

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

**WRIT PETITION NO. 2013 OF 2006**

**IN THE MATTER OF:**

An application under Article 40 and  
102(2)(a)(ii) of the Constitution of the People's  
Republic of Bangladesh

AND

**IN THE MATTER OF:**

Karnafully Fertilizer Company Limited

**.....PETITIONER**

-Versus-

Govt. of Bangladesh represented by the  
Secretary, Ministry of Industries, Bangladesh  
Secretariat, Ramna, Dhaka and others

**...RESPONDENTS**

Mr. Ajmalul Hossain QC, Senior Advocate  
with

Mr. Abdullah Al Hady and

Mr. Mohmmad Saifullah Mamun, Advocates

... For the Petitioner

Mr. Murad Reza, Additional Attorney General  
with

Mr. Md. Mokleshur Rahman, DAG

... For the Respondent No. 2

Mr. Tanjib-ul Alam with

Mr. Md. Saquibuzzaman, Advocates

...For the Respondents No.4

**Heard on: 29.11.2017, 05.12.2017**

**& 21.03.2018**

**Judgment on: 05.04.2018**

**Present:**

**Ms. Justice Naima Haider**

**&**

**Mr. Justice Zafar Ahmed**

**Naima Haider, J:**

In this application under Article 40 and 102(2)(a)(ii) of the  
Constitution, Rule Nisi was issued in the following terms:

*Let a Rule Nisi was issued calling upon the respondents  
to show cause as to why the Impugned Decision, being Memo  
No. ভূঃ মঃ/শা-৮/খাজাব/৭৮/২০০১/৯০৭ dated 26<sup>th</sup> October 2005  
(Annexure-L) and the Impugned Deed dated 4 December 2005*

*(Annexure-M) should not be declared to have been issued without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.*

The relevant facts, in brief, are set out as follows: the petitioner is one of the largest international joint venture companies in Bangladesh. The petitioner is engaged in the business of manufacturing and selling urea and ammonia. The pro-forma respondent No. 4, Soya Products Bangladesh Limited (“Soya”), is a private limited company and is engaged in the business of manufacturing soya products. Soya’s plant is adjacent to the petitioner’s plant. Soya has been illegally granted a lease by the respondents in violation of the Government of Bangladesh Undertaking in favour of the petitioner dated 05.04.1990 (the “Undertaking”). The Undertaking clearly contemplates expansion of the petitioner’s plant and sets out assurance to provide land for the purpose of expansion. The Government of Bangladesh also issued “Government Assurances” dated 05.04.1990 (the “Assurance”) which provides that the Government shall ensure fair and equitable treatment to the foreign investors of the petitioner. The Assurance also provides that the petitioner shall be given highest priority by the Government.

The petitioner required additional land adjacent to the existing plant for expansion. That being the case, the petitioner applied to the Government of Bangladesh on 05.04.1994 for allotment of additional land for expansion. Following exchange of correspondence between the petitioner and the Government of Bangladesh, administrative approval for allocation of additional 34.08 acres of land to the petitioner was given by

the respondent No.1 in 1995. The petitioner subsequently came to know from the Commissioner's office that a Lease Deed was executed on 02.03.2003 and registered on 15.03.2003 in favour of Soya. Through the said Lease Deed, Soya had been allotted 15 acres of land which encroached the petitioner's proposed expansion areas. The petitioner informed the respondent No.1 about the prejudicial consequence of the allotment. The respondent No.1 urgently directed the respondent No.2 and the Commissioner to stop the transfer of any land adjacent to the petitioner. However since no steps were taken, the petitioner filed a writ petition being Writ Petition No. 3302 of 2003 seeking for a declaration that the said Lease Deed was illegal. The said writ petition was later withdrawn in light of a Settlement Agreement dated 21.04.2005 entered into between the petitioner and Soya ("the Settlement Agreement"). The said Settlement Agreement reflected understanding between the petitioner and Soya regarding, among others, use of land. Subsequently, the petitioner on 10.09.2005 applied for permanent acquisition of the property in question for expansion purpose. The petitioner, by letter dated 12.10.2005 informed the respondents of the Settlement Agreement and requested the respondents to ensure that Soya's acquisition does not overlap the petitioner's future expansion area, being the property in question. However, in breach of the Settlement Agreement, Soya applied for allotment of 30 acres of land adjacent to the petitioner's site which included the property in question. The respondent No.2 in breach of the Undertaking approved the allotment of 30 acres of land in favour of Soya. Subsequently, the Lease Deed was executed in favour of Soya. The petitioner being aggrieved by the aforesaid moved this Division and obtained the instant Rule.

