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

WRIT PETITION NO. 12633 OF 2022

IN THE MATTER OF :

Energis Power Corporation Ltd.
....Petitioner
- V E R S U S -
Bangladesh Energy Regulatory Commission and others
....Respondents
Mr. Tanjib-Ul Alam, Senior Advocate with
Ms. Nazmun Binte Islam, Advocate
.....For the petitioner
Mr. A. M. Masum, with
Mr. Sayed Mahsib Hossain, Advocates
.....for the Respondent No. 4

Present:
Mr. Justice Zafar Ahmed
And
Mr. Justice Md. Bashir Ullah

Heard on: 15.06.2023, 26.07.2023, 09.08.2023, 16.08.2023 and 23.08.2023
Judgment on: 31.08.2023

Zafar Ahmed, J.

In the instant writ petition, the petitioner company has challenged the award dated 09.12.2021 (Annexure-A) passed by the respondent No. 1 (Bangladesh Energy Regulatory Commission) in Dispute Settlement Application No. 5/2019 filed by the petitioner as claimant against the respondent No. 4 (BPDB) directing the petitioner

to pay US$ 94,28,090.36 to the BPDB and the order bearing Memo No. 28.01.0000.016.31.005.19/3562 dated 14.08.2022 (Annexure-A1) passed by the respondent No. 1 rejecting the petitioner's review petition. The petitioner has further prayed for a direction upon the respondent No. 1 to reopen the Dispute Settlement Application No. 5 of 2019 and refer the same to an Arbitral Tribunal duly constituted under the Bangladesh Energy Regulatory Commission Act, 2003 and Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2021 for adjudication.

This Court, on 06.11.2022, issued a Rule Nisi and passed an interim order staying operation of all proceedings of Money Execution Case No. 03 of 2022 now pending before the Court of the District Judge, Dhaka.

The respondent No. 4 Bangladesh Power Development Board (BPDB) contested the Rule by filing affidavit-in-opposition.

The petitioner, namely Energis Power Corporation Ltd. is a private company limited by shares. It entered into a contract being No. 09711 dated 28.12.2008 ("contract") with the BPDB for supply of power on a rental basis. The tenure of the contract was extended for a further period of 5(five) years by the amended contract No. 09932 dated 09.02.2014 ("extended contract"). Following completion of the

first year of the term of the contract after commencement of commercial operation, the petitioner received a letter dated 22.05.2011 from the BPDB demanding liquidated damages (LD) of US$ 34,65,636.546 for excess outage. In response, the petitioner by letter dated 15.06.2011 stated that it did not agree with the basis of calculation of the liquidated damages; rather, based on the demand data from the National Load Dispatch Centre (NLDC), the liquidated damages stood at US$ 1,76,523.00 which the petitioner paid and the BPDB accepted the same without raising any objection. After completion of the second year of the contract, the BPDB issued a further notice dated 08.10.2012 to the petitioner demanding liquidated damages of US$ 48,52,932.22 on account of outage. After completion of the third year of the contract, the BPDB issued another notice dated 29.05.2023 to the petitioner demanding US$ 50,23,168.79 on account of outage. On the same date, the BPDB also issued a notice demanding an amount of US$ 28,49,713.40 from the petitioner for excess consumption of fuel.

The petitioner had been pressing the BPDB to know the basis for computation of liquidated damages. Numerous correspondences were exchanged between the parties on the issue.

The petitioner's specific case is that no amount remained outstanding payable to the BPDB, rather the latter had held an excess amount of US$ 1,56,200.00. Since no settlement was reached between the parties the petitioner was constrained to initiate an arbitral proceeding in the form of Dispute Settlement Application No. 5 of 2019 before the respondent No. 1 Bangladesh Energy Regulatory Commission against the BPDB under Section 40 of the Bangladesh Energy Regulatory Commission Act, 2003 (in short, the 'BERC Act, 2003'). The arbitral case was contested by the BPDB. Upon hearing the parties, the impugned award dated 09.12.2021 (Annexure-A) was passed directing the petitioner to pay an amount of US$ 94,28,090.36 on account of unpaid liquidated damages and excess fuel consumption.

