

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

Writ Petition 6036 of 2006.

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:

Md. Abbas Ullah, Proprietor of Abbas Associates being dead his heirs Tazin Abbas and others.

..... Petitioners

-Versus-

People's Republic of Bangladesh represented by the Secretary, Ministry of Textile and Jute and others.

..... Respondents

Mr. Murad Reza, Senior Advocate with
Mr. Muhammad Shafiqur Rahman and
Mr. Md. Samiul Huque, and
Mr. Redwan Ahmed and
Mr. Milton Das, Advocates

. . . . For the petitioners

Mr. Kazi Mynul Hassan, DAG

. . . . For the respondent No.1

Mr. K. S. Salauddin Ahmed, Advocate

. . . For the respondents No. 3 and 4.

Mr. Golam Rabbani, Advocate

. . . For the respondent No. 5.

Mr. A. M. Amin Uddin, Senior Advocate with
Mr. Md. Bodruddoza, Senior Advocate and
Mr. Raghob Roush Chowdhury and
Mr. Shishir Kanti Mazumder and
Mr. Md. Shohidul Islam and

Mr. Md. Asherul Islam Chowdhury, Advocates

. . . For the respondent No.6.

Present:

Mr. Justice J. B. M. Hassan
and

Mr. Justice Razik Al Jalil

Heard on 10.08.2023, 17.08.2023 and
Judgment on 29.08.2023.

J.B.M. Hassan, J.

The predecessor of present petitioners, namely, Md. Abbas Ullah, Proprietor of Abbas Associates as writ petitioner obtained the Rule Nisi in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned letter No. বপাম/শাঃবেঃবিঃ/বিক্রয়-8/০৫(অংশ-২)/২৬২ dated 20.06.2006 written by respondent No.2 (Annexure-K) rejecting the petitioner’s prayer to pay his part of the installment owed to the Government separately and to accept the petitioner’s proposal to pay the balance 20% money as consideration for the unpaid shares of the Samity and to take necessary steps in order to keep the Mymensingh Jute Mill running should not be declared to have been issued without lawful authority and is of no legal effect and direct respondent Nos. 1-4 to take necessary steps in the line with the essence of the contracts dated 03.07.2001 and 12.07.2001 in order to keep the mill running and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Relevant facts leading to issuance of the Rule Nisi are that Mymensingh Jute Mills Ltd., Shambuganj, Mymensingh (the Jute Mill) is a nationalised enterprise being vested in the Government in accordance with section 4(1) of the Bangladesh Industrial Enterprise (Nationalisation) Order, 1972 (shortly, the PO 27 of 1972). Subsequently, the Mill could not run and in 1993, it was closed. Thereafter, the Government took several unsuccessful attempts to sell the Mill through Privatization Board by floating open tender. Lastly at the instance of the Privatization Board tender having been floated on 02.02.1998, the Mymensingh Jute Mills Sramik Karmachari Kallayan Bohumukhi Samabay Samity (the Samity) was selected as Purchaser with their offer at Tk. 11.02 crore. But they failed to deposit required bid money to the tune of Tk. 144.74 lac within the schedule time. In the circumstances,

the Samity made proposal to take a financial investor, namely, Md. Abbas Ullah proprietor of Abbas Associates Company (writ petitioner i.e predecessor of present substituted petitioners) for arranging fund. Thereafter, the Parliamentary Standing Committee relating to the Ministry of Jute by their meeting dated 25.11.1998 took decision to sell the Mill to the Samity. Accordingly, the Standing Committee referred to the matter to the Ministry and then the Ministry sent the proposal for approval of the Executive Committee on the National Economic Council (ECNEC). The ECNEC by their decision through the meeting held on 22.05.2001, accepted the proposal of the Ministry and took decision to transfer (Sale) the Mill in favour of the Samity along with its financier, namely, Md. Abbas Ullah proprietor of Abbas Associates (the writ petitioner).

Pursuant to said decision, the Bangladesh Jute Mills Corporation (BJMC) issued the Letter of Intent (LOI) on 20.06.2001 for transferring the Mill jointly to the Samity and the writ petitioner at Tk. 11.02 crore under certain terms and conditions. Accordingly, a Contract was signed on 12.07.2001 between the respondent-Government in one part and jointly with the Samity as well as its Financer (petitioner) as Purchaser on the other part, fixing share ratio of the Samity and the Financer-petitioner at 20% and 80% respectively And also incorporating payment schedule to be paid by 10 installments. As per the Letter of Intent the Samity and the petitioner also entered into another Contract on 03.07.2001 incorporating the terms and conditions to be followed by both the parties for running the Mill.

Subsequently, the Samity could not pay their proportionate 20% of the bid money and the Financer-petitioner raised the said issue before the respondents authority on several occasions. Finally, the Financer-petitioner made a proposal on 12.02.2006 to the respondents to allow him to pay 80% bid money separately as per his share and also transferring the entire Mill in his favour on receipt of remaining 20% bid money, the share of the Samity. The respondents Ministry by the impugned letter dated 20.06.2006 (Annexure-K to the writ petition) declined to accept the petitioner's offer and directed to pay the entire bid money as per schedule under the Contract. In this context, the Financer-writ petitioner i.e predecessor of present substituted petitioners filed this writ petition challenging the Annexure-K and obtained the Rule Nisi.

At the time of issuance of the Rule Nisi, this Court also allowed the writ petitioner (Financer) to pay his part of 80% of the total bid amount within 02(two) weeks from date on condition that the payment would not create any subsistent right in favour of the petitioner or the same would not effect the merit of the case.