The Rule is opposed. Two separate Affidavits in Opposition were filed by the respondent No.2 and respondent No. 4. The respondents, through the Affidavits in Opposition state, among others, (a) the Undertaking was issued by the Government in private capacity and therefore, does not give the petitioner a right to move this Division in the event of alleged breach (b) the dispute arising out of the Settlement Agreement cannot be resolved by this Division in exercise of powers under Article 102 of the Constitution (c) the writ petition is misconceived given that the petitioner is seeking an intervention from this Division to resolve contractual disputes (d) Soya was granted the lease of the property in question in accordance with law (e) the petitioner is raising the issue once again which was already covered by the judgment passed by this Division in Writ Petition No. 3302 of 2003 (f) the Government can, as shareholder of the petitioner and in sovereign capacity allocate land in favour of the petitioner as and when the need arises and therefore, there is no need to cancel the lease granted to respondent No. 4 (g) the land in question was leased in favour of the respondent No.4 in national interest given that the respondent No. 4 would be establishing 300MW HFO based power plant and LNG gas terminal (h) the petitioner has no plan for immediate expansion and therefore, the petitioner cannot claim that the land in question must remain unutilized till its future expansion “at some point in time”. The respondent No.4 additionally points out that this Division should not pass any order cancelling the registered Lease Deed because such order falls within the domain of civil proceeding before a competent Court. The respondents state that the writ petition is not maintainable and should be discharged.

The petitioner filed two separate Affidavits in Reply to the Affidavits in Opposition filed by the respondents. In the Affidavits in Reply, the petitioner states, among others (a) the functions of the Government in the instant case cannot be treated as contractual but rather should be construed as functions in connection with the affairs of the Republic (b) arbitration proceeding initiated was stayed by this Division in Writ Petition No. 10138 of 2016 (c) the issue raised in the instant proceeding is different from the issue raised in Writ Petition No. 3302 of 2003 (d) intervention from this Division is necessary because of the Lease Deed entered into with Soya is not cancelled then there will remain no property adjacent to the petitioner's factory from which expansion can be made (e) prior to granting the lease, the respondents ought to have taken account of the Settlement Agreement.

The learned Counsel for the petitioner, taking us through the pleadings filed, submits that the Undertaking and Assurance are "State Representations" which are binding on the respondents. Since the Lease Agreement was entered into in violation of the terms of the Undertaking and Assurance, the same is liable to be declared illegal. The learned Counsel further submits that the act of granting the lease is an executive act and since the lease was not granted lawfully, this Division should interfere. The learned Counsel further submits that the Government of Bangladesh is a shareholder of the petitioner and therefore, this Division should interfere to protect the interest of the State. It is also argued that the action of the respondents in granting the lease in favour of Soya denies the adequate and equitable treatment, guaranteed under Section 4 of the Foreign Private Investment (Promotion and Protection) Act 1980.

The learned Counsels for the respondents take us through the pleadings and make elaborate submissions on the maintainability of the instant writ petition. According to them, the dispute before this Division is purely contractual and therefore this Division should not entertain. Taking us through the judgment passed by this Division in Writ Petition No. 3302 of 2003, the learned Counsels for the respondents submit that the issue before the said writ petition and the present writ petition are same. The learned Counsels also make elaborate submissions on the doctrine of economic necessity in support of their contentions raised in the Affidavits in Opposition.

We have perused the pleading and the documents annexed. We have also heard the learned Counsels at length.

We have perused the judgment passed in Writ Petition No. 3302 of 2003 carefully. In the said writ petition, Rule was issued by this Division calling upon the respondents to show cause as to why the lease deed dated 02.02.2003 should not be cancelled and why the respondents should not be directed to “allot the said 32.88 and 37.85 acres of land as detailed in the map (Annexure-D) to the petition”. In the said writ petition, the Rule was discharged for various reasons. One of the factors that their Lordships took account of in discharging the Rule was that the Government is in a position to provide the land to the petitioner; the granting of lease in favour of Soya did not restrict the Government’s power to grant lease to the petitioner for expansion of its factory.

The learned Counsel for the respondents submit that the issue raised in the instant writ petition and the issue raised in Writ Petition No. 3302 of 2003 are identical. We are unable to agree. The issue before this Division is

different. The petitioner, in this writ petition, questions the propriety of the decision taken by the respondents in granting lease to the respondent No. 4 despite wordings of the Undertaking, the Assurance and the Settlement Agreement. In the instant writ petition, this Division is called to interpret the status of the Undertaking and Assurance. This Division is also called upon to assess the extent to which the Settlement Agreement is binding upon the respondents.

It is often the case the State offers concrete promises and specific guarantees to foreign investors. The assurance provided by the State creates reasonable and legitimate expectation to foreign investors. While the common form of State assurance is guarantee from expropriation of assets, State assurances can be over different issues, for instance, tax, general cooperation, repatriation of proceedings. Assurance by the State ensures that irrespective of the legal and political environment, the State shall take measures to honor the assurance(s) at any cost.

The learned Counsel for the petitioner submits that the assurances in the Undertaking and Assurance were State assurances. The learned Counsels for the respondents submit that the assurances provided in the Undertaking and Assurances are simply contractual.

