

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 6540 of 2023

Sinha Power Generation Company Ltd.

.....Petitioner.

-Versus-

Bangladesh Power Development Board
(BPDB) and others

.....Opposite parties.

Mr. Khairul Alam Chowdhury, Adv. with

Mr. Syed Mehedi Hasan, Advocate and

Mr. Md. Jubair, Advocate

.....For the petitioner.

None appears.

..... For the opposite parties.

Heard and judgment on 22nd February, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the impugned order No.3 dated 25.10.2023

passed by the District Judge, Dhaka in Arbitration Miscellaneous Case No. 511 of 2023 rejecting the case as being not sustainable in law should not be set aside.

Fact relevant for disposal of this rule are that petitioner is a private company and the opposite party No.1 is a statutory body, represented by the Chairman constituted under the Bangladesh Power Development Board's Order, 1972 (P.O. No. 59 of 1972). The opposite party No.2 is the Secretary of the opposite party No. 1. The opposite party No.3 is the member company affairs of the opposite party No.1. The opposite party No.4 is the Director of IPP Cell-2 of the opposite party No.1 company. The petitioner submitted a proposal with the opposite party No.1 for setting of a 50(50)MW liquid fuel fired power station on rental basis for a period of 5(five) years. The opposite party No.1 having considered the proposal of the petitioner issued Notification of Award being No. 840-BPDB(Sectt./Dev-175/2009 dated 19.06.2010 in favour of the petitioner. Thereafter the petitioner entered into a contract being Contract No. 09764 with the opposite party No.1 on 15.07.2010 for installation of 50 MW power plant, operation and maintenance services as well as for supply of electricity on rental

basis for a period of 5 (five) years at Amnura, Chapai Nababganj. Thereafter the said contract dated 15.07.2010 was amended under Contract No. 09961 dated 12.08.2014. The Contract dated 15.07.2010 was thereafter extended upto 12.01.2022 under Contract No. 10199 dated 13.08.2017. Lastly, the contract was further extended under Contract No. 10670 dated 04.12.2022 for a further period of 2 (two) years. Article 26 of the said Contract dated 15.07.2010 deals with the provision of delivery and supply of liquid fuel. Article 26 provides that Bangladesh Petroleum Corporation (BPC) will be the liquid fuel provider and the opposite party No. 1 shall make the payment of the fuel. Under the said Contract dated 15.07.2010 the opposite party No. I will act as the Facilitator to ensure that the Rental Power Company receives sufficient liquid fuel from the fuel provider i.e. Bangladesh Petroleum Corporation. It is also stipulated under Article 26 that the measurement of liquid fuel will be performed by both the Petitioner Company and BPC jointly. Moreover, under Schedule 1 of the said Contract provides technical specification including heating value of Heavy Fuel Oil (HFO) at 18,424 BTU/IB. The quality of liquid fuel supplied by BPC to the petitioner company

was absolutely of lower quality as well as not in accordance with the terms and specification of the said Contract dated 15.07.2010. Apart from the petitioner company there were many power rental companies which entered into similar contracts with the BPDB raised similar objection as to the quality of liquid fuel supplied by BPC. Thereafter, the Ministry of Power, Energy and Mineral Resources vide its Memo No. Ra/FG- ১/বেসরকারীকরণ-১২৬/২০১০/612 dated 20.06.2012 constituted a Committee of 5 (five) members to ascertain the quality and quantity of supplied the liquid fuel by BPC. The Ministry of Power, Energy and Mineral Resources thereafter vide its Memo No. বিএনস/ বিঃ উঃ- ১/বেসরকারীকরণ-১৯৩/২০১২/৬৫৬ dated 11.07.2012 directed the opposite party No. 1 not to deduct any price of excess fuel consumption from the monthly invoices of the rental power companies subject to submission of written undertaking by the rental power companies to the effect that they would make excess fuel payment to BPDB after determination of the quality of the Heavy Fuel Oil (HFO) by the said Committee. Accordingly, the petitioner company furnished written Undertaking dated