Thereafter, the Rule Nisi was heard and by the judgment and order dated 15.01.2009 it was made absolute declaring the impugned letter dated 20.06.2006 (Annexure-K) without lawful authority and the respondents were directed to accept the writ petitioner as the sole Purchaser of the 100% share of the Mill and to allow the writ petitioner (Financer) to pay the balance consideration money in installments. The respondents No. 1 and 2 were also directed to reschedule the mode of payment of the balance consideration

money. Against the said judgment, the Samity filed Civil Petition for Leave to Appeal (CP) No. 428 of 2009. But ultimately the Samity opted to file Review Petition and accordingly did not proceed with the CP and it was dismissed on 05.01.2010 as not being pressed.

Thereafter, the Samity filed Review Petition No. 17 of 2010 for reviewing the judgment and order dated 15.01.2009 passed in this writ petition. Ultimately, the Review Rule was made absolute by the judgment and order dated 10.05.2011 setting aside the judgment and order dated 15.01.2009 upon condonation of delay of 254 days in filing the review application. In the review judgment, it was precisely held that the writ petitioner used manufactured documents regarding resolution of the Samity. Against the said review judgment the writ petitioner filed CP No. 340 of 2012 and after hearing the said CP, the Appellate Division by order dated 18.11.2013 disposed of the CP making observation and directions, in particular, directing the High Court Division to hear and dispose of the writ Rule afresh issued in the present writ petition.

In the aforesaid circumstances, while the Rule Nisi was awaiting hearing, the respondent No.1 issued the impugned memo dated 04.08.2014 cancelling the original Contract for sale dated 12.07.2001 executed between the Government and jointly the Samity and its Financer-writ petitioner and also directing to take over the Mill under control of the BJMC (Annexures-T to the application for issuance of the 1st supplementary Rule). Pursuant to said memo, the BJMC also issued another impugned memo dated 05.08.2014 constituting a committee for taking over the Mill from

possession of the writ petitioner and the Samity. (Annexure-S to the supplementary affidavit). Challenging both the memos dated 04.08.2014 and 05.08.2014 the petitioner filed an application and obtained the 1st supplementary Rule Nisi on 02.09.2014 which runs as follows:

“Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the Proggapon under memo No. 24.00.0000.202.18.045.13 (5th Vol.) 181 dated 04.08.2014 issued by respondent No.1 purporting to cancel the agreement dated 12.07.2001, taking back Mymnesingh Jute Mills from the petitioner, forfeiting all payments made by the petitioner and put the Mill in control of BJMC (Annexure-T) and why memo No. 24.04.0000.209.51.006.14-202 dated 05.08.2014 issued by respondent No. 3 purporting to form a committee and directing the committee to take back possession of the Mill and to make an inventory of the Mill’s properties (Annexure-S)during pendency the instant writ petition i.e writ petition No. 6036 of 2006 should not be declared to have been issued without lawful authority and be of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

At the time of issuance of the supplementary Rule Nisi, an interim order of stay was also passed and that against the said interim order, the Samity filed Civil Miscellaneous Petition for Leave to Appeal No. 986 of 2014 and after hearing the same, the Hon’ble Judge in Chamber passed an order of Status-quo in respect of present management of the Mill. Ultimately, CP No. 2422 of 2014 was filed and it was disposed of maintaining order of status-quo. In the meantime, the petitioner came to know that the respondents issued a Letter of Intent in favour of the Samity jointly with another Financer, namely, Shamim Enterprise Property (Pvt.) Limited and pursuant to the said Letter of Intent the Government entered into an Contract registered on 19.08.2014 (executed on 13.08.2014) with the

Samity along with the Financer, Shamim Enterprise Property (Pvt.) Limited (respondent No.6). The petitioner again challenged the said Contract in this writ petition by way of application for issuance of supplementary Rule and accordingly the 2nd supplementary Rule Nisi was issued on 22.02.2015 in the following terms:

“Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the impugned deed of agreement being No. 13 dated 19.08.2014 purporting to sell the mill to Shamim Enterprise (Pvt.). Ltd. and Mymensingh Jute Mills Sramik Samabay Samity Limited (Annexure-Z30) should not be declared to have been executed without lawful authority and is of no legal effect.”

The respondent No. 1 (The Secretary, Ministry of Textiles and Jute), the Respondent No. 4 (Secretary, Bangladesh Jute Mills Corporation), the respondent No.5 (The Mymensingh Jute Mills Sramik Samabay Samity Ltd. shortly, the Samity) and the respondent No.6 (new Financer- Shamim Enterprise Properties (Pvt.) Limited) separately filed their respective affidavits in opposition denying petitioner’s case. Contentions of these respondents are being more or less similar and identical are summarized herein below:

Pursuant to the Letter of Intent dated 20.06.2001 and the Contract dated 12.07.2001 the substituted petitioners’ predecessor i.e deceased writ petitioner utterly failed to pay the bid money as per schedule and subsequent reschedule. The Government executed the Contract with the Financer petitioner along with the Samity jointly and thus the writ petitioner and the Samity being one part of the Contract, there was no scope to transfer the entire Mill in favour of the petitioner alone making entire payment and so

the letter contained in Annexure-K to the writ petition was rightly issued declining Financer's offer. In order to accommodate the Purchaser-petitioner, the respondents rescheduled the mode of payment. Even then the petitioner failed to pay the same and so, as per terms and conditions, the Contract was cancelled. Subsequently, for smooth running of the Mill, the Government took decision to enter into a fresh Contract with the Samity along with the new Financer-respondent No.6 and accordingly, the registered Contract having been signed, the respondent No.6 has been running the Mill since 2014 contributing in the national economy as well as rehabilitating huge number of workers of the Mill.

The Contract was purely a commercial Contract containing arbitration clause. Despite the petitioner filed this writ petition on misconception of law. Further, before filing the writ petition, a suit being No. 37 of 2005 was instituted by the Samity against the writ petitioner. In the said suit, the concerned Court passed an order of temporary injunction but without disclosing the said facts, the petitioner filed this writ petition. As such, the Rule Nisi is liable to be discharged due to suppression of materials facts. During pendency of the Rule Nisi the Financer-writ petitioner died. Although his heirs have been substituted in the Rule but there was no agreement with these substituted petitioners. Hence, they are not entitled to seek any relief under the present Rule Nisi.