At this juncture, we set out the relevant part of the Assurance below for ease of reference:

*“ Government of Bangladesh (“GOB”) in consideration of Haldor Topsoe A/S, Denmark (“Topose”) having agreed to join GOB in promoting a project (the “Project”) involving construction, financing and operation of an export oriented 1,500/1,725 (or such other capacity as may be determined later by the Board of Directors of KAFCO) Metric tons per day Ammonia/Urea plant and service*

*utilities to be situated in the Chittagong Area (the “Plant”) and for this purpose having together formed a limited liability Company in Bangladesh, ...the assurances listed below and further undertakes to do all things necessary to implement such assurances ...”*

The relevant part of the Undertaking is set out below for ease of reference:

*Government Undertakings*

*GOB undertakes towards the other Promoters and KAFCO, the following:*

- 1. GOB shall put at the disposal of KAFCO for the Project*

In the Assurance, the Government of Bangladesh has committed to certain obligations. From reading of the document, it appears that the Government of Bangladesh agreed to provide certain assurances because Haldor Topsoe A/S, Denmark agreed to form a limited liability company with the Government of Bangladesh. This is manifested from the following wordings “and for this purpose having together formed a limited liability Company in Bangladesh, ...the assurances listed below and further undertakes to do all things necessary to implement such assurances ...” (emphasis added).

The Government of Bangladesh is a shareholder of the petitioner. Therefore, it is logical to conclude that the assurances set out in the Assurance had been provided by the Government of Bangladesh in the capacity of shareholder of the petitioner. This assurance, in our view, is akin to Promoters Agreement/Shareholders Agreement. We do note that the wordings of the Assurance do not expressly state that the Government is giving the assurances in the capacity of a shareholder. However, the following wordings being “and for this purpose having together formed a



*limited liability Company in Bangladesh, ...the assurances listed below and further undertakes to do all things necessary to implement such assurances ...*” are sufficient for our inference that the assurances were provided in the capacity of a shareholder.

Under Article 145(1) of our Constitution, “*all contracts and deeds made in exercise of the executive authority of the Republic shall be expressed to be made by the President, and shall be executed on behalf of the President by such person and in such manner as he may direct or authorize*”. The Undertaking was signed by the Secretary, Ministry of Industries “*for and on behalf of the Government of the People’s Republic of Bangladesh*”. Under the Constitution, President means the Head of the State and not the Head of the Government. The Undertaking was neither expressed to be made by the President nor executed on behalf of the President; the undertaking was signed for and on behalf of the Government. Therefore, the Undertaking does not, in our view, qualify as a State assurance. The Undertaking forms a part of the contractual arrangement between the Government and the petitioner.

The Settlement Agreement has been entered into between Soya and the petitioner. The Government of Bangladesh is not a party to the said agreement. Any dispute between the parties to the Settlement Agreement is best described as either “commercial dispute” or “contractual dispute”.

The learned Counsel for the petitioner submits that Soya was granted the Lease in breach of the Settlement Agreement and the terms of Undertaking and Assurance. We have pointed out that the documents being, Settlement Agreement, Undertaking and Assurance, are contractual documents. In giving the assurances provided under the Undertaking and

Assurance were given by the Government in the capacity of a shareholder and not while administering the functions of the Republic. The learned Counsel for the petitioner's contention is that there had been gross violation of the terms of the Undertaking and Assurance. Given that the assurances are purely contractual this Division in exercise of powers under Article 102 of the Constitution cannot review the alleged violations. Furthermore, the remedy for the alleged breach of the terms of the Settlement Agreement is contractual. It is a settled principle that this Division should not entertain contractual disputes. However, the exceptions had been set out by their Lordships in number of cases. In the cases of Bangladesh Power Development Board and others vs Md. Aasaduzzaman Sikder [9 BLC (AD) (2004) 1] and GEMS International vs Gramsieco Limited [15 BLC (AD) (2010) 223] their Lordships held that an aggrieved party may invoke writ jurisdiction in case of breach of contract if (a) the contract is entered into by the Government in the capacity of sovereign (b) contractual obligations arise out of a statutory duty or sovereign obligation or public function of a public authority (c) the contract is a statutory contract (d) the contract was entered into by the public authority invested with statutory power or (e) the relief sought is against breach of statutory duty. None of the exceptions apply in the instant case. The petitioner's remedy in the instant case, if any, is contractual and not under Article 102 of the Constitution.

The learned Counsel for the petitioner takes us through the Foreign Private Investment (Promotion and Protection) Act 1980 and submits that if the lease deed entered into with Soya is not cancelled, the foreign investors

of the petitioner would not be accorded adequate protection and equitable treatment guaranteed under Section 4 thereof. Section 4 reads as follows:

*The Government shall accord fair and equitable treatment to foreign private investment which shall enjoy full protection and security in Bangladesh.*

We are not entirely sure how the investors of the petitioner would be deprived of equitable treatment in the event lease with Soya is not cancelled.

In view of the above, we are inclined to hold that there is no merit in the Rule. The Rule is accordingly discharged, without any order as to costs.

Communicate the Judgment and Order at once.

**Zafar Ahmed, J:**

***I agree.***