The petitioner submitted a review application dated 06.01.2022 against the said award before the respondent No. 1 under regulation 18 of the Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2021 (in short, the 'BERC Regulations'). Upon hearing, the review application was rejected by the respondent No. 1 on 14.08.2022 (Annexure-A-1). Thereafter, the BPDB filed Execution Case bearing No. 03 of 2022 before the Court of District Judge, Dhaka for execution of the award which is now pending.

Challenging the award dated 09.12.2021 and order dated 14.08.2022 rejecting the review petition, the petitioner filed the instant writ petition, obtained the Rule and order of stay.

The petitioner company filed the arbitration case under Section 40 of the BERC Act, 2003 praying for declaration *inter alia* that:

(a) the calculation adopted by the BPDB for calculating the liquidated damages (LD) under clause 8.3 of the contract is not in compliance with the said contract dated 28.12.2008 (contract No. 09711) and the same is illegal, unlawful and inoperative as a whole;

(b) the BPDB's claim of liquidated damages for USD 1,23,72,198, vide letter bearing Memo No. 1354-PDB(Sectt)/Dev-175/2009 dated 27/05/2015 for the period from 06.05.2010 to 05.05.2013 is unlawful;

(c) the claimant is not responsible for failure of the fuel supplier to supply fuel as per specification set out in the contract and that the BPDB is not entitled to deduct any money from the invoices of the claimant;

(d) to pass an award directing the BPDB to refund an amount of USD 4,094,270/- being illegally deducted from the invoices

of the claimant submitted as per the terms and conditions of the contract.

The BPDB filed statement of defence in the arbitration proceedings praying for rejection of the claim.

The Arbitral Tribunal framed the following issues:

(১) প্রতিপক্ষ বিউবো কর্তৃক যে পদ্ধতিতে LD for Excess Outage নিরূপন করা হয়েছে তা ২৮/১২/২০০৮ খ্রি: তারিখে স্বাক্ষরিত চুক্তি অনুযায়ী যথাযথ হয়েছে কিনা?

(২) দাবিকারী Energis Power Company Ltd কর্তৃক HFO এর স্পেসিফিকেশন (২৮/১২/২০০৮ খ্রিঃ তারিখে স্বাক্ষরিত চুক্তির Article 26.3 এর SoC এর পৃষ্ঠা ১২৬, ১৬৯ ও ১৮২ দ্রষ্টব্য) এর বিষয়ে যে আপত্তি উত্থাপিত হয়েছে তা সঠিক কিনা?

(৩) প্রতিপক্ষ ২৮/১২/২০০৮ খ্রিঃ তারিখে সম্পদিত চুক্তির ১ম বছরের জন্য যে পরিমাণ LD দাবি করছে তা চুক্তি অনুযায়ী সঠিক কিনা?

(৪) বাবিউবো LD এর যে পরিমাণের উপর সুদ কর্তন করেছে তা Disputed amount কিনা এবং সুদ কর্তন করা চুক্তি অনুযায়ী যথাযথ হয়েছে কিনা?

(৫) এতদ্ব্যতীত কোন পক্ষ অন্য কোন প্রতিকার পেতে পারে কিনা?

In respect of the issue No. 1, the Tribunal considered and discussed various clauses contained in the power purchase agreement regarding calculation of liquidated damages for excess outage, the opinion and calculation methods proposed by both the petitioner company and the BPDB and finally, accepted the calculation method proposed by the BPDB. In so doing, the Tribunal assigned detailed reasons.