Mr. Murad Reza, learned Senior Advocate with Mr. Muhammad Shafiqur Rahman and Mr. Md. Samiul Huque, learned Advocates appears

for the substituted petitioners. Submissions advanced on behalf of the petitioners precisely are as follows:

- (a) As per terms of the Contract executed between the Government and the Samity, the Financer-petitioner paid Tk. 1.44 crore as earnest money against the offer. Pursuant to the Contract, the petitioner was always ready to pay his proportionate share of 80% payment but due to non-cooperation of the Samity, the payment could not be made. Although in several meetings, the respondents pointed out about the Samity's default, despite the respondents declined to accept the petitioner's offer to transfer the entire Mill in favour of the petitioner on receipt of entire payment.
- (b) The respondents declined to transfer the Mill to the petitioner entirely but subsequently they have done the same thing accepting the respondent No.6 as the sole transferee of the Mill by the subsequent deal with the same amount and thus, the entire action of the respondents was malafide with an ulterior motive.
- (c) The Contract for transferring the Mill to the petitioner along with the Samity was decided by the ECNEC meeting. But it was cancelled without any decision of the ECNEC.
- (d) The new decision of the Government to enter into the Contract with the Samity along with its new Financer-respondent No.6, was neither under any tender or decision of the ECNEC. Thus the subsequent deal with the respondent No.6 was involved with a huge corruption of the respondents without having any authority and with malafide intention.
- (e) The subsequent action of the respondents cancelling the Contract and entering into a new Contract with the Samity with its financer-respondent No.6 were all done, during pendency of the Rule and such transactions directly indicate malafide intention of the respondents. In support of this submission he refers to the case of Syed Salauddin Ahmed Vs Government of Bangladesh and others reported in 59 DLR (HCD) 388.
- (f) At the 1st instance, after making the Rule Nisi absolute by the judgment and order dated 15.01.2009, the petitioner made offer to pay the bid money but the respondents did not accept the same and rather asked him to wait until decision of the litigation. Therefore, there was no laches on the part of the petitioner to pay the bid money.

Mr. Kazi Mynul Hassan, learned DAG appears for the respondent No. 1,

Mr. K. S. Salauddin Ahmed, learned Advocate appears for the respondents

No. 3 and 4 (BJMC). Mr. Golam Rabbani, learned Advocate appears for the respondent No. 5 (the Samity). Mr. A. M. Amin Uddin, learned Senior Advocate with Mr. Md. Bodruddoza, learned Senior Advocate, Mr. Raghib Rouf Chowdhury, Mr. Shishir Kanti Mazumder, Mr. Md. Shohidul Islam and Mr. Md. Asherul Islam Chowdhury, learned Advocates appears for the respondent No.6. (New Financer). Contentions of these respondents are more or less identical and hence, have been summarized below:

- (i) It is a misconceived writ petition because the dispute is absolutely related to a commercial Contract having arbitration clause and so, under this constitutional jurisdiction, the petitioner does not have any remedy. In support of this contention, learned Advocate has referred to the case of Government of Bangladesh represented by the Secretary, Ministry of Communication, Dhaka and others Vs. Zafar Brothers Limited and another reported in 69 DLR (AD) 53 and the case of Bangladesh Power Development Board and others Vs. Md. Asaduzzamand Sikder reported in 9 BLC (AD) 1.
- (ii) The petitioner utterly failed to pay the bid money in terms of the Contract and so due to violation of terms of the said Contract, it was cancelled and as such, there was no illegality in cancelling the Contract.
- (iii) Since the Samity and the petitioner jointly entered into the Contract with the Government, the petitioner did not have scope to take the entire Mill without consent of the Samity and so the respondents rightly declined to transfer the Mill to the petitioner on receipt of entire bid money.
- (iv) There was a suit regarding the affairs of the Mill and concerning the present dispute and that a temporary injunction was granted therein against the petitioner. But without disclosing the said facts, the petitioner filed this writ petition and as such, on this score alone, the Rule Nisi is liable to be discharged. In support of this submission, learned Advocate refers the case of Awlad Hossain Vs Hazi Moniruddin Ahmed and others reported in 40 DLR (HCD) 427.
- (v) After the Letter of Intent and the Contract with the respondent No. 5 and 6, the respondent No.6 paid the entire bid money and took possession of the Mill in 2014. Since then the respondent No.6 has

been running the Mill with satisfaction of all concerned and contributing in the national economic.

- (vi) Although at the instance of the petitioner himself, this Court allowed the petitioner to pay his proportionate part but yet he did not pay the bid money except 80% of the 1st installment and earnest money. The petitioner was asked to pay the bid money finally before cancellation of the Contract by Annexure-K to the writ petition which was tantamount to show cause notice to pay the money. But still he did not come forward and so it can not be said that the Contract was cancelled arbitrarily or with malafide intention or without any prior notice.

