

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

WRIT PETITION NO. 563 OF 2023.

In the matter of:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:

Northern Power Solution Limited.

..... Petitioner.

-Versus-

Bangladesh Energy Regulatory Commission and others.

..... Respondents.

Mr. Md. Nasir Shikder, Advocate with
Mr. Md. Homayoun Kabir Ahsan, Advocate
..... For the Petitioner.

Mr. A.M. Masum, Senior Advocate with
Mr. Taisir Haque, Advocate
Mr. Sayed Mahsib Hossain, Advocate and
Mr. Nahiyan Ibne Subhan, Advocate
..... For the Respondent No.3.

Present:

Mr. Justice Mohammad Ullah

And

Mr. Justice Md. Toufiq Inam

Heard on 21.05.2025, 22.05.2025 and

Judgment Delivered On 28.05.2025.

Md. Toufiq Inam, J:

Following the initial hearing of the application under Article 102 of the Constitution, this Rule Nisi was issued on 29.01.2023 at the

instance of the petitioner, calling upon the respondents to show cause as to:

“Why the impugned Award dated 26.04.2022 passed by the respondent No. 1 in Dispute Settlement Case No. 04 of 2015 (Annexure-E) and as to why the order being No. 28.01.0000.016.31.004.16.4359 dated 14.12.2022 passed by the respondent No. 2 rejecting the review application (Annexure-F1) should not be declared without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

At the time of issuance of the Rule Nisi, the operation of the impugned Award dated 26.04.2022, passed by respondent No. 1 in Dispute Settlement Case No. 04 of 2015 (Annexure-E), was stayed for a period of six (6) months from the date thereof. However, the effect of this interim stay order has itself been stayed by the Appellate Division, pursuant to its order dated 15.05.2024 passed in Civil Petition for Leave to Appeal No. 957 of 2023, until disposal of the present Rule Nisi. The Hon’ble Chief Justice has sent the matter to this court for disposal.

The relevant facts for disposal of the present Rule Nisi are as under:

- a) In response to a nationwide power crisis, the Government of Bangladesh adopted a fast-track policy to procure electricity from local and foreign producers. Under this policy, the

Petitioner proposed to establish a 50 MW HFO-based rental power plant for a five-year term. Accordingly, Bangladesh Power Development Board-BPDB (the Respondent No.3) issued a Notification of Award on 30.06.2010 in favour of the Petitioner. The Petitioner was subsequently given a standard form contract unilaterally drafted by BPDB, without negotiation. Nonetheless, the Petitioner executed Contract No. 09768 on 27.07.2010 for the supply of electricity from its Katakali, Rajshahi plant under the stipulated terms.

- b) Disputes later arose, primarily concerning Respondent No. 3's claim of USD 4,085,697.59 for alleged excess fuel consumption. The Petitioner filed Arbitration Misc. Case No. 127 of 2015 before the learned District Judge, Dhaka, under Section 7Ka of the Arbitration Act, 2001, seeking an injunction against invoice deductions. The Court, by order dated 09.03.2015, directed the parties to maintain *status quo*.
- c) However, since the Bangladesh Energy Regulatory Commission (BERC) was the appropriate forum, the matter was accordingly referred to it. The Petitioner subsequently initiated arbitration proceedings before BERC by submitting a detailed statement of claim, following which an Arbitral Tribunal was constituted. Respondent No. 3 (BPDB) filed a

statement of defence along with counterclaims. On 22.06.2019, the Tribunal issued its Award, which included several directives, including a direction requiring BPDB to interpret the heating value of HFO 18,424 BTU/lb (as specified in Schedule 1 of the Contract) as the *lower heating value*.

- d) However, the BERC upon rehearing the Dispute Settlement Application No. 04 of 2015, by its Award dated 26.04.2022, rejected the Petitioner's claims by adopting an entirely different view from that previously taken by the earlier Arbitration Tribunal constituted under BERC's authority and directed the Petitioner for payment of USD 4,085,697.59 to BPDB. Then the Petitioner moved a Review Petition, which was also dismissed on 14.12.2022 as being time-barred. Challenging both the BERC Award dated 26.04.2022 (**Annexure-E**) and the subsequent dismissal of Review Petition (**Annexure-F1**), the Petitioner obtained the present Rule Nisi.