The issue No. 2 was decided in favour of the BPDB. The Tribunal observed:

"উভয় পক্ষের দাখিলকৃত দালিলাদি এবং শুনানিতে উপস্থাপিত বক্তব্য বিশ্লেষন করে কমিশন মনে করে যে, দাবিকারী তার দাবি প্রতিষ্ঠার ব্যাপারে যথেষ্ট তথ্য-উপাত্ত সরবরাহ করতে পারে নাই। শুধুমাত্র একটি প্রতিষ্ঠানের একটিমাত্র টেস্ট রিপোর্টের ভিত্তিতে তিন বছর ব্যাপী বিভিন্ন সময়ে সরবরাহকৃত জ্বালনির মানের বিষয়ে কোন চূড়ান্ত সিদ্ধান্ত গ্রহণ করা যায়না। বাণিজ্যিক ভিত্তিতে প্রাপ্ত ফার্নেস অয়েলের ক্যালরিফিক ভ্যালু Lower Heating Value কোনক্রমেই ১৭৭০০ বিটিইউ/পাউন্ড এর উপরে হওয়ার কথা নয়। সুতরাং বিউবো আরএফপিতে ফার্নেস অয়েলের ক্যালরিফিক ভ্যালু যা উল্লেখ করেছে তা Higher Heating Value ।

১ম সংশোধনী চুক্তির (১ম তিন বছরের পর পরবর্তী পাঁচ বছর মেয়াদে বর্ধিতকরণ) অনুচ্ছেদ ১৩ ও ২৫ অনুসারে জ্বালানির হিটিং ভ্যালুকে Higher Heating Value ধরে Net Guaranteed Flat Heat Rate (HHV) নির্ধারণ করা হয়েছে। এমতাবস্থায় জ্বালানির মান নয় বরং বরং প্ল্যান্টের ইঞ্জিন ও মেশিনারীর মান এবং রক্ষণাবেক্ষণজনিত সমস্যার কারণে অতিরিক্ত জ্বালানি খরচ হয়েছে মর্মে প্রতিপক্ষের বক্তব্যকে কমিশনের নিকট গ্রহনযোগ্য।"

The issue No. 3 was also decided in favour of the BPDB. The Tribunal observed:

"দাবিকারীর স্বীকৃতমতে ১ম চুক্তিবছরের ১ম ৮মাসে NLDC কর্তৃক মৌখিক চাহিদার পরিপ্রেক্ষিতে বিদ্যুৎ সরবরাহ করা হত এবং এই সময়ের জন্য কোন available capacity declaration দেওয়া হয়নি। তাই এই সময়ের জন্য বিউবো'র প্রস্তাবিত ফর্মুলা অনুযায়ী outage ক্যালকুলেশন করা যৌক্তিক বলে কমিশন মনে করে। প্রতিপক্ষের SoD এর সাথে দাখিলকৃত বিউবো'র এলডি কমিটি ও দাবিকারীর প্রতিষ্ঠানের ব্যবস্থাপনা পরিচালকের স্বাক্ষরিত

সভার কার্য বিবরনী হতে প্রতীয়মান হয় যে ১ম চুক্তিবছরের LD (outage) পরিমান ৩০,৮৪,৩৮৫.৭৫ (ত্রিশ লক্ষ চুরাশি হাজার তিনশত পঁচাশি দশমিক সাত পাঁচ) মার্কিন ডলার দাবিকারী মেনে নিয়েছে। সার্বিক বিবেচনায় কমিশন মনে করে যে, ১ম চুক্তিবছরের (০৫/০৫/২০১০ - ০৪/০৫/২০১৩) জন্য পরিশোধিত LD for Excess outage কে full and final হিসেবে গন্য করার সুযোগ নেই।

In respect of the issue No. 4, the Tribunal considered clause 8.5(a)(ii) of the contract and held:

"উভয় পক্ষের মধ্যে সম্পাদিত ও সম্মত চুক্তিপত্রের উক্ত অনুচ্ছেদ মতে বিরোধ নিষ্পত্তির জন্য দাবিকারী কর্তৃক কমিশনে আবেদন দাখিলের দিন হতে রোয়েদাদ জারীর দিন পর্যন্ত বিরোধীয় amount এর উপর কোন সুদ বা সারচার্জ আরোপযোগ্য হবেনা।"

