

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaquul Islam

CIVIL APPEAL NO.61 OF 2022

(Arising out of C. P. No.1500 of 2022)

(From the judgment and order dated the 14th March, 2021 passed by a Division of the High Court Division in Writ Petition No.5474 of 2020)

Paschimanchal Gas Company Ltd. : . . . Appellant

-Versus-

Manticore Technologies Ltd. and : . . . Respondents
others

For the Appellant : Mr. Sk. Md. Morshed, Senior
Advocate instructed by Ms.
Shahanara Begum, Advocate-on-
Record

For Respondent No.1 : Mr. Md. Mostafizur Rahman Khan,
Advocate instructed by Ms. Madhu
Maloti Chowdhury Barua,
Advocate-on-Record

For Respondent Nos.2-6 : Not represented

Date of Hearing : **The 23rd day of August, 2023**

Date of Judgment : **The 29th day of August, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 14.03.2021 passed by a Division of the High Court Division in Writ Petition No.5474 of 2020 making the Rule absolute.

Relevant facts for disposal of the appeal are as follows:

The writ-petitioner-respondent, a private limited company was incorporated under the Joint Stock Companies and Firms with the objects, amongst others, to run its

business by setting up and operating power plants and thereby generating power and selling the same by transmission and distribution. The writ-petitioner company has been inspired by the government policy to enhance number of gas-based power plants in private sectors within the Export Processing Zones (EPZs) under the Bangladesh Export Processing Zones Authority (BEPZA). Accordingly, the petitioner company amended its object clause of the Memorandum of Association for installing a gas-based power plant in Ishwardi EPZ, an unit under the BEPZA.

In the 17th meeting of the Board of Governors of BEPZA held on 15.06.1999 under the chair of the then Hon'ble Prime Minister in a capacity of Chairman of the Board, it was decided that the Ministry of Power, Energy and Mineral Resources (writ-respondent No.1) shall take all necessary measures immediately to ensure supply of gas to the Ishwardi EPZ to be established within the location of North Bengal and issued instruction upon the said ministry (writ-respondent No.1). It was decided that the gas supply to Ishwardi EPZ will be connected from Baghabari through Pabna.

Accordingly, the gas pipeline was established form Baghabari through Pabna to Ishwardi EPZ for the purpose of supplying gas connection to Ishwardi EPZ. In the context of scarcity of electricity (power), the then Caretaker Government in 2006, took further policy to generate electricity in the EPZs on private initiatives. Accordingly, in the 25th Board Meeting dated 03.04.2007

of BEPZA, it was decided to generate electricity in private sectors by setting up gas-based power plants in the EPZs as service oriented industry and distribute and transmit the same to those industrial units located within the respective EPZs.

Being inspired by the said decision of the Government and the BEPZA as to setting up gas-based power plant in the EPZs, the Petitioner Company submitted a project proposal before the BEPZA seeking allotment of two plots in Ishwardi EPZ for establishing a gas-based power plant. Being fully satisfied, the BEPZA vide its memos No. IP: PJT-IEPZ-25/07/2382 and IP: PJT-IEPZ-25/07/2383 both dated 18.10.2007 accepted writ-petitioner's proposal for establishing a gas based power plant in Ishwardi EPZ. Thereafter, BEPZA executed a land lease agreement dated 22.10.2007 (subsequently another agreement on 28.07.2008) with the writ-petitioner company for leasing out two plots being Nos.157/158 in Ishwardi EPZ for 30 years incorporating the conditions that the lessee-writ-petitioner shall supply uninterrupted and quality power to be required by the Ishwardi EPZ by setting up a gas based service oriented power industry having capacity up to 50 MW. Accordingly, BEPZA also executed a Power Supply agreement dated 22.10.2007 with the writ-petitioner company for uninterrupted and quality power supply of required quantity to BEPZA for distribution of the same by BEPZA to the individual private industrial units located inside the Ishwardi EPZ.