Mr. Nasir Shikder, the learned counsel for the Petitioner, submits that upon rehearing, the BERC, by its Award dated 26.04.2022, arbitrarily rejected the Petitioner's claims by adopting an entirely

different view from that previously taken by the earlier Arbitration Tribunal constituted under BERC's authority. He further contends that BERC directed the Petitioner to pay USD 4,085,697.59 to Respondent No. 3 (BPDB) on account of alleged excess fuel consumption. This action, in his submission, is without lawful authority, devoid of legal effect.

Mr. Shikder argues that in conducting the rehearing, BERC wholly deviated from the findings of its own duly constituted Arbitral Tribunal, failed to apply settled principles of law, and acted without due judicial consideration. Such conduct, he asserts, constitutes a grave jurisdictional error. In taking these steps, BERC is said to have exceeded the authority vested in it under the Bangladesh Energy Regulatory Commission Act, 2003 ("the Act, 2003") and the Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2014 ("the Regulations, 2014"). According to him, neither the Act nor the Regulations empower BERC to rehear a dispute *de novo* without first setting aside the earlier Award dated 22.06.2019. Any action taken beyond the scope of its statutory mandate is, therefore, ultra vires, invalid, and without legal effect.

He further submits that BERC failed to properly consider the applicable legal framework, including Section 40 of the Act, 2003, Regulations 10, 11, 12, and 20 of the Regulations, 2014, as well as

the subsequently enacted Regulations of 2021. In particular, he argues that BERC acted unlawfully in purporting to issue a fresh award without first nullifying or setting aside the original Award dated 22.06.2019. In his view, an award passed by a duly constituted and competent Arbitral Tribunal cannot be reopened or re-adjudicated by BERC acting in its administrative capacity. The impugned Award dated 26.04.2022 is therefore, he contends, vitiated by malafide intent and a clear absence of jurisdiction.

Per contra, Mr. A.M. Masum, the learned senior counsel appearing on behalf of Respondent No. 3 (BPDB), at the outset, submits that the instant Writ Petition involves disputed questions of fact, which are not amenable to adjudication under writ jurisdiction. He contends that the relief sought by the Petitioner is essentially predicated on a re-evaluation of facts, evidence, and technical matters, an exercise that falls outside the scope of judicial review under Article 102 of the Constitution. Interference with the impugned Award and the subsequent decision on review would undermine the legislative scheme, which specifically provides a specialized dispute resolution mechanism within the commercial and technical context through BERC.

Mr. Masum argues that under Section 40(1) of the Act, 2003, disputes between licensees, or between licensees and consumers,

are to be referred to the BERC for settlement, notwithstanding anything to the contrary in the Arbitration Act, 2001 or any other law. Section 40(2) empowers the BERC either to conduct the arbitration itself or to appoint an external arbitrator. In the present case, BERC acted in its own capacity and rightly passed the impugned Award dated 26.04.2022 under Section 40(2).

He further submits that Section 40(4) of the Act empowers BERC, upon receiving an award, to (i) approve and implement the award; (ii) cancel or modify; or (iii) send back it to the arbitrator for review. Therefore, BERC acted well within its statutory mandate when it declined to accept the prior Award dated 22.06.2019 and issued a fresh Award dated 26.04.2022 upon re-hearing the matter.

Mr. Masum relies on the case of *Government of Bangladesh v. Md. Jalil and Others*, reported in 15 BLD (AD) 175, to submit that the High Court Division is not an appellate forum over an award passed by BERC. He contends that interference with findings of fact by BERC is impermissible in writ jurisdiction unless it is established that BERC acted without jurisdiction, proceeded without evidence or ignored material evidence, acted malafide, or violated the principles of natural justice. In the absence of such conditions, intervention by the High Court Division would itself be without jurisdiction.

He also contends that the BERC's Award dated 26.04.2022 and its subsequent rejection of the Petitioner's review petition were passed validly. BERC found that the proceedings initiated by the previous Commission had not been approved under Section 40(4), thereby rendering the earlier tribunal's Award *non-est*. As such, BERC's final Award is legally binding and conclusive.

Lastly