The orders passed by the Tribunal are as follows:

"<u>আদেশ-(১)</u>

প্রতিপক্ষ বাবিউবো কর্তৃক ২য় বছরের LD for Excess Outage বাবদ দাবীকৃত ৮৪,৫২,৯৩২.২২ মার্কিন ডলার ও LD for Excess Fuel Consumption বাবদ ৩০,৬১,৩২০.৮৯ মার্কিন ডলার এবং ৩য় বছরের LD for Excess Outage বাবদ দাবীকৃত ৫০,২৩,১৬৮.৭৯ মার্কিন ডলার এবং LD for Excess Fuel Consumption বাবদ ২৮,৫১,২৯৮.৭৪ মার্কিন ডলার অর্থাৎ সর্বমোর্ট ১,৫৭,৮৮,৭২০.৬৪ মার্কিন ডলার এর বিপরীতে পরিশোধিত ৬৩,৬০,৬৩০.২৮ মার্কিক ডলার বাদে অপরিশোধিত অংশ মোট ৯৪,২৮,০৯০.৩৬ মার্কিন ডলার রোয়েদাদ জারীর ১(এক) মাসের মধ্যে দাবীকারী কর্তৃক পরিশোধ করতে হবে।

<u>আদেশ-২</u>

চুক্তি সম্পাদনের ১ম বছরের বিরোধীয় LD এর পরিমানের বিষয়ে সমঝোতার ভিত্তিতে নিষ্পত্তি হওয়ায় সমঝোতা পত্রটি কমিশন কর্তৃক গৃহিত হল।

আদেশ-৩

বিরোধ নিষ্পত্তির জন্য দাবিকারী কর্তৃক কমিশনে দাখিলের দিন হতে রোয়েদাদ জারীর দিন পর্যন্ত বিরোধীয় amount এর উপর কোন সুদ বা সারচার্জ আরোপযোগ্য হবেনা।

আদেশ-৪

কোন পক্ষ এ বিরোধ নিষ্পত্তি আবেদনের ভিত্তিতে অন্য কোন প্রকার প্রতিকার পেতে পারে না।”

Mr. A.M. Masum, the learned Advocate appearing for the respondent BPDB, at the outset, raised a preliminary objection as to the maintainability of the writ petition. He submits that as per Section 40(5) of the BERC Act, 2003, any award or order passed by the Commission is final and under regulation 18 of BERC Regulations, 2021, there is a provision for review of the award and the decision of the Commission is full and final. He further submits that unlike the Arbitration Act, 2001 (Sections 42 and 43), which contains provisions for setting aside any arbitral award, the BERC Act and Regulations do not contain any such provision for appeal or setting aside an award. Hence, it is the intention of the legislature to make any award and order passed on review application, if any, passed by the Commission absolute and judicial review is not maintainable.

Mr. Masum further submits that the English Courts have traditionally been adherent to the view that the finality clause or the ouster clause contained in a statute does not oust the jurisdiction of the Court to consider a judicial review claim. Even the underlying logic of the majority of the House of Lords in ***Anisminic Ltd. vs. Foreign Compen. Trib.,*** [1969] 2 AC 147 was that an ouster clause does not protect an unlawful decision from judicial oversight. However, very recently, the Supreme Court of the UK expressly acknowledged the right of Parliament to oust or exclude judicial review with the use of clear language. Also it has been seen that judicial oversight of the investigatory powers of the Tribunal has been successfully ousted by Section 67(8) of the Regulation of Investigatory Powers Act, 2000 in the unanimous decision of the Court of Appeal in ***R (Privacy International) v Foreign and Commonwealth Secretary,*** [2017] EWCA Civ 1868.