The said project is based on natural gas and BEPZA permitted to set up the said power plant on consideration of Government's decision to bring natural gas supply from Baghabari to Ishwardi EPZ only for the purpose of supplying the same to Ishwardi EPZ. Thus, the writ-petitioner legitimately expected that the Government and the BEPZA permitted the writ-petitioner company to set up gas based power plant only because there would be gas supply to Ishwardi EPZ for generating power. On the basis of the legitimate expectation of secure gas supply, the writ-petitioner spent a huge amount of money for establishing the said power plant with the bank finance. According to the power supply agreement dated 22.10.2007 the guaranteed commercial operation date was 15 months after the date of agreement. So the writ-petitioner company had to start supplying electricity before expiry of 15 months from the date of agreement i.e. 22.10.2007. The period of said 15 months expired on 21.01.2009. However, it has been extended later.

After executing the aforesaid land lease agreement and power supply agreement, the petitioner company vide a letter dated 27.01.2008 applied to the Pashchimanchal Gas Company Limited, shortly, the PGCL (respondent No.5) for gas connection to its 50 MW power industry at Ishwardi EPZ. The PGCL as a company of the Bangladesh Oil, GAS and Mineral Corporation, shortly, Petrobangla (writ-respondent No.4) forwarded a copy of the petitioner's letter dated 27.01.2008 to the Petrobangla

for necessary action. Subsequently, Ishwardi EPZ by its letter dated 10.03.2008 instructed the PGCL to take all necessary steps for providing required gas connection to the writ-petitioner company under Ishwardi EPZ in order to power generation and supply the same in different industrial units under the EPZ. The Petrobangla and the PGCL were well aware that the gas pipeline upto Ishwardi EPZ was set up only for the purpose of supplying gas in Ishwardi EPZ. Despite, the PGCL vide its memo No.77.06.63/77 dated 18.03.2008 refused to give gas connection to the writ-petitioner's power plant. Although, they admitted in this memo as to construction of gas pipeline from Baghabari through Pabna to Ishwardi EPZ for supplying gas to Ishwardi EPZ. However, they were supplying Gas to some other places instead of Ishwardi EPZ in violation of specific instructions and policy of the Government and the BEPZA.

In reply to the letter dated 11.03.2008 (18.03.2008), BEPZA sent two consecutive letters to the PGCL on 23.04.2008 and 22.06.2008 (Annexures-H and H/I to the writ petition respectively) to give gas connection to the writ-petitioner company. The writ-petitioner company vide its letter dated 24.06.2008 again requested the PGCL to arrange gas supply to the writ-petitioner company for running the said power plant, but the PGCL remained silent regarding the issue. In such circumstances, the BEPZA (writ-respondent No.6) once again vide letter dated 07.07.2008 requested the Principal Secretary of the Office of the then Chief

Advisor to give instruction to the Petrobangla and the PGCL for supplying gas to Ishwardi EPZ. The PGCL replied to the aforesaid letters through its letter dated 10.07.2008 stating that gas was being supplied to Ishwardi town from the said gas pipeline, due to incapacity of line and technical reasons, gas could not be supplied to the writ-petitioner company even though there was gas pipeline from Baghabari through Pabna up to Ishwardi EPZ.

In such situation, the writ-petitioner company vide its letter dated 16.07.2008 informed the BEPZA that the PGCL declined to give gas connection to the writ-petitioner's power plant and the petitioner requested the BEPZA to intervene for resolving the issue. Referring to the BEPZA's Board decision taken in its 17th meeting, the BAPZA vide its memo dated 27.07.2008 again requested the concern Ministry (writ-Respondent No.1) to give gas connection immediately. Subsequently, the BEPZA held a meeting on 21.08.2008 at the office of PGCL and referring to said meeting vide its letter dated 02.09.2008 the BEPZA further requested the PGCL to supply required quantity of gas to the writ-petitioner company.

The concern ministry (writ-respondent No.1) sent a letter on 10.08.2008 to the Petrobangla (writ-respondent No.4) for supplying the required gas to Ishwardi EPZ and in reply to said letter, the Petrobangla informed the ministry vide letter dated 09.09.2008 referring to an explanation of PGCL refusing outright to give gas

connection to the writ-petitioner at Ishwardi EPZ stating incapacity of gas pipeline inasmuch as they were in the process of gas supply to Square Group's factory and some other CNG refueling stations at Pabna. In the aforesaid circumstances, the writ-petitioner filed writ petition No.418 of 2009 and obtained Rule challenging the aforesaid 02 memos dated 09.09.2008 and 10.07.2008 issued by the respondents No.4 and 5 respectively refusing to give gas connection.