To reply the question of maintainability of the writ petition, Mr. Murad Reza again submits that article 4(2) of the P.O 27 of 1972 empowers the respondents to transfer the Mill which was vested in the Government under the said P.O 27 of 1972 and thus having the statutory authority, the Contract for transfer the Mill was executed on behalf of the Hon'ble President of the Republic of Bangladesh in exercise of article 145 of the Constitution. As such, it is not an ordinary commercial Contract and rather being rooted in the statute i.e P.O 27 of 1972, the writ petition is quite maintainable. To strengthen his submission, Mr. Reza refers to the case of Government of Bangladesh represented by the Secretary, Ministry of Communication. Dhaka and others Vs Zafar Brothers Limited and another reported in 69 DLR (AD) 53, the case of Chief Engineer (Project), Rural Electrification Board and another Vs. Biwajit Ganguly and others reported in 69 DLR (AD) 10, the Case of Managing Director Dhaka WASA Vs. Superior Builders & Engineers reported 51 DLR (AD) 56 And the case of Bangladesh Power Development Board and others Vs MD. Asaduzzaman Sikder reported in 9 BLC (AD) 1. He further submits that since the cancellation was aimed with malafide intention and arbitrary exercise of

power, inspite of arbitration clause, the writ petition is maintainable as per ratio laid down by our apex Court as reported in 69 DLR (AD) 10 (supra). He again submits that cancelling the Contract arbitrarily and with malafide intention, the petitioner's fundamental rights have been violated and in that circumstances, the writ petition is quite maintainable as per ratio of our apex Court laid down in the case of Abdul Rauf and others Vs. Abdul Hamid Khan and others reported in 17 DLR (SC) 515.

Referring to the judgment passed earlier in another writ petition arose out of a dispute under the present Contract, he lastly submits that in earlier writ petition the High Court Division held that inspite of arbitration clause the writ petition was maintainable relating to this particular Contract and the said judgment was affirmed by the Appellate Division. As such, there is no scope in this particular case to raise the question of maintainability of writ petition on plea of arbitration clause.

We have gone through the writ petition, 4(four) sets of affidavits in opposition separately filed by the respondents No. 1, 4, 5 and 6, supplementary affidavits thereto, cited cases and other materials on record.

The Mymensingh Jute Mills Limited (the Mill) was established at Shambuganj, Mymensingh over an area of 63.181 acres land. Thereafter, all shares of the company-Mill were vested in the Government in accordance with article 4(1) of the Bangladesh Industrial Enterprise (Nationalisation) Order, 1972 (shortly, the PO 27 of 1972). Accordingly it appeared in the vested mills serial No. 63 of the 1st schedule of the said P.O. But subsequently, the Government could not run the Mill smoothly with profit

and in that context, it was closed in 1993. In the circumstances, Government decided to transfer (sale) the Mill through the Privatization Board and accordingly floated tender on different occasions. Lastly, at the instance of the Privatization Board, the Mymensingh Jute Mills Sramik Samabay Samity Ltd. (the Samity) made an offer at Tk. 11.02 crore but due to the irregularity in making the offer by issuance of the cheque, the tender was cancelled. Even then, Government was interested to accept the offer of the Samity and sent the matter to the Parliamentary Standing Committee who also agreeing with the Government decision sent the similar proposal to the Hon'ble Prime Minister. Ultimately the matter was placed before the meeting of the Executive Committee on the National Economic Council (the ECNEC) and on 12.05.2001 the ECNEC meeting took the following decision:

“পাট মন্ত্রণালয় সম্পর্কিত সংসদীয় স্থায়ী কমিটির সিদ্ধান্তের আলোকে এবং মিলটি অবিলম্বে চালু করার স্বার্থে ময়মনসিংহ জুট মিলস শ্রমিক কর্মচারী কল্যাণ বহুমুখী সমবায় সমিতি লিঃ এর দেশী পুজি বিনিয়োগকারী আব্বাস এসোসিয়েটস কোম্পানী এর নামে যৌথভাবে হস্তান্তর সংক্রান্ত পাট মন্ত্রণালয়ের প্রস্তাব অনুমোদনের সুপারিশ করা হলো।”

By the said meeting it was decided to transfer the Mill jointly in favour of the Samity along with its Financer i.e the writ petitioner, namely, Mohammad Abbas Ullah. Accordingly, the Letter of Intent was issued on 20.06.2001 and as per the said Letter of Intent, a Contract was signed on 12.07.2001 between the Hon'ble President of the Republic acting through the Ministry of Jute as Vendor and jointly with the Samity and its Financer, Mohammad Abbas Ullah i.e the writ petitioner as Purchaser incorporating certain terms and conditions amongst others fixing share ratio of the Samity

and the Financer in the Mill as 20% and 80% respectively. Accordingly, share of the Company shall be transferred after full payment of the consideration money within next 10 years by 10 yearly equal installments to be paid from 12.07.2002 to 12.07.2011. Following the Contract, Purchaser paid only Tk. 149.68 lac including the earnest money, Tk. 144.74 lac. Pursuant to the said Letter of Intent and the Contract, the petitioner also entered into another agreement with the Samity incorporating the terms and conditions between them in order to run the Mill.

Subsequently, due to non-payment of rest amount by the Purchaser party, the respondents again rescheduled the mode of payment on 08.02.2006 fixing 10 installments to be paid from 03.03.2006 to 03.03.2015. Within the aforesaid payment schedule, the petitioner paid only Tk. 88,56,520/- as 80% of the 1st installment. Petitioner claims that he intended to pay his portion (80%) but the Samity did not pay proportionate to their ratio. In the circumstances, the petitioner sought to transfer the entire share of the Mill in his favour upon payment of entire bid money and being declined by the impugned letter dated 20.06.2006 (Annexure-K), the present dispute has been arisen.

Although, earlier the writ petition was heard and the Rule Nisi was made absolute by the judgment and order dated 15.01.2009 but subsequently it was set aside by the judgment and order dated 10.05.2011 passed in Review Petition No. 17 of 2010. Thereafter the judgment of the Review Petition was challenged before the Appellate Division in CPLA No. 340 of 2012 and by the judgment and order dated 18.11.2013 instead of interfering

with the review judgment, the High Court Division was directed to hear the Rule afresh. Accordingly, this Bench heard the matter.