Mr. Masum further submits that the question as to the implication of ouster of judicial review under Section 11A of the Tribunal, Courts and Enforcement Act, 2007 again arose in ***R (Oceana) v Upper Tribunal***, [2023] EWHC 791. In that case Saini J's wider remarks on ouster clauses and constitutional principle are of significance. Saini J. observed:

"Putting aside obiter observations in certain cases and academic commentaries, in my judgment, the legal position under the law of England and Wales is clear and well-established. The starting point is that the courts must always be the authoritative interpreters of all legislation including ouster clauses. That is a fundamental requirement of the rule of law and the courts jealously guard this role. However, the rule of law applies as much to the Courts as it does to anyone else. That means that under, our constitutional system, effect must be given to Parliament's will expressed in legislation. In the absence of a written constitution capable of serving as some form of "higher" law, the status of legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no immunity from these principles when clear legislative language is used, and parliament has expressly confronted the issue of exclusion of judicial review, as was the case with Section 11A. In short, there is no superior form of law than primary legislation, save only where

Parliament has itself made provision to allow that to happen". (emphasis supplied)

The learned Advocate finally submits that adopting the views taken in both ***Privacy International*** and ***Oceana***, Section 40(5) of the BERC Act, 2003 not only confirms that no appeal lies against the award given by the Commission, but also does effectively oust the jurisdiction of the Court to consider a judicial review of the award dated 09.12.2021 passed by the BERC.

The argument advanced on behalf of the respondent BPDB as to maintainability of the writ petition to review the award is misconceived. We have a written constitution in Bangladesh which is the supreme law of the land. Article 102(2)(a)(ii) of the Constitution empowers the High Court Division to issue an order declaring any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority to be without lawful authority and is of no legal effect. Under Article 102(5), "person" includes any Court or tribunal. In ***Ayesha Salahuddin vs. Chairman, Second Labour Court***, (1980) 32 DLR (AD) 68, 71 the Appellate Division observed that the High Court Division can issue a writ in the nature of *certiorari* where there is an error apparent on the face of the record. In ***Pabna Mental Hospital vs.***

Tossadek Hossain, (2005) 13 BLT (AD) 91, the Apex Court held that the High Court Division can entertain a *certiorari* proceedings in case of lack of jurisdiction, excess of jurisdiction or violation of the principles of natural justice.

The case laws decided in our jurisdiction unequivocally establish the principle that the ouster clause contained in a statute does not take away the jurisdiction of the High Court Division to exercise its power to review any act done or proceeding taken by a person performing functions in connection with the Republic or of a local authority. The ***Oceana*** case (*supra*) was decided by the English Court against the backdrop of English constitutional system recognising that there is no written constitution in England and the Crown in Parliament is sovereign and the legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. Since we have a written constitution which is the supreme law of the land and the power of judicial review has been exclusively conferred upon the High Court Division by the supreme law, the English principle laid down in the ***Oceana*** case has no manner of application to our constitutional framework and legal system. The principle laid down in ***Anisminic*** applies to our jurisdiction in full force. Therefore, the writ petition is maintainable.

In the instant case, the award was passed under Section 40(2) of the BERC Act, 2003. Section 40(2) states, "কমিশন সালিসকারী হিসাবে স্বীয় উদ্যোগে পদক্ষেপ গ্রহণ করিয়া রোয়েদাদ প্রদান করিতে পারিবে বা বিরোধের নিস্পত্তি করিবার জন্য সালিসকারী নিয়োগ দিতে পারিবে".

The Court in *certiorari* proceeding will not interfere with findings of fact unless it is a case of no evidence or a case on non-consideration of material evidence, misreading of the evidence, or misconstruction of the documents. Appreciation or weight of evidence is an issue of fact and a finding of fact is generally not reviewable, nor shall the reviewing court interfere when disputed questions of fact are involved. In exercising the power of judicial review the Court does not assume the function of an appellate authority. Therefore, we refrain from dwelling upon the question of facts, which is essentially based on evidence and disputed in nature, to review the award as a whole despite repeated arguments advanced by Mr. Tanjib-Ul Alam, the learned Advocate appearing for the petitioner.