During pendency of the said Rule in writ petition No.418 of 2009, on 11.12.2013, the Managing Director of PGCL himself sent a letter to the Petrobangla (Annexure-P to the writ petition) informing that it was possible to supply gas to the writ-petitioner company by establishing pipe line at the cost of consumer from Pakshi Valve Station of Gas Transmission Company Ltd. (GTCL) and there is positive recommendation from the office of the Hon'ble Prime Minister and the Government.

Further, on 15.05.2019 a circular was issued by the respondent No.1 (concern ministry) to the effect that every application for gas connection shall be disposed of by the management of concern Distribution Company itself and gas connection shall be given on priority basis, in case of Industry, Electricity (Power) and Fertilizer factory.

Further, due to want of gas supply, the writ-petitioner could not start generating the electricity in its power plant and the guaranteed commercial operation date being expired, BEPZA issued two memos on 22.10.2014

and 27.10.2014 terminating the land lease agreement. Challenging the said memos, the writ-petitioner filed writ petition No.10901 of 2014 and ultimately the Rule was disposed of by the judgment and order dated 08.07.2018 with a direction upon the writ-petitioner to pay all the outstanding dues of BEPZA authorities within 6 months from date and to commission the project within one year from date. Accordingly, on receipt of payment of outstanding dues, the BEPZA withdrew the termination order of land lease agreement dated 22.10.2007 in compliance to the order of the Court. However, in the meantime, the writ-petitioner company lost four years and incurred huge loss and at the same time, BEPZA has kept the petitioner under pressure extending operation date from time to time.

Further case of writ-petitioner is that the petitioner company has obtained approved provisional license on 07.08.2012 from the Bangladesh Energy Regulatory Commission (shortly, the BERC, writ-respondent No.3) in accordance with sections 27 and 28 of the Bangladesh Energy Regulatory Commission Act, 2003 and regulations 15(9) and 15(10) of the Bangladesh Energy Regulatory Commission License Regulations, 2006 (as amended 2016) as Commercial Power Plant in the category of Independent Power Producer (IPP) for generation of 50MW power at Ishwardi EPZ. The period of validity of license was extended on 29.12.2019 with effect from 08.08.2015 which was valid up to 07.08.2020. However, the writ-petitioner already submitted the

required fees on 16.08.2020 for routine renewal of license through pay order and Treasury Challan and informed the same to the writ-respondent No.3 vide letter dated 17.08.2020.

In the developed situation of having gas supply capacity by extending gas line, the writ-petitioner company submitted another application on 08.07.2019 to the PGCL to provide gas connection for running the proposed power project at least for 10MW for the time being and the BEPZA, Prime Minister's Office also sent a letter to the PGCL on 23.09.2019 requesting to provide gas connection to the petitioner at least for 10 MW for the time being. In reply thereof, the PGCL issued the letter dated 11.11.2019, Annexure-R2 to the writ petition asking the petitioner to apply after taking approval from the Power Division of respondent No.1 to establish IPP Power Plant to Captive category in Ishwardi EPZ. The writ-petitioner raised objection vide letter dated 27.08.2020 against the letter dated 11.11.2019 stating that the project of the writ-petitioner company did not fall under captive category and so, it did not require to obtain approval from the Power Division. The writ-petitioner company again made a representation to the respondent No.2 (Energy and Mineral Resources Division) on 24.09.2019 with a request to give gas connection to the writ-petitioner company. The Assistant Secretary of Energy and Mineral Resources Division forwarded the same vide letter dated 16.10.2019 to the Senior Secretary, Power Division seeking their

opinion regarding the issue. But there was no positive response from the Power Division.

In such changing situation as to refusal of respondents to provide gas connection on plea of requiring approval of Power Division classifying the writ-petitioner in captive category consumer, the writ-petitioner thought fit to file a fresh writ petition in the context development of above facts and also available respondents' capacity to provide gas connection. Accordingly, the writ-petitioner company obtained an order dated 31.08.2020 discharging the Rule of earlier writ petition No.418 of 2009 for non-prosecution.

