

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Murad-A-Mowla Sohel

Civil Revision No. 2546 of 2023

NEPC Consortium Power Limited petitioner
-Versus-

Bangladesh Power Development Board and others
..... opposite parties

With

Civil Revision No. 2641 of 2024

Bangladesh Power Development Board (BPDB)
..... petitioner

-Versus-

NEPC Consortium Power Limited
..... opposite party

Mr. SK Md. Morshed, Senior Advocate with Mr.
Ashraful Hadi and Mr. Md. Anisul Hasan,
Advocates

..... for the petitioner in CR 2546 of 2023
and opposite party 1 in CR 2641 of 2024

Mr. Md. Forhad Bin Hossain with Mr. Md. Maruf
Hasan, Advocates

..... for opposite party 1 in CR 2546 of 2023
and petitioner in CR 2641 of 2024

Judgment on 03.12.2025

Bhishmadev Chakrabortty, J:

The Appellate Division has sent the matters to this Bench for
speedy disposal.

Since the subject matter of the Rules are more or less identical,
parties thereto are same and common question of fact and law are
involved in both, these have been heard together and are being
disposed of by this judgment.

In Civil Revision 2546 of 2023 Rule was issued calling upon
opposite party 1 to show cause as to why order of the Joint District

Judge, Court 5, Dhaka passed on 30.04.2023 in Title Suit 168 of 2021 rejecting the petitioner's application under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure (the Code) for rejection of the plaint shall not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper. At the time of issuing the Rule, all further proceedings of the aforesaid suit was stayed for a limited period which was subsequently extended and still subsists.

In Civil Revision 2641 of 2024 Rule was issued calling upon the opposite parties to show cause as to why the judgment and order of the District Judge, Dhaka passed on 25.03.2024 in Money Decree Execution Case 09 of 2022 rejecting the petitioner's application filed under Order 21 Rule 29 read with section 151 of the Code for staying the execution case till disposal of Title Suit 168 of 2021 pending in the Court of Joint District Judge, Court 5, Dhaka should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper. At the time of issuing the Rule all further proceedings of the execution case was stayed for a limited period which still subsists.

Facts relevant for disposal of Rule issued in Civil Revision 2546 of 2023, in brief, are that the plaintiff of Title Suit 168 of 2021, opposite party 1 herein entered into a Power Purchase Agreement (PPA) with defendant 1 on 11.03.1998 for a term of 15 years to

supply, build, own, operate and maintain a 110 MW floating barge Mountain Power Plant at Haripur, Narayangonj. It subsequently entered into another contract of Power Purchase Agreement Extended Period (PPAEP) for extended period of 01 year which was further extended for twice firstly on 16.03.2016 and secondly on 19.07.2018 which expired on 19.06.2019. A dispute arose between the parties when the plaintiff failed to pay the invoice amount to defendant 1 under the PPAEP. There was an arbitration clause in the agreement and the defendant-petitioner, referred the matter of dispute to the International Centre for Settlement of Investment Disputes (ICSID). The case was registered and the defendant-petitioner claimed outstanding tariff payment of Taka 1,085,282,044/- and late payment interest calculated in accordance with PPAEP. The plaintiff appeared in the proceeding and through its international counsels submitted its counter memorial and rejoinder. The ICSID Tribunal comprising Mr. Jonathan Mance, a retired Hon'ble Lord member of the House of Lords of UK after hearing passed award on 12.04.2021 against the plaintiff. Thereafter, the debtor as plaintiff instituted aforesaid Title Suit 168 of 2021 in the Court of Joint District Judge, Court 5, Dhaka challenging the award alleging that the award is contrary under section 46 of the Arbitration Act, 2001 (Act, 2001).

During pending of the aforesaid suit, the defendant, petitioner herein filed an application under Order 7 Rule 11 read with section

151 of the Code for rejecting the plaint stating mainly the ground that the present suit challenging the award passed by ICSID Tribunal is not maintainable under the provisions of the Act, 2001 and some law settled by our Apex Court. The plaintiff filed written objection against the application denying the statements made in the application. However, the Joint District Judge by the order passed on 30.04.2023 rejected the application which prompted defendant 1 to approach this Court with this application under section 115(1) of the Code and the Rule was issued with an *interim* order of stay of the proceedings of the suit.