The dispute arises out of a Contract and so, maintainability of the writ petition having been raised, we are deciding the said issue first. It has now been well settled by our Apex Court that relating to the dispute arising out of an ordinary commercial Contract, the writ petition is not maintainable. Secondly, when arbitration clause is incorporated in any Contract, the writ petition is not maintainable due to availability of alternative forum. There is no scope to deny this established jurisprudence as we have again been posted by the latest ratio of our Apex Court, cited by both the parties i.e 51 DLR (AD) 56, 9 BLC (AD) 1 and 69 DLR (AD) 53.

In the aforementioned decisions, although bar to maintain writ petition has been declared but at the same time the Apex Court has drawn out guidelines describing the circumstances as to maintainability of writ petition regarding the dispute arising out of a Contract and also having the arbitration clause. Specially, in the case reported in 69 DLR (AD) 53 the apex Court considered and discussed all the previous ratios in this field and thereby reiterated the settled certain categories in entertaining writ petition which are as follows:

“21. Considering the decisions reported in a good number of cases, this Division in the case of Bangladesh Power Development Board vs Md Asaduzzaman Sikder, 9 BLC (AD) 1, held that the writ jurisdiction is available in case of breach of contracts of the following categories.

(a) the contract is entered into by the Government in the capacity as sovereign;

(b) where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;

(c) where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, but “if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions is a must under the statute then the contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory”;

(d) where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and the contract so entered by the statutory body is not an exercise of statutory power then merely because one of the parties to the contract is a statutory or public body such contract is not a statutory contract;

(e) when contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;

(f) where the contract has been entered into in exercise of statutory power by a statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligation.”

(Underlined)

Remaining with those guidelines, Mr. Murad Reza has drawn our attention to the article 4 of the P.O 27 of 1972, relevant portions of the Contract as contained in Annexure-B to the writ petition and article 145 of the Constitution. For better appreciation of the issue, the same are quoted herein below:

Article 4 of the PO 27 of 1972:

“4. (1) All such shares and other proprietary interests in each of the scheduled industrial enterprises, and all such industrial enterprises placed under a Corporation by, or by an order under clause (1) of Article 10 and all shares and proprietary and other interests, as have not already vested in the Government by or under any law for the time being in force, shall, by virtue of this Article and without any further proceeding or formality, stand vested in, and allotted to, the Government free of any trust, mortgage, charge, lien, interest or other encumbrance whatsoever-

(a) in the case of a scheduled industrial enterprise, on the commencement of this Order; and

(b) in the case of an industrial enterprise placed under a Corporation by order under clause (1) of Article 10, on the date on which it is so placed;

and subject to the provisions of clause (2), the Government shall, as from such commencement or date, be the sole shareholder in, or owner of, such industrial enterprises.

(2) The Government may, if in the national interest it deems it expedient so to do, sell or otherwise transfer to a Corporation or to any other person, in such manner and on such terms and conditions as it deems fit, any scheduled industrial enterprise or any other industrial enterprise or any share or proprietary or other interest therein, vested in the Government under clause (1).

.....”

(Underlined)

“AGREEMENT

This Agreement is made on this 12th day of July Two Thousand One of the Christian Era.

BETWEEN

The President of the Peoples Republic of Bangladesh hereinafter referred to as “the VENDOR” acting through the Ministry of Jute, Government of the People’s Republic of Bangladesh (which expression unless repugnant to the context, shall mean and include its successor in interests and assigns) of the FIRST PART.

AND

The Mymensingh Jute Mills Sramik Karmachari Kallyan Bohumukhi Shamabay Shamity Limited, Shambhuganj, Mymensingh, registered as a Cooperative Society under Reg. No. 122 by the Registrar of Cooperative Societies represented by the President and the General Secretary of Mymensingh Jute Mills Sramik Karmachari Kallyan Bohumukhi Shamabay Shamity Limited and its financier Mohammed Abbas Ullah son of Alhaj Abdul Hamid, House # 79, Block-E, Airport Road, Chairman Bari, Banani, Dhaka-1213 owner of M/S Abbas Associates who are authorized to execute this deed, hereinafter jointly referred to as the PURCHASER of the SECOND PART.

.....

(M. Shamsul Huq)
 Joint Secretary
 Ministry of Jute
Government of the People's
 Republic of Bangladesh pursuant
 to the article 145 of the
 Constitution of the People's
 Republic of Bangladesh.

For and on behalf of
 Mymensingh Jute Mills Sramik
 Karmachari Kallyan Bohumukhi
 Samabay Samity Limited Regn.
 NO. 122, its President and General
 Secretary; and Mohammad Abbas
 Ullah owner of Abbas Associates
 Jointly as purchaser.”

(Underlined)

Article 145 of the Constitution:

“১৪৫। (১) প্রজাতন্ত্রের নির্বাহী কর্তৃত্বে প্রণীত সকল চুক্তি ও দলিল রাষ্ট্রপতি কর্তৃক প্রণীত বলিয়া প্রকাশ করা হইবে এবং রাষ্ট্রপতি যেরূপ নির্দেশ বা ক্ষমতা প্রদান করিবেন, তাঁহার পক্ষে সেইরূপ ব্যক্তি কর্তৃক ও সেইরূপ প্রণালীতে তাহা সম্পাদিত হইবে।
 (২) প্রজাতন্ত্রের নির্বাহী কর্তৃত্বে কোন চুক্তি বা দলিল প্রণয়ন বা সম্পাদন করা হইলে উক্ত কর্তৃত্বে অনুরূপ চুক্তি বা দলিল প্রণয়ন বা সম্পাদন করিবার জন্য রাষ্ট্রপতি কিংবা অন্য কোন ব্যক্তি ব্যক্তিগতভাবে দায়ী হইবেন না, তবে এই অনুচ্ছেদ সরকারের বিরুদ্ধে যথাযথ কার্যধারা আনয়নে কোন ব্যক্তির অধিকার ক্ষুণ্ণ করিবে না।”

On perusal of the above, we find that article 4(2) of the P.O. 27 of 1972 authorizes the Government to transfer the vested Mills and in exercise thereof, the Hon'ble President of the Republic has entered into the Contract being signed on his behalf pursuant to article 145 of the Constitution. Thus, finding the parties of the Contract, article 145 of the Constitution and the statutory provision under article 4(2) of the P.O. 27 of 1972, we are led to hold that it is not an ordinary commercial Contract, rather rooted in the statute under article 4(2) of the P.O 27 of 1972 and signed under article 145 of the Constitution.