In this backdrop, the writ-petitioner filed the writ petition.

Pashchimanchal Gas company Limited (shortly, the PGCL) as respondent No.5 filed an affidavit-in-opposition controverting the statements of the writ petition. This respondent contends that the PGCL neither violate any specific instruction nor violate any policy of the Government. Indeed, the capacity of gas supply in the installed pipeline had reached the maximum level and so, it was not possible for the PGCL to supply gas in the writ-petitioner company from the existing infrastructure of the pipeline. PGCL informed the said matter to the writ-petitioner company on several occasions vide its different letter and one of them was on 18.03.2008. Further contention of the respondent (PGCL) is that the writ-petitioner company will be using

gas for power generation to supply uninterrupted electricity to the industries located in Ishwardi EPZ through BEPZA. Hence, it is clear that the writ-petitioner company falls under the Captive Power Customer Category in accordance with the definition provided in clause 2.2.5 of “গ্যাস বিপন্ন নিয়মাবলী, ২০১৪”. Pursuant to said Regulations the Respondent No.1 (concern ministry) issued an official order on 19.08.2019 stating that before applying for supply of gas in the captive power plant, No-objection certificate must be obtained from the concerned power distribution company with the prior approval of the Power Division of the Respondent No.1.

Further, in 276th Board Meeting of PGCL it was decided that since the writ-petitioner company is a customer of captive power category, therefore it is necessary for the petitioner company to obtain prior approval from the Power Division of the respondent No.1 before getting the gas connection from the PGCL. Accordingly, the PGCL vide its letter dated 11.11.2019 communicated the aforesaid decision to the writ-petitioner company and requested to do the needful to obtain the approval of the Power Division of the respondent No.1. However, the writ-petitioner company filed to collect the aforesaid approval from the respondent No.1 till date. As a result, without approval of the respondent No.1, the PGCL is unable to provide the gas connection to the writ-petitioner company as a captive power customer. The PGCL is bound to follow the

office order dated 19.08.2019 of the respondent No.1 and as such, the PGCL requested the writ-petitioner company to take approval from the Power Division of the respondent No.1 and apply for the gas connection to PGCL as captive category customer.

Regulation 11.9 of the “গ্যাস বিপন্নন নিয়মাবলী, ২০১৪” provides that “গ্যাস আইন-২০১০, এর আওতা বহির্ভূত এ নীতিমালার কোন বিষয়ে গ্রাহক এবং কোম্পানীর মধ্যে কোন বিরোধ সৃষ্টি হলে তা বাংলাদেশ এনার্জি রেগুলেটরী কমিশন আইন, ২০০৩ অনুযায়ী কমিশন কর্তৃক নিষ্পত্তিযোগ্য হবে।” thus, it is clear that the dispute arises between the PGCL and the petitioner under “গ্যাস বিপন্নন নিয়মাবলী, ২০১৪”, will be resolved by the Commission according to the Bangladesh Energy Regulatory Commission Act, 2003. Despite the writ-petitioner company has come before this court under writ jurisdiction without availing the alternative remedy as mentioned herein before. Thus, the writ petition is not maintainable.

Bangladesh Export processing Zones Authority (the BEPZA) as respondent No.6 has also filed an affidavit in opposition stating, inter alia, that the Board of Governors of BEPZA at their 17th meeting held on 15.06.1999 presided by the Board Chairman, the then Hon'ble Prime Minister, took a decision in the following manner:

“ঈশ্বরদী ইপিজেডে গ্যাস সরবরাহের লক্ষ্যে বিদ্যুৎ জ্বালানী ও খনিজ সম্পদ মন্ত্রণালয় বাঘাবাড়ী হতে পাবনা শহর হয়ে ঈশ্বরদী ইপিজেডে সংযোগ স্থাপনের নিমিত্তে সত্বর প্রয়োজনীয় ব্যবস্থা গ্রহণ করবে।”

At their 25th Board meeting held on 03.04.2007 BEPZA took decision that “বেপজার অধিনস্ত ইপিজেড সমূহে BOO এর পরিবর্তে ব্যক্তি মালিকানায়