12.07.2012 to that effect with the opposite party No. 1. However, the opposite party No. 1 vide letter dated 19.12.2012 informed the petitioner company that the price of excess fuel consumption would be deducted from the monthly invoices of the petitioner company as per Article 13.1(b)(iii) of the said Contract dated 15.07.2010. In reply to the said letter dated 19.12.2012 the petitioner company vide its letter dated 20.12.2012 informed the opposite party No. 1 that the HFO supplied by BPC were not in accordance with the terms of its specification narrated under Schedule 1 of the Contract dated 15.07.2010 and the quality of liquid fuel is not satisfactory at all. The petitioner company vide the said letter dated 20.12.2012 also informed that the Committee formed by Ministry of Power, Energy and Mineral Resources has not submitted its report as to the quality of HFO and requested BPDB not to deduct the price of excess fuel consumption from the monthly running bills. However, BPDB did not pay any heed to the request of the petitioner company and got stick to deduct the price of excess fuel consumption and issued a letter dated 19.02.2013 to that effect. As a result, disputes crept into between the parties in relation to deduction of price of excess consumption

of fuel from the monthly running bills of the petitioner company. Thereafter, the petitioner company filed an application under section 7Ka of the Arbitration Act, 2001 before the District Judge Court against the opposite parties being No. Arbitration Miscellaneous Case No. 197 of 2013 praying for interim order. Vide order dated 02.04.2013 the Court was pleased to issue show cause notice for a period of 7 (seven) days upon the opposite party Nos. 1 and 2 as to why the opposite party Nos. 1 and 2 shall not be restrained from deducting any price of excess fuel of consumption from the monthly invoices of the petitioner arising out of the Contract dated 15.07.2010. Thereafter, being aggrieved and dissatisfied with the order dated 02.04.2013 passed by the Hon'ble District Judge, the petitioner filed Civil Revision No. 942 of 2013 before the Hon'ble High Court Division of the Supreme Court of Bangladesh. Upon hearing the said Revisional application the Hon'ble High Court Division vide order dated 07.04.2013 was pleased to issue a Rule upon the opposite party Nos. 1 and 2 and further pleased to pass an order of injunction for a period of 4 (four) months and subsequently which was extended till disposal of the said rule. The opposite party No.1 i.e. BPDB preferred Civil

Miscellaneous Petition No. 1482 of 2013 before the Hon'ble Appellate Division, Supreme Court, challenging the order dated 07.04.2013 passed by the Hon'ble High Court Division in Civil Revision No. 942 of 2013 and upon hearing, the Hon'ble Appellate Division was pleased to dispose of the Civil Miscellaneous petition with a direction to dispose of the rule. Thereafter the Hon'ble High Court Division made the rule absolute vide its Judgment and order dated 15.6.2016. In the meantime, with the intervention of the District Judge an Arbitral Tribunal was constituted and the petitioner filed an application under section 21 of the Arbitration Act, 2001 before the said Arbitral Tribunal for an order restraining the opposite party Nos. 1 and 2 from deducting price of excess fuel consumptions from the monthly running bills of the petitioner company in connection with the Contract No. 09764 dated 15.7.2010. After hearing the said application filed by the petitioner, the Arbitral Tribunal was pleased to pass an Order No. 23 dated 12.09.2017 directing the respondent Bangladesh Power Development Board (BPDB) to maintain status- quo till the proceedings. The respondent No. 1 as per the aforesaid restraining order, made the payment of all

running bills without deducting any excess price of fuel from the monthly invoices of the petitioner's bill till June, 2019. Thereafter, BPDB in violation of the order of status-quo vide 17 SEP board resolution dated 05.08.2019 decided not to pay Reference Rental Price (RRP) on account of excess fuel price with effect from July 2019. Thereafter, BPDB vide Memo No. 27.11.0000.101.88.19.378 dated 12.09.2019 directed the opposite party No. 4 to deduct excess fuel price from the monthly running bills of the petitioner. This is outright disregards of the various Courts orders and also a flagrant insult to the judicial system of the Republic. BPDB till date retained USD 8,776,409.33 which is payable as Reference Rental Price (RRP) under the said Contract dated 15.07.2010. Thereafter, the petitioner on various occasions on 25.08.2020, 20.04.2022 and 20.10.2022 requested the opposite party No. I to make payment of unpaid outstanding of RRP in light of the order dated 12.09.2017 passed by the Arbitral Tribunal in the arbitration proceeding between the petitioner and the opposite parties. Thereafter, the petitioner finding no other alternative, through its lawyer issued a legal notice dated 20.08.2023 upon the opposite parties for rectifying the violation of

