findings and observations we conclude that (a) that the said Bank Guarantee was placed for encashment on time; (b) that the injunction granted by this Division upon the encashment of the Bank Guarantee was not an informed decision and thus susceptible to the settled principles consistently followed by our apex court; (c) that the issues of disputes as to the performance of obligations under the guarantee between the contracting parties are hereby set to naught; aggrieved party's grievances can be remedied by bringing an appropriate action for damages; (d) that performance of guarantee, letter of guarantee, letter of credit, documentary credit, bank guarantee, etc., are of cognate; (e) that Bangladesh

Bank has sufficient authority, if not a duty or obligations, to give direction upon the bank companies under the law; and (f) that the international commercial practices are also in alignment with the observation we made above.

Premised in the above, this Court finds merit in the application and the substance in the Rule issued.

In the result, the Rule is made absolute with the following direction.

The respondent nos.1 & 2, Bangladesh Bank, are hereby directed to take effective and efficient action in order for encashment of the Bank Guarantee being no.12 dated 19.04.2015 for an amount of TK.50,000,00/ (fifty lakh) issued by the respondent nos.4 and 5, Islami Bank Bangladesh Limited, on behalf of the respondent no.6, M/s Rabeya Traders, in favour of the petitioner, Unique Cement Industries Limited, within 30 (thirty) days from the date of receipt of a copy of this judgment and order.

There is no order as to costs.

Communicate this judgment and order at once.

Md. Jahangir Hossain, J:

I agree.