বিদ্যুৎ উৎপাদন, বিতরণ ও পরিচালন এর জন্য ৪০/৫০ মেগাওয়াট পর্যন্ত ক্ষমতাসম্পন্ন service oriented industry হিসেবে বিদ্যুৎ কেন্দ্র স্থাপনের সিদ্ধান্ত গৃহীত হল। বেপজা এ বিষয়ে প্রয়োজনীয় ব্যবস্থা গ্রহণ করবে।”

On 19.07.2007 the writ-petitioner submitted a proposal for installation of a power plant in Ishwardi EPZ with a production capacity of 43.096 MW (enhanced at 50 MW) which would run full capacity of its output. Accordingly, this respondent (BEPZA) granted permission for setting up a gas based power plant as service oriented industry in Ishwardi EPZ. Accordingly, both the writ petitioner and the BEPZA signed land Lease Agreement and Power Supply Agreement on 22.10.2007. The writ petitioner was obliged to start their construction and commercial operation within 15 months from the date of signing of those agreements.

The BEPZA tried to help the writ-petitioner by making several requests to the respondents No.1 to 5 to provide gas connection to the writ-petitioner in order to start its commercial operation in due time. The BEPZA cannot wait for indefinite period for petitioners' commercial operation inasmuch as power is a vital source to run an economic zone smoothly and so on failure of writ petitioner to start its operation, BEPZA terminated the petitioner's land lease agreement. However, by filing writ petition No.10901 of 2014 against the termination order of BEPZA, the petitioner obtained judgment and order dated 08.07.2018 directing the writ petitioner to pay outstanding dues of BEPZA and to

commission the project within one year from date, failing which the BEPZA would be at liberty to take appropriate steps for terminating the said agreement. After the judgment, BEPZA on 18.04.2019 withdrew the termination order on condition to pay total outstanding by 17.10.2019 and to start commercial operation on or before 17.04.2020 failing which the authority would be at liberty to act as per order passed by the Court.

A Division Bench of the High Court Division after hearing the Rule by the impugned judgment and order dated 14.03.2022 made the Rule absolute and directed the writ-Respondent Nos.1-5 to provide gas connection to the IPP power plant to the writ petitioner within a period of 30 days.

Feeling aggrieved by and dissatisfied with the said impugned judgment and orders the writ respondent No.5 has filed this civil petition for leave to appeal and accordingly leave was granted.

Hence the present appeal.

Heard Mr. Sk. Md. Morshed, learned Senior Advocate, appearing for the appellant-petitioner makes the following submission:

- i) the High Court Division failed to appreciate that clause 4 of Policy Guidelines For Enhancement of Private Participation in The Power Sector,2008 provides that, "(4e) Given the fast depleting condition of domestic natural gas, the new power plants shall preferably rely on coal, imported gas, liquid

fuel, or renewable energy sources like solar, wind, hydro, biomass, municipal waste, and others, as fuels, instead of domestic natural gas. Any fuel supply or source of energy has to be arranged by developers for Commercial Power Plants". Additionally, clause 4(f) of the above mentioned Policy also provides that "Except for the power plants for which the GoB has committed guaranteed fuel supply, GoB will not be responsible to supply fuels, or provide guarantee in favour of any fuel supplier to supply fuels to Commercial Power Plants." and thus, the High Court Division arrived at a wrong decision;

- ii) the present petitioner had advised by its letter dated 11.11.2019 to the writ-petitioner to apply for approval from Government for ensuring compliance with the law; but the writ-petitioner choose not to make appropriate application to the Government for approval under Clauses 4 and 10(a) of the 2008 Policy read with Clauses 2.0, 3.1 and 3.2 of "Private Sector Power Generation Policy of Bangladesh,1996(revised 2004)" read with Rule 5 and 8 of the BERC Licensing Rules 2006;
- iii) the writ-petitioner applied for gas connection as IPP, but it has not yet obtained any kind of approval from the Ministry of Energy/Power Division as was decided in 276th Board of

Directors Meeting dated 29.10.2019 of present petitioner's Board (Annexure-3 to the Affidavit in Opposition) and the administrative communication dated 11.11.2019 (Annexure-3.1 to the Affidavit in Opposition) to the writ-petitioner. Moreover, Government Notification dated 27.10.2020 has discouraged gas based commercial power plants in EPZ area as a matter of national interest due to huge surplus electricity, which is un-utilized, as well as acute shortage of gas;