Facts relevant for disposal of the Rule issued in Civil Revision 2641 of 2024, in brief, are that the petitioner of the previous Rule in whose favour the award was passed in the aforesaid ICSID Tribunal filed execution case before the District Judge bearing Execution Case 09 of 2022 on 14.06.2022 for execution of the award dated 12.04.2011 as per the provisions of section 45 of the Act, 2001. The notices of the aforesaid execution case were duly sent. The plaintiff of the previous suit appeared in the execution case and filed an application under Order 21 Rule 29 of the Code and prayed for an order staying all further proceedings of the execution case till disposal of Title Suit 168 of 2021 pending in the Court of Joint District Judge, Court 5, Dhaka which has been filed challenging the award put into execution in the execution case. However, the District Judge by the

order passed on 25.03.2024 rejected the said application. Being aggrieved by debtor-petitioner approached this Court with an application under section 115(1) of the Code upon which the Rule was issued and proceeding of the execution case was stayed.

Mr. SK Md. Morshed, learned Senior Advocate for the petitioner in Civil Revision 2546 of 2023 and opposite party 1 in Civil Revision 2641 of 2024 taking us through the impugned orders of both the Rules and the provisions of sections 3, 45, 46 and 47 of the Act, 2001 submits that the aforesaid Act is a special law and the provisions laid therein should be strictly followed. If remedy is available in the special law, general law is not entertainable. He takes us through the prayer of the suit filed by the debtor and submits that in the suit the plaintiff prayed for a declaration that the final award passed in the ICSID case on 12.04.2021 is illegal, void and not binding upon it. The award has been passed by the ICSID Tribunal and if the awardee files execution case before the District Judge as per the provisions of law, the plaintiff may raise objection there under section 46 of the Act, 2001 and in a fit case the District Judge may refuse to enforce the award. The plaintiff could have raised and still can raise objection before the District Judge as contemplated under section 46 of the Act, 2001. It could have waited till filing of the execution case by the awardee but without doing so it instituted the instant suit for setting aside an International Arbitration Award only to delay the disposal of

the execution case. He then refers to section 3 of the Act, 2001 for applicability of sections 45, 46 and 47 of the same Act in respect of award passed in an International Arbitration. He refers to the cases of Md. Nurul Abser vs. Golam Rabbani and others, 68 DLR (AD) 4; Goenka Impex S.A. vs. Tallu Spinning Mills Ltd. 33 BLD (HCD) 340 and Smith Co-Generation (BD) Private Limited vs. Bangladesh Power Development Board and another, 15 BLC 704 and relied on the *ratio* laid therein that civil suits challenging the arbitral award is not maintainable. If the parties are allowed to challenge any award passed by Arbitral Tribunal in a civil suit then the arbitration proceeding shall become a farce and whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. He then submits that since the plaintiff of the title suit has a forum under section 46 of the Act, 2001 to oppose the award in the execution case, therefore, the application filed by the plaintiff in the execution case filed under Order 21 Rule 29 of the Code is not maintainable. In Title Suit 168 of 2020, the learned Joint District Judge's view is like that as if he was dealing with a civil suit filed under section 9 of the Code or under section 42 of the Specific Relief Act and thereby committed error of law resulting in a error in such order occasioning failure of justice in rejecting the application for rejection of plaint. In the money execution case which has been filed for enforcement of the award passed by the ICSID Tribunal, the District Judge correctly assessed

the fact and law and rejected the application for staying the execution case. In view of the aforesaid position of law and fact, the Rule issued in Civil Revision 2546 of 2023 would be made absolute by rejecting the plaint of the suit and the Rule issued in Civil Revision 2641 of 2024 for staying execution case be discharged.

Mr. Md. Farhad Bin Hossain, learned Advocate for opposite party 1 in Civil Revision 2546 of 2023 and petitioner in Civil Revision 2641 of 2024 on the other hand opposes the Rule issued against the BPDB and supports the Rule issued against NEPC consortium. He takes us through the materials on record, the provisions of law of the Act, 2001 and submits that the plaintiff has no remedy to file a miscellaneous case under the provisions of the Act, 2001 against the award passed by ICSID Tribunal. Since the award has been passed contrary to the public interest of Bangladesh and as such the same is not enforceable by any Court in Bangladesh. It is not binding upon the plaintiff merely having a piece of paper and as such he instituted the suit under section 42 of the Specific Relief Act on the prayer that the award is illegal, void and not binding upon the plaintiff. He refers in the cases of Bangladesh Shilpa Rin Sangstha vs. Rahman Textile Mills Ltd and others, 51 DLR (AD) 221, Sekander and others vs. Janata Bank Ltd. and others, 22 BLT (AD) 53; Ismet Zerin Khan vs. World Bank and others, 58 DLR (AD) 01; Abdul Jalil and others vs. Islami Bank Bangladesh Ltd. 20 BLD (AD) 278 and