Further, the Contract was executed by the Government and expressed to have been made by the Hon'ble President. As such, it was executed in exercise of the executive authority of the Republic in accordance with article

145 of the Constitution. Hence, we hold that the Contract was entered into by the Hon'ble President of the Republic in the capacity as sovereign.

Therefore, the writ petition is quite maintainable relating to dispute arising out of this Contract in accordance with the guidelines drawn out in the case reported in 9 BLC (AD) 1 and 69 DLR (AD) 53 (supra).

Even then, question remains whether the arbitration clause embodied in clause 7 of the Contract is debarring writ jurisdiction appearing as an alternative efficacious remedy. Referring to this clause, Mr. AM Aminuddin, learned Senior Advocate for the respondent No.6 submits that the alternative remedy having been provided by arbitration, it is a misconceived writ petition. For better understanding, we shall address this submission at the later part of this judgment, after discussing some other issues.

Mr. Aminuddin has also raised the question of maintainability due to non-disclosure of material facts as to pendency of the suit before filing the writ petition.

To answer on these two points, let us again come back to the facts involved in the writ petition.

Here in this case, it is apparent that the Contract was signed to transfer the Mill. The Government is on one side as Vendor and the other side is the Purchaser i.e the Samity along with its Financer, the writ petitioner. In other words, the Government as Vendor entered into the Contract to sell the Mill to the Purchaser i.e the other party jointly comprising of the Samity and the writ petitioner. Both Parties of the Contract have to follow the Contract complying with their respective obligations. In this case, we find that

although after signing the Contract, the Mill was handed over to the Purchaser in 2003 but subsequently, the relationship between the Samity and the writ petitioner was not going well and several disputes arose between them. Eventually, it went to the suit being Other Class Suit No. 37 of 2005. In the plaint of the suit, the Samity as plaintiff made prayer to restrain the writ petitioner in participating in the affairs of the Mill and ad-interim order of temporary injunction was also passed in the suit. Although the suit is relating to the affairs of the Mill but pendency of the suit is not defeating the merit of relief sought for in the writ petition. As such, this fact is not directly involved with the issue and remedy sought for under the present Rule Nisi. Further, the dispute under suit was between the Samity and the Financer-petitioner while by this writ petition the petitioner is seeking relief against the Government due to cancellation of the Contract itself by which both the Samity and the writ petitioner got the Mill. Therefore, non-discloser of the fact as to civil suit does not materially effect the merit of the Rule Nisi and as such, for such non-discloser, it would not be fair to discharge the Rule Nisi without going to its merit. The case cited by Mr. A. M. Aminuddin reported in 40 DLR (HCD) 427 is not applicable in this case because here the suit was not filed for the same relief between the same parties.

However, on perusal of the Letter of Intent and the Contract, it is apparent that the Government has entered into the deal to sell the Mill jointly in favour of the Samity and the writ petitioner as Financer of the Samity. Accordingly, in the Contract the petitioner and the Samity are jointly one part as the Purchaser and the Government is on the other part as the Vendor.

As such, under this Contract, leaving the Samity, there was no scope to transfer the entire share of the Mill to the petitioner upon receiving consideration money from him alone. On consideration of this aspect, the respondent Government rightly refused the petitioner's offer to receive his portion of 80% payment separately and also to transfer the entire Mill to the petitioner leaving the Samity. Hence, we do not find any illegality in issuance of the Annexure-K, the letter dated 20.06.2006.

Now let us examine as to whether the Contract was cancelled legally. In this regard for better understanding clauses 8 and 12 of the Letter of Intent and clause 8 of the Contract are quoted herein below:

Clause 8 and 12 of the Letter of Intent:

“(৮) ডাউন পেমেন্ট হিসাবে ১৪৪.৭৪ (এক কোটি চুয়াল্লিশ লক্ষ চুয়াত্তর হাজার) লক্ষ টাকা এককালীন নগদ জমা দিতে হবে এবং অবশিষ্ট টাকা ১০ (দশ) টি সমান কিস্তিতে (সুদ মুক্ত) পরিশোধ করতে হবে। এ অর্থ পরিশোধে ব্যর্থ হলে সরকার দরপত্র গ্রহণের এ ইচ্ছাপত্র লেটার অব ইনটেন্ট বাতিল এবং প্রদত্ত টাকা বাজেয়াপ্ত করতে পারবেন।

(১২) যদি সমিতি কিংবা আব্বাস এসোসিয়েটস মিল হস্তান্তর শর্তাদি লংঘন করে তবে সরকার হস্তান্তর চুক্তি বাতিল করতঃ সংশ্লিষ্ট মিলের মালিকানা কোন প্রকার ক্ষতিপূরণ ব্যতিরেকে পুনঃ অধিগ্রহণ করতে পারবে।”

(Underlined)

Clause 8 of the Contract dated 12.07.2001:

“8. Notwithstanding anything contained in any other provisions of this AGREEMENT or the Schedules to this Agreement and without prejudice to the right of the VENDOR, any violation by the PURCHASER of any of the above terms and conditions of this Agreement shall entitle the VENDOR to take all or any of the following actions:

- (i) the VENDOR may forfeit the total amount paid by the PURCHASER;
- (ii) The property handed over to the PURCHASER shall be revoked and possession of the said property shall be taken back;
- (iii) If the PURCHASER fails to pay any installment within the stipulated time mentioned in the Article (1) of this Agreement with regard to the purchase consideration, the VENDOR shall have the right to cancel this AGREEMENT without any notice

and revoke the SAID PROPERTY immediately without any compensation.”