- iv) under Article 18A of the Constitution, it is the duty of the Government to preserve and regulate and safeguard natural resources, which is also reconfirmed by Section 24 of the Bangladesh Energy Regulatory Commission Act, 2003. Therefore, such constitutional duty overrides and supersedes every other law that has, or results in, the opposite effect and hence all the decisions and policy directives formed by the Proforma Respondent No.2 are binding on the present petitioner-PGCL. As per the Schedule I of the Rules of Business, 1996 (Part 16A) framed under Article 44 of the Constitution, it is the Proforma Respondent No.2/Ministry of Power, Energy and Mineral Resources which is solely responsible of the formulation and administration of

national power policy and that such policies are binding on the present petitioner-writ respondent No.5;

v) the High Court Division erred in law and in facts as it erred in interpreting Section 5A(2) Bangladesh Export Processing Zones Authority Act 1980 in isolation, without considering that Section 5A(2) has to be read in the context of Section 5A(1);

vi) the High Court Division failed to take into consideration that surplus electricity is currently being produced in Bangladesh including at the national grid in Ishwardi EPZ area, wherefrom 10, 150KW were sanctioned for consumption by the Ishwardi EPZ and at this moment Ishwardi EPZ has been consuming 7,740 KW at the highest. Moreover, after Rooppur Nuclear Plant comes into operation in two years in year 2023 (located within 4.0km of Ishwardi EPZ), there would be no further necessity of the Government or any Government entity (including EPZ) to purchase and consume expensive electricity manufactured by any Commercial Power Plants and/or IPPs.

vii) the High Court Division has failed to appreciate the physical and technological limitations for supplying gas to a bulk customer like a power plant. Such type of bulk supply is different from supply to

other industries. GTCL (Gas Transmission Co. Ltd) is yet to install the required Town Bordering Station (TBS)/City Gate Station (CGS) and related infrastructure required for supplying 2.5mmcf and 12 mmcf gas supply for a bulk customer like proposed power plant at the proposed site. Without additional infrastructure it is materially impossible to supply gas to the writ-petitioner.

Per contra Mr. Md. Mostafizur Rahman Khan, learned Advocate appearing for the respondents makes the following submission:

- I) the contentions of the appellant that the direction of the High Court Division to provide the respondent No.1 with gas connection runs counter to the policy decisions of the Government and that the respondent No.1 had to obtain approval of the Power Division for gas connection are incorrect inasmuch that BEPZA entered into the land lease agreement dated 18.10.2007 and power supply agreement dated 22.10.2007 with the respondent No.1 pursuant to the decision of BEPZA in the 17th Meeting of its Board of Governors chaired by the Hon'ble Prime Minister herself on 15.06.1999, which decision, in view of Section 5A(2) of the

Bangladesh Export Processing Zones Act, 1980, was deemed to be the policy decision of the Government required to be followed accordingly without any further requirement of formal approval from any Ministry or Division dealing with the matter of its implementation;

II) the contentions of the appellant that providing gas connection to the respondent No.1 would be contrary to public policy due to there being already alleged surplus of electricity production capacity in the area, and that after commissioning of the Ruppur Nuclear Plant, there will not be any necessity to purchase expensive electricity from commercial power plants, are irrelevant in the matter given that the respondent No.1 has simply entered into a power supply agreement with BEPZA with no requirement of capacity payment or mandatory purchase, and hence, the commercial risk of establishing a power plant is being borne entirely by the respondent No.1, meaning that if there is surplus electricity production capacity at present as alleged by the appellant, or if there are cheaper alternatives for purchasing electricity in the future as anticipated by the appellant, the

respondent No.1 will not in any event, be able to sell electricity upon producing the same on consumption of gas, but this should not be a reason why a gas connection should be refused now;

III) the respondent No.1 is simply asserting itself to be an IPP is incorrect inasmuch that BERC has licensed it as an IPP, and in any event, under the relevant Gas Marketing Regulations, 2014, particularly Clause 2.1, the respondent No.1 is a consumer of gas as opposed to a captive power plant, which was the contention of the appellant in the High Court Division, but which the High court Division found to be incorrect in view of the definition of a captive power consumer as provided for in Clause 2.2.5, which provides that a captive power consumer is one who produces power for itself or its associate concerns, while in this case, the respondent No.1's proposed consumers are not itself or its associated concerns, but rather independent investors who have or will set up their industrial establishments in Ishwardi EPZ;