Shitalakhaya Ice and Cold Storage Pvt. Ltd vs. Artha Rin Adalat No.1, Dhaka and others, 64 DLR 487 and relied on the principle laid in the aforesaid cases that even in the special law filing of a suit is found bar but it cannot debar a person to file a civil suit under section 42 of the Specific Relief Act. He then submits that before filing an application under Order 7 Rule 11 read with section 151 of the Code, the defendant had to file written statement in the suit. Mr. Hossain further submits that the plea of implied bar would be decided in the trial of the suit on examining witnesses. He then refers to the case of Mannujan Begum vs. A. Saman Molla and others and Nuruzzaman Chowdhury vs. Asrarul Hoque Chowdhury and others, 29 DLR (AD) 282 and submits that where a suit is pending in any Court against the holder of a decree the Court may stay execution of the decree until the pending suit is decided. It contemplates pendency of the suit between decree-holder and judgment-debtor in respect of the decree in question and it has no reference to any suit filed by a 3rd party. Here, since the plaintiff BPDB instituted the title suit in the Court of Joint District Judge against the NEPC consortium challenging the award passed by the ICSID Tribunal, the District Judge ought to have stayed the execution case till disposal of the civil suit pending in the Court of Joint District Judge challenging the same award. Learned Joint District Judge on correct assessment of fact and law rejected the application filed by the defendant for rejection of the plaint and

learned District Judge committed error of law resulting in an error in such order for rejecting BPDB's application filed under Order 21 Rule 29 read with section 151 of the Code for staying all further proceeding of the execution case subject to disposal of the suit pending before the Joint District Judge. Therefore, the Rule issued in Civil Revision 2564 of 2023 would be discharged and the Rule issued in Civil Revision 2641 of 2024 be made absolute.

We have considered the submissions of both the sides, gone through the materials on record, the relevant provisions of the Act, 2001, the provisions of Code of Civil Procedure and principle of the cases cited by the parties.

It is admitted by the parties that the parties, NEPC Consortium Power Limited (NEPC) and Bangladesh Power Development Board (BPDB) entered into the PPA in the year 1998 for 15 years which was subsequently extended for two times and it was in force up to 19.06.2019. A dispute arose between them on payment of invoice amount then NEPC referred the dispute to the ICSID tribunal and as per the terms of agreement claimed the invoice amount with compensation. BPDB appeared in the ICSID Tribunal and opposed the claim. It is also admitted that sole Arbitrator passed award on 12.04.2021 against BPDB of Taka 176,18,37,231/- with interest. The plaintiff instituted Title Suit 168 of 2021 challenging the award passed by the ICSID Tribunal. In the suit the plaintiff prayed as under-

“A. for a declaration that the final award dated 12.04.2021 passed by the defendant No. 3 in ICSID Case No. ARB/18/15 as fully described in the schedule herein is illegal, void and having no binding effect on the plaintiff.”

It is clear in the prayer made in the suit that in the aforesaid suit the plaintiff DPDB has challenged the award passed by the ICSID Tribunal. It is to be decided here whether the plaintiff can file a suit in a civil court challenging an award passed by the ICSID Tribunal by overlooking the provisions of Act, 2001. In the plaint the plaintiff alleges that since this is an international foreign award passed by the ICSD Tribunal, he has no remedy to challenge it under section 42 of the Act, 2001 and such he filed a declaratory suit challenging the award. We find that there is specific provision under section 45 of the Act, 2001 for enforcement of foreign award passed by ICSID tribunal in an arbitration proceeding. Section 46 of the Act, 2001 provides that a Court can refuse to enforce an award passed by such a Tribunal on the reasons embodied therein if the debtor can satisfy the Court. For convenient of discussion section 46 of the Act, 2001 is quoted below-

“Grounds for refusing recognition or execution of foreign arbitral awards- (1) Recognition or execution of foreign arbitral award may be refused only on the following grounds, namely-

- (a) if the party against whom it is invoked furnishes proof of the Court that-
 - (i) a party to the arbitration agreement was under some incapacity,
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it;

(iii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case; or

(iv) the concerned foreign arbitral award contains decisions on matters beyond the scope of the submission to arbitration:-

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

(vi) the award has not yet become binding on the parties, or has been set aside or suspected by a competent authority of the country in which, or under the law of which, that award made; or

(b) the court in which recognition or execution of the foreign arbitral award is sought, finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; or

(ii) the recognition and execution of the foreign arbitral award is in conflict with the public policy of Bangladesh.