(Underlined)

At the time of issuance of the Letter of Intent, it has been mentioned clearly in condition No. 8 that non payment of consideration money as per payment schedule, itself alone be the sole ground for cancelling the Contract and forfeiting the down payment. Clause 8 of the Contract also provides same condition as to cancellation of Contract. However, there are other conditions which are required to be followed and on failure to comply with those conditions, there is also scope to cancel the Contract following the clauses 12 of the Letter of Intent.

It is admitted fact that the Purchaser utterly failed to comply with the payment schedule. Therefore, there was no scope on the part of the Purchaser to maintain the Contract and accordingly, they have faced the consequences by terminating the Contract in accordance with the above mentioned clauses. Although, Mr. Murad Reza submits that without notifying the petitioner the Contract was cancelled arbitrarily, but we find the contents of Annexure-K wherein the petitioner was lastly reminded the consequences on failure to make the payment within 21 days from the date of notice. Even when the writ petition was filed and moved, this Court passed the interim order allowing the petitioner to pay his undisputed part i.e 80% of the consideration money. But still he did not come forward to pay the installments.

Although, learned Advocate for the petitioner has drawn our attention to a letter to the effect that the respondents asked them to wait for the

payment. But the said letter was issued after making the Rule Nisi absolute at the first instance by the judgment and order dated 15.01.2009 (later on set aside in review) and when the petitioner tried to pay the entire money for getting entire share of the Company-Mill. But that issue of entire payment to get entire Mill was being sub-judice before the Appellate Division and then Review Petition, the writ petitioner was asked to wait for the result of the litigation. There was never any embargo to pay the petitioner's ratio 80% which was not complied with although from 2003 the petitioner took over the Mill and enjoyed the same keeping in possession until 2014. Thus, due to non-compliance of payment schedule by the Purchaser, in terms of unambiguous clause 8 of the Letter of Intent and clause 8 of the Contract, the respondents terminated the Contract forfeiting the advanced money.

Therefore, we do not find any illegality in passing the impugned order as contained in Annexures-S and T (challenged in 1st supplementary Rule Nisi).

Again to address the question of maintainability of writ petition regarding dispute arose out of a Contract having arbitration clause, we have gone through the Arbitration clause as mentioned in clause 7 of the Agreement (Contract) which runs as follows:

“The VENDOR and the PURCHASER have agreed that any present or future difference between them as regards the subject matter of this AGREEMENT or any matter relating thereto will so far as they are capable of settlement by arbitration be submitted to arbitrator as per Arbitration Act, 2001 (Act I of 2001).”

(Underlined)

The clause provides to settle the differences between the parties by arbitration. But here, it is admitted position that the Purchaser including the writ petitioner did not make the payment within the schedule time as stipulated in the Letter of Intent and the Contract. Accordingly, in terms of the condition embodied therein the Contract was cancelled and earnest money was forfeited. Thus, there was no difference regarding non-payment of consideration money within the schedule time. Contract also contains undisputed clause as to consequences of non-payment of the consideration money. Therefore, in such situation this Court can entertain the issue based on undisputed facts. Considering similar circumstances, earlier the High Court Division entertained writ petition No. 4584 of 2002 on different issue connecting to the present Contract embodied with Arbitration clause and that the said finding on maintainability was not interfered by the Appellate Division in C. P. No. 12 of 2003.

Moreover, in the case of Chief Engineer (Project), Rural Electrification Board and another Vs. Biwajit Ganguly and others reported in 69 DLR (AD) 10, the Apex Court held that arbitration clause embodied in the agreement is not a bar to invoke writ jurisdiction. Although in that case arbitration clause was ignored finding the action malafide, arbitrary and violation of natural justice, but ratio is there that arbitration clause in the Contract itself will not oust the writ jurisdiction when the involved facts and circumstances demand. In view of above ratio and considering the facts and above mentioned circumstances of the present case, we are unable to accept

the submission of Mr. Aminuddin that the writ petition is not maintainable due to Arbitration clause in the Contract.

We find that in order to sell the Mill, the respondents Government floated tender but the highest bidder (Samity) having failed to pay the entire bid money, through decision of the ECNEC meeting the Letter of Intent was issued allowing the Samity to take a Financer, the writ petitioner. We mentioned above that ECNEC meeting took the decision to transfer the Mill in favour of the Samity and its Financer-Mohammad Abbas Ullah (writ petitioner). But the said Contract could not come to end successfully because of non-compliance of condition of the Contract by the Purchaser Samity along with its Financer and eventually, it has been cancelled (challenged herein).

We are surprised how the respondents again entered into another Contract with the same default Samity only by changing its Financer at the same price which was fixed long back in 1998. The respondents' side could not show us any decision of the ECNEC nor they floated any open tender to transfer the said Mill. We find the only memo dated 04.08.2014 from Annexures-4 series to the affidavit in opposition against the 2nd supplementary Rule filed by the respondent No.5 by which the Government decided to enter into the agreement with the Samity along with its new Financer-i.e respondent No.6. Contents of the said memo dated 04.08.2014 runs as follows:

“নং ২৪.০০.০০০০.২০২.১৮.০৪৫.১৩(৫ম খন্ড)-১৮৩ তারিখ-০৪ আগষ্ট ২০১৪ খ্রিঃ
বিষয়ঃ ময়মনসিংহ জুট মিল শ্রমিক কর্মচারী কল্যাণ বহুমুখি সমবায় সমিতি লিঃ ও দেশীয় পুজি
বিনিয়োগকারী আব্বাস এসোসিয়েটস এর সত্ত্বাধিকারী জনাব আব্বাস উল্লাহর মধ্যে