IV) the ground taken by the appellant that to the effect that the judgment of the High court Division runs counter to Clause 4 Policy Guidelines for Enhancement of

Private Participation In The Power Sector, 2008 providing that, "(4e) Given the fast depleting condition of domestic natural gas, the new power plants shall preferably rely on coal, imported gas, liquid fuel, or renewable energy sources, like solar, wind, hydro, biomass, municipal waste, and others as fuels, instead of domestic natural gas. Any fuel supply or source of energy has to be arranged by developers for Commercial Power Plants" and that "except for the power plants for which the GoB has committed guaranteed fuel supply, GoB will not be responsible to supply fuels, or provide guarantee in favour of any fuel supplier to supply fuels for commercial power plants", is misconceived inasmuch that providing the gas connection is not a guarantee on the part of the Government that gas will in fact be supplied, which would in fact depend upon availability and demand, and more importantly, the respondent No.1 will only be purchasing gas if it is able to sell electricity at a competitive rate, and if the price of gas rises to a level where the respondent No.1 is unable to sell electricity at a competitive rate, due to, among others, the availability of cheaper alternatives as

anticipated by the appellant, then the respondent No.1 would not have any demand for electricity requiring it to consume gas in any event.

We have considered the rival submissions of the learned Advocates for the respective parties, perused the impugned judgment and other materials as placed before us.

Upon perusal of the judgment of the High Court Division it transpires that the High Court Division held that a legitimate expectation was accrued to the writ-petitioner to get connection of the gas as the BEPZA kept allotment to the writ-petitioner to install a Power Plant.

It transpires from the record that on 16.02.2015 the writ-petitioner was given license by the Bangladesh Energy Regulatory Commission for generating 50MW Electricity by Commercial Power Plant as Independent Power Producer under policy guidelines for Enhancement Of Private Partnership In Power Sector, 2008 at Ishwardi Export Processing Zone (IEPZ) for a period of 3 years which was eventually extended up to 07.08.2020. From the license it is very much clear that the writ-petitioner was given license for Generating Electricity in Ishwardi Export Processing Zone (IEPZ) Authority under the Policy Guidelines of 2008 not IPPR Policy of 1996.

Clause 4(E) of the Policy Guidelines for Enhancement of Private Partnership in Power Sector, 2008 clearly stipulates to the effect;

Commercial Power Plants:

- (a) Private Investors can establish and operate Commercial Power Plants subject to provisions under Section 10(a) and 10(b) of these Guidelines.
- (b) Commercial Power Plants shall comply with applicable technical standards of grid connectivity and operation.
- (c) Such investors shall find their own buyer(s) to sell the electricity generated. They will be free to negotiate the applicable tariff with the Large Consumers.
- (d) Distribution Licensees may purchase power from Commercial Power Plants, as needed, subject to approval by BERC, but GOB will not provide any guarantee in favour of any Distribution Licensee.
- (e) Given the fast depleting condition of domestic natural gas, the new power plants shall preferably rely on coal, imported gas, liquid fuel, or renewable energy sources like solar, wind, hydro, biomass, municipal waste, and others, as fuels, instead of domestic natural gas. Any fuel supply or source of energy has to be arranged by developers for Commercial Power Plants. (Underlines supplied)

Clause-4(E) of the Policy Guidelines, 2008 clearly stipulated that any fuel supply or Source of Energy has to be arranged by the developers for Commercial Power Plant.

In view of the above clear provision the present-appellant is not bound to provide gas supply to the writ petitioners-respondents. The High Court Division failed to consider this vital aspect in deciding the merit of the Rule and thereby committed error of law.

Further the writ-petitioner did not obtain any permission from the Government as Independent Power Producer (IPP) under the policy of 1996 and it has obtained permission from the Bangladesh Energy Regulatory Commission under policy 2008 as Commercial Power Plant (CoPP). This Policy Clearly speaks that CoPP will not be entitled to any gas supply as of right.