(2) If an application for the setting aside or suspension of the enforcement of the foreign arbitral award has been made to a competent authority referred to in sub-clause (e) of clause (a) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the foreign arbitral award and may

also, on the application of the party claiming enforcement of the foreign award, order the other party to give suitable security.
(emphasis supplied)

On going through the provisions of law as quoted hereinabove, we find that judgment debtor against whom the award has been passed may raise objection before the District Judge at the event of execution of the arbitral award. If the debtor can prove that the allegation brought by him therein comes within the purview of sub-section 1(ka)(i)-(vi) of section 46 of the Act, 2001 and the Court (District Judge) being satisfied under sub-sections 1(Kha) (i) and (ii) may refuse to execute the award. The Court of District Judge further may stay the execution of the award or on bond of the debtor under sub-section (2) of section 46 of the Act, 2001. We do not find that the plaintiff had any hurry to institute title suit in the Court of Joint District Judge challenging the award because the award would not be effected *suo motu*. It could have wait until and unless the awardee files an application to the District Judge under section 45 of the Act, 2001 to enforce the ICSID award passed by the Tribunal.

The Act, 2001 is a special law and remedy is available therein for the debtor BPDB. Therefore, the debtor, plaintiff of the suit cannot seek any remedy in the civil Court by filing a civil suit either under section 9 of the Code or section 42 of Specific Relief Act challenging the international arbitral award. The principle laid in cases as referred to by the learned Advocate for BPDB in both the

Rules are found not applicable in the present cases considering the facts upon which *ratio* has been laid therein. Learned Advocate for BPDB further argued that the defendant of the suit filed the application under Order 7 Rule 11 read with section 151 of the Code before filing written statement in the suit and the *ratio* laid in numerous cases our Appellate Davison held that such application is not maintainable. It is by now well settled by our Apex Court in numerous cases that a plaint can be rejected at the very initial stage of a suit even under section 151 of the Code by applying inherent jurisdiction, if it is found that the suit is barred by any law or its further continuation will be abuse of valuable time of the litigant people and the Court. In this case, we find that the instant civil suit is expressly and impliedly barred under the provisions of the Act, 2001. In the case of Md. Nurul Abser vs. Golam Rabbani and others, 68 DLR (AD) 04 our Appellate Division held-

“The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrators, if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaint and the High Court Division did not commit any error of law affirming the same and, as such, no interference is called for with the impugned judgment and decree.”

The learned Advocate for the BPDB submits that the above principle shall not apply in the present because of the fact that in that

case against whom the award was passed could have filed a miscellaneous case under section 42 of the Act, 2001 but in the present case, the debtor cannot invoke the provisions of the aforesaid section because of the fact that this is a foreign arbitral award. But we find that remedy of the debtor BPDB is available under section 46 of the Act, 2001 in the event of filing execution case by the awardee NEPC Consortium. The debtor still can raise objection in the Court of District Judge in Execution Case 09 of 2022 which has been filed for execution of the award. The learned District Judge has jurisdiction to stay execution of the award under sub-section 2 of section 46 of the Act, 2001, if the debtor as per law can satisfy the Court.

We have gone through the provisions of Order 21 Rule 29 of the Code. It appears that under the aforesaid Rule and Order a Court can stay the proceedings of an execution case, if a suit challenging such decree is pending before it. But here the debtor BPDB prayed for stay of the execution case pending before the District Judge till disposal of the title suit pending before the Joint District Judge, Court 5, Dhaka which cannot be sustained in law. In the case of Smith Co-Generation (BD) Private Limited vs. Bangladesh Power Development Board and another, 15 BLC 704 it has been held that where remedy available under the special law, the remedy under the general law is not entertainable. It has been further held there that opposite party herein BPDB who is also plaintiff in the suit in hand without making

any application under section 46 of the Arbitration Act made an application under Order 21 Rule 29 of the Code and obtained stay of the execution case which was in gross violation the provisions of law. Such order of stay was set aside by the High Court Division in the aforesaid reported case. The aforesaid judgment on same principle was passed against the petitioner of Civil Revision 2641 of 2024, the BPDB and opposite party of Civil Revision 2546 of 2023. The learned Advocate for BPBP failed to apprise us whether they moved to the Appellate Division against the aforesaid judgment and order passed by the High Court Division in the reported case.

In view of the discussion made hereinabove, we find substance in the submission of Mr. Morshed. The Rule issued in Civil Revision 2546 of 2023 bears merit and Rule issued in Civil Revision 2641 of 2024 bears no merit.

Therefore, Rule issued in Civil Revision 2546 of 2023 is made absolute. The impugned judgment and order passed by the Joint District Judge Court 5, Dhaka Title Suit 168 of 2021 is hereby set aside and consequently plaint of the aforesaid suit is rejected. The Rule issued in Civil Revision 2641 of 2024 is discharged. No order as to costs. The order of stay granted in both the Rules are hereby vacated.

However, learned District Judge, Dhaka is directed to proceed with the Money Execution Case 09 of 2022 in accordance with law.

The debtor BPDB will be at liberty to file any objection against the award in execution as per the provisions of section 46 of the Act, 2001.

Communicate this judgment and order to the Courts concerned.

Murad-A-Mowla Sohel, J.

I agree.

Sumon-B.O.