সম্পাদিত চুক্তি বাতিল ও সমিতি এবং শামীম এন্টারপ্রাইজ প্রোপার্টিজ লিঃ এর ব্যবস্থাপনা পরিচালক জনাব মোঃ আমিনুল হক শামীম এর সাথে নতুন চুক্তি করার অনুমতি প্রদান প্রসঙ্গে।

সূত্রঃ ময়মনসিংহ জুট মিল শ্রমিক-কর্মচারী কল্যাণ বহুমুখি সমবায় সমিতি লিঃ এর ২১.০৭.২০১৪ তারিখের আবেদন।

উপর্যুক্ত বিষয় ও সূত্রে ময়মনসিংহ জুট মিল শ্রমিক-কর্মচারী কল্যাণ বহুমুখি সমবায় সমিতি লিঃ এর ২১.০৭.২০১৪ তারিখে মাননীয় বস্ত্র ও পাট মন্ত্রীর বরাবরে পেশকৃত আবেদনের প্রেক্ষিতে নির্দেশক্রমে জানান যাচ্ছে যে, মিলটি সুষ্ঠুভাবে পরিচালনা ও সরকারী পাওনা আদায় করার স্বার্থে নতুন পুর্জি বিনিয়োগকারী শামীম এন্টার প্রাইজ প্রোপার্টিজ লিঃ এর সাথে চুক্তি সম্পাদন করার অনুমতি প্রদান করা হল এবং তৎপূর্বে আব্বাস এসোসিয়েটস এর সাথে সম্পাদিত চুক্তি বাতিল করার অনুমতি প্রদান করা হল।

(মোঃ আলাউদ্দিন পাটওয়ারী)
সহকারী সচিব”

On perusal of the aforesaid memo it appears that the Samity wrote a letter to the Hon'ble Minster, Ministry of Textile and Jute and under his instruction the agreement was entered into by the Government. On consideration of above facts, we find that **firstly**, the Samity along with the writ petitioner-Financer utterly failed to comply with the conditions of Contract and because of their default in paying consideration money, the Contract was cancelled. **Secondly**, earlier (Annexure-K to the writ petition) the respondents declined the writ petitioner's offer to accept him as sole transferee splitting the Contract and the Letter of Intent leaving the Samity from the joint Contract. But in this case, immediately after getting the Mill jointly by the Samity and the Financer-respondent No.6, the Samity transferred its 20% share to the respondent No.6 treating it as sole transferee on 19.08.2014 when the Contract for sell by the Government was registered on the same day. **Thirdly**, the price was fixed in the year 1998 and after 16 years, at the same price it was decided to transfer the Mill to the same default Samity including the respondent No.6.

Surprisingly, no tender was floated in dealing with this transaction. Admittedly, it is a public property, like a private person, Government can not pick and choose a person in selling a public property. If it does so, it must do so fairly without discrimination and without unfair procedure. Government must be transparent in dealing with the state property.

Thus from the above scenario, it is apparent that the respondents in colorable exercise of their authority and for the purpose of undue gain, collusively are transferring the Mill to the respondents No. 5 and 6. As such, we are of the view that this transaction has to be interfered under judicial review of this Court. Therefore, the new Contract is liable to be cancelled.

This view of ours finds support from the case of Syed Salauddin Ahmed Vs Government of Bangladesh and others reported in 59 DLR (HCD) 388 wherein their Lordships held as under:

“15. The above judgment also quoted from another judgment reported in AIR 1972 SC 1816 as under:

“The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence, quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate.

16. In view of the aforesaid pronouncements, we are of the view that the Government by making certain guidelines cannot lease out the property belonging to it without observing fairness. The lands owned by the Government should be leased out by open auction so that there may not be any doubt in the mind of general public about transparency of such dealings. Therefore, we are of the view that the lease of the disputed land given initially to the petitioner and subsequently to respondent No. 7 was not in transparency.”

(Underlined)

.....
 18. In the result, the Rule is disposed of and respondent Nos. 1 to 6 are directed to cancel the lease agreement entered between respondent No. 5 and added respondent No. 7, and to lease out the disputed property by inviting open auction tender so that general public can participate in it.

Let a copy each of the judgment be communicated to the Ministry of Law, Justice and Parliamentary Affairs and the Ministry of Communication.”

(Underlined)

Thus, considering the foregoing observations and referred ratio, we are led to hold that the deal of the respondent ministry in executing Contract on 13.08.2014 (registered on 19.08.2014) to sell the Mill alongwith its machinery and huge land property in favour of the defaulted Samity and eventually transferring the same to the respondent No. 6 by registered Contract executed on the same day on 19.08.2014 without floating any open tender and at a nominal price fixed in a transfer deal of 16 years back (02.02.1998), was not in transparency. The Mill should be sold by inviting open auction tender so that general public can participate in it.

In view of above discussions, we find merit in this Rule Nisi in part.

In the result, the Rule Nisi is made absolute in part to the extent of the Contract executed on 13.08.2014 and registered on 19.08.2014 between the Government and the respondents No. 5 and 6 and also the subsequent Contract dated 19.08.2014 executed between the respondents No. 5 and 6. These two Contracts are hereby declared to have been executed without lawful authority and of no legal effect. The respondent No.6 is directed to hand over the Mill in favour of the BJMC within 02(two) months from date and if the Government intends to sell the Mill, shall float open tender in

order to have a transparent transaction. The BJMC is directed to prepare an inventory list within 15 days from date regarding assets (both moveable and immovable) of the Mill and company. The learned Deputy Attorney General, namely, Kazi Mynul Hassan is directed to intimate the Court's order.

Communicate a copy of this judgment and order to the respondents at once for information and necessary action.

Razik Al Jalil, J

I agree.