Thus, the writ-petitioner falls squarely within the terms of scope of 2008 policy. The appellant never made any promise to supply the gas to the writ-petitioner and as such question of legitimate expectation does not arise at all by virtue of the license issued by the Bangladesh Energy Regulatory Commission for Generation of Electricity in Ishwardi EPZ. No vested and legal right has been created in favour of the writ-petitioner. As such the direction upon the writ-respondents by the High Court Division to provide gas connection to the writ-petitioners is beyond the scope of law. It is by now a well settled proposition of law that when any legal and vested right

has not been created in favour of a particular persons and no promise was made in that event mandamus cannot be issued by the Court. Thus, the High Court Division has committed serious error of law in passing the impugned judgment.

The High Court Division further committed error in not considering the fact that the commercial agreement between the writ-petitioner and BEPZA for selling power to BEPZA and the lease agreement between them without obtaining required permission from the concerned Ministry as per law for setting up power plant, the signing of commercial agreement between the writ-petitioner and BEPZA does not create any right in favour of the writ-petitioner for getting gas supply from the writ-respondents.

It is admitted by the learned Advocate for the writ-petitioner that no infrastructures of the power plant have been set up in the plot, leased out to the writ-petitioner by the BEPZA and as such question of gas connection at this stage does not arise at all.

It is also undeniable fact that the permission given to the writ-petitioner for generating electricity was temporary, which was expired on 06.08.2020 and at present there is no valid permission in favour of the writ-petitioner. Further, we appreciate the submission of the learned Advocate for the appellant that the Government having improved electricity condition in Ishwardi region, now there is supplied electricity in Ishwardi region and Rooppur Nuclear Plant is located

within 4KM Radius for Ishwardi EPZ area and there is no necessity for further Generation of Electricity in Ishwardi EPZ area.

It reveals from the dated 25.03.2021 that concerned Ministry asked the Petro Bangla and other gas distribution organizations not to give gas supply to the Bangladesh Economic Zones Authority (BEZA).

The contents of the said letter are as follow:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
বিদ্যুৎ জ্বালানী ও খনিজ সম্পদ মন্ত্রণালয়
বাংলাদেশ তৈল, গ্যাস ও খনিজ সম্পদ করপোরেশন
(পেট্রোবাংলা)
উৎপাদন ও বিপণন বিভাগ

www.petrobangla.org.bd

স্মারক নম্বর: ২৮.০২.০০০০.০৩৬.২৬.০০১.২০.১২৮

তারিখ: ২৫ মার্চ ২০২১

বিষয়: Bangladesh Economic Zones (BEZA) এর আওতাধীন বিভিন্ন অর্থনৈতিক অনুমতি প্রদান না করা প্রসঙ্গে।

সূত্রঃ জ্বালানী ও খনিজ সম্পদ বিভাগের স্মারক নং-২৮.০০.০০০০.০১৬.৯৯.০০৫.১৯.১১৪, তারিখ: ১৬ মার্চ ২০২১।

উপর্যুক্ত বিষয়ে জ্বালানী ও খনিজ সম্পদ বিভাগের সূত্রোক্ত পত্রের (কপি সংযুক্ত) প্রতি সদয় দৃষ্টি আকর্ষণ করা যাচ্ছে। পত্রে বর্ণিত গ্যাস সরবরাহের অনুমতি প্রদান না করা বিষয় সদয় অবগতি ও পরবর্তী প্রয়োজনীয় ব্যবস্থা গ্রহণের জন্য নির্দেশক্রমে এসঙ্গে প্রেরণ করা হলো।

সংযুক্তিঃ জ্বালানী ও খনিজ সম্পদ বিভাগের ১৬ মার্চ ২০২১ তারিখের পত্র।

২৫-৩-২০২১

মোঃ আনোয়ারুল ইসলাম
মহাব্যবস্থাপক (উৎপাদন ও বিপণন)

In view of the forgoing discussions, we are of the view that the High Court Division committed grave error in passing the impugned judgment and order making the Rule absolute.

Thus, we find merit in the appeal.

Accordingly, the appeal is allowed.

The impugned judgment and order dated 14.03.2021 passed by the High Court Division is hereby set aside.

No order as to cost.

C.J.

J.

J.