the order of status-quo dated 12.09.2017 by way of making payment of USD 8,776,409.33 in favour of the petitioner. But the opposite parties did not make any single payment to the petitioner as on today. The opposite parties having knowledge of the order of status quo passed by the Arbitral Tribunal under order No. 23 dated 12.09.2017 deducted excess fuel price from the monthly running bill of the petitioner and violated the order of status quo dated 12.09.2017 passed by the Arbitral Tribunal in the arbitration proceeding between Sinha Power Generation Company Ltd. and Bangladesh Power Development Board (BPDB).

The petitioner company then filed Arbitration Miscellaneous Case No. 511 of 2023 before the Court of District Judge, Dhaka under section 21(4) of the Arbitration Act, 2001 for enforcement of Order No. 23 dated 12.09.2017 passed by the Arbitration Tribunal in the arbitration proceeding between the petitioner and opposite party No.1 initiated under Contract No. 09764 dated 15.07.2010.

The petitioner then prays for an ad-interim order of direction upon the opposite parties to pay the said amount of BDT 96,97,93,230.97 (Taka ninety six crore ninety seven lac ninety

three thousand two hundred thirty and paisa ninety seven) only equivalent to USD 8,776,409.33 (at the rate of USD 1 = BDT 110.50) pending hearing of the above application, subject to condition that the petitioner shall furnish bank guarantee of the said equivalent amount with the Court so that if the petitioner succeeds then the bank guarantee shall be released and on the other hand if the opposite parties succeed then BPDB shall be entitled to encash the bank guarantee. The balance of convenience and inconvenience is in favour of the petitioner for release of the said amount on furnishing bank guarantee, because neither party will be prejudiced in such circumstances; and moreover, if BPDB is directed to release the said amount later, then they have to pay accrued interest on the said amount and again the petitioner shall suffer irreparable loss and injury if the said amount is not released, because due to liquidity problem the petitioner company shall be on the verge of collapse and national interest shall also be prejudiced as the power plant run by the petitioner may be shut down permanently. Under the facts and circumstances stated above, it is ex-facie that the opposite parties violated the order of status-quo dated 12.09.2017 passed by the Arbitration Tribunal by

way of deducting excess fuel price from the running bills of the petitioner under the said contract dated 15.07.2010.

By the impugned order dated 25.10.2023 the District Judge rejected the said Arbitration Miscellaneous Case on the ground that the said application is not sustainable in law.

Challenging the said order petitioner obtained the instant Rule.

Mr. Khairul Alam Chowdhury, the learned advocate appearing for the petitioner drawing my attention to the fact narrated in the petition along with the impugned order submits that the petitioner prays for direction upon BPDB to release the money retained by the BPDB by way of deducting from the running bills. Petitioner also intends to furnish security by way of submitting bank guarantee against the amount, which is solved by the petitioner to be needs, which the BPDB intends to keep the money in separate account. If the said money is released by bank guarantee furnished by petitioner then the BPDB shall not suffer any loss and the BPDB shall be entitled to encash the bank guarantee and the petitioner want to succeed in the arbitration.

However if the money is not released with BPDB deducted in violation the order of entering together passed by the Tribunal, the petitioner shall suffer irreparable loss. Because the power plant of the petitioner company shall ultimately shutdown due to liquidity crisis for furnishing fuel the petitioner company finally collapse. The learned advocate further submits that when the District Judge in his impugned judgment has found that the order passed by the tribunal to maintain status-quo is the outcome of a proceedings, which went to the Appellate Division and finally been asked to disposed of by the High Court Division and the Tribunal accordingly passed an order in favour of the petitioner and the order passed by the Tribunal cannot be said to be a vague, even then the District Judge without applying judicial mind most illegally disposed of the arbitration proceedings having a wrong impression. Accordingly the impugned judgment is not sustainable in law. He finally prays that for the ends of justice as well as for the balance of convenience and inconvenience, which is in favour of the petitioner, petitioner is entitled to get an order in favour of the petitioner as prayed for.

Although the notice of this rule was issued upon the opposite party by way of special messenger but no one appears to oppose the rule.