When the Tribunal passes an order under Section 40(2), it acts as a quasi-judicial authority. Mahmudul Islam in 'Constitutional Law of Bangladesh' (3rd ed., p. 694 para 5.64J) referred to a number of cases and observed,

> "The requirement of recording reasons by every quasi-judicial or even an administrative authority entrusted with the task of passing an order adversely against an individual and communication thereof to the affected persons is one of the recognised facets of the rules of natural justice and violation thereof has the effect of vitiating the order passed by the authority concerned. ...The requirement of reasoned decision not only ensures application of mind of the authority, eschews arbitrariness and improves the quality of administrative adjudication, but also ensures fairness and transparency and enables the review court to properly examine the impugned decision."

In ***R.V. Higher Education Funding Council ex p. Institute of Dental Surgery*** [1994] 1 AC 531, it was held that the giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process.

In the instant arbitration case, the petitioner company prayed for a declaration that the BPDB's claim of liquidated damages (LD) to the tune of USD 1,23,72,198 for the period from 06.05.2010 to 05.05.2013 is unlawful. The Tribunal in its order No. 1, which is already quoted above, directed the petitioner to pay the outstanding

amount to the tune of total USD 94,28,090.36 to the BPDB as LD for excess outage and LD for excess fuel consumption for 2nd and 3rd year of the contract whereas, it appears that no issue was framed on this point. Issue No. 3 relates to whether the LD claimed by the BPDB for the 1st year of the contract dated 28.12.2008 is proper in accordance with the terms of the contract. In our view, the order No. 1 lacks clarification as to the basis and materials for arriving at the decision by the Tribunal in respect of the amount payable by the petitioner.

Regulation 16 of the BERC Regulations, 2021 provides provisions for correction and interpretation of award. Regulation 16 states:

"১৬। রোয়েদাদ সংশোধন ও ব্যাখ্যা।- (১) রোয়েদাদ প্রাপ্তির ১৪(চৌদ্দ) দিনের মধ্যে কোনো পক্ষ অপর পক্ষকে নোটিশ প্রদান পূর্বক কমিশনকে নিম্নরূপ অনুরোধ করিতে পারিবে, যথাঃ-

(ক) রোয়েদাদে কোনো গণনার হিসাব, করণীক এ্রুটি বা মুদ্রণজনিত ভুল বা অন্য কোন ভুল পরিলক্ষিত হইলে উহা সংশোধন; এবং

(খ) রোয়েদাদের কোনো বিষয়ে ব্যাখ্যা প্রদান।

(২) উপ-প্রবিধান (১) এর অধীন প্রাপ্ত অনুরোধ কমিশনের নিকট যথাযথ প্রতীয়মান হইলে কমিশন উক্তরূপ অনুরোধ প্রাপ্তির ৩০ (ত্রিশ) দিনের মধ্যে উহা সংশোধন বা ব্যাখ্যা প্রদান করিবে এবং উক্তরূপ সংশোধন বা ব্যাখ্যা রোয়েদাদের অংশ হিসাবে গণ্য হইবে।"

The petitioner company did not submit any application under regulation 16 for interpretation of the order No. 1, rather it filed a review application under regulation 18 which was rejected. We have

already taken the view that the order No. 1 lacks clarification. However, in view of the principles discussed above regarding ambit of the High Court Division in exercising the power of judicial review in *certiorari* proceedings, we find no ground to interfere with the order Nos. 2-4 passed by the Tribunal.

Accordingly, the respondent No. 1 BERC is directed to interpret the order No. 1 of the award dated 09.12.2021 as to the basis and materials for arriving at the decision in respect of the amount payable by the petitioner and to reach a decision accordingly within a period of 3(three) months from the date of receipt of this judgment. In so doing, the BERC shall follow the calculation method approved by the Tribunal as discussed and decided under issue No. 1 in the award dated 09.12.2021.

Till the decision of the Tribunal, the further proceedings of Money Execution Case No. 3 of 2022 shall remain stayed.

With the above observations and directions, the Rule is disposed of.

Md. Bashir Ullah, J.

I agree.

Mazhar/BO