Heard the learned advocate and perused the document annexed to the application along with supplementary affidavit with the impugned judgment.

It appears that on a contract between the opposite party No.1 and the petitioner dated 15.07.2010 a 50MW power plant for supplying electricity on rental basis was established at Amnura, Chapai Nababganj and the said contract was ultimately been extended time to time. Subsequently the question raised on quality of the liquid fuel supplied by the BPC to the petitioner company, and a dispute has been arisen on the price of excess fuel consumption from the monthly invoices of the rental power companies. The Ministry of Power, Energy and Mineral Resources has constituted a committee to submit a report accordingly on the dispute. As and when the BPDB without paying heed to the direction of the Ministry for deducting the price of fuel consumed excess to the allocated fuel, the matter came to the court and went up the Appellate Division, as would apparent

from the impugned judgment and a direction was given to the opposite party not to deduct the price and was directed to maintain status-quo. Even the order of status-quo as been passed by the court on the payment of all running bills without deducting excess price of fuel from the monthly invoice of the petitioner bill till June, 2019, when the opposite party No.1 issued a letter dated 17.09.2019 upon the Bangladesh Krishi Bank, and directed the opposite party No.4 to deduct excess fuel price from the monthly running bills of the petitioner vide its Memo No. 27.11.0000.101.88.19.378 dated 12.09.2019, and subsequently deducted total amount of USD 8,77,64,09.33 from July, 2019 to April, 2021 from the monthly running bills of petitioner company, the petitioner filed this Arbitration Miscellaneous Case No. 511 of 2023 before the Court of District Judge under section 21(4) of the Arbitration Act, 2001 for enforcement of order No. 23 dated 12.09.2017 passed by the Arbitration Tribunal in the arbitration proceeding between the petitioner and the opposite party No.1 initiated under contract No. 09764 dated 15.07.2010.

In the said proceeding initiated on 17.09.2023, the petitioner also filed an application for direction upon the opposite

parties to make payment of Tk. 96,97,93,230.97 (Taka ninety six crore ninety seven lac ninety three thousand two hundred thirty and paisa ninety seven), which equivalent to USD 8,776,409.33 on account of RRP against the running bills from July 2019 to April 2021 subject to furnishing bank guarantee with annexing all relevant documents of the Arbitration Miscellaneous Case No. 511 of 2023, but the District Judge rejected the said miscellaneous case vide impugned order dated 25.10.2023. In the said impugned order, it appears that the District Judge although noted therein that the matter was finally been adjudicated through arbitration proceedings upon a direction by the Apex Court but rejected it with a vague and improper order.

Going through the order passed by the Arbitral Tribunal in Arbitration Case No. 1 of 2014 dated 12.09.2017 (Annexure-N) it appears that the Tribunal passed the order considering the directions of the High Court Division as well as the Appellate Division and is thus cannot be said a vague and unspecified and uncertain order. The term as issued vague and uncertain order to an order passed by the Arbitral Tribunal, which is the outcome of the direction of the Apex Court cannot be a vague and unspecified

and uncertain. The said term issued in the impugned order appears to be a clear improvidence as well as showing disrespect to the Apex Court and it is obviously an amount to a contempt of court, which was in fact passed by the District Judge without applying judicial mind and thus needs to be interfere with.

However going through the scenario of this case as well as the prayer of the petitioner on their application filed under section 21(4) of the Arbitration Act, 2001 for enforcement of Order No.23 dated 12.09.2017 passed by the Arbitral Tribunal, I find substances.

I find merits in this rule.

In the result, the rule is made absolute and the judgment and order passed by the District Judge dated 25.10.2023 in Arbitration Miscellaneous Case No. 511 of 2023 is hereby set aside.

The opposite party is hereby directed to make payment of BDT Tk.96,97,93,230.97 (ninety six crore ninety seven lac ninety three thousand and two hundred thirty and ninety seven paisa) only equivalent to USD 8,776,409.33 on account of RRP (Reference Retail Price) against the running bills from July 2019

to April 2021 subject to furnishing bank guarantee of the said amount of BDT Tk. 96,97,93,230.97 (ninety six crore ninety seven lac ninety three thousand two hundred thirty and ninety seven paisa) only by the petitioner forthwithly, subject to disposal of the arbitration case.

Communicate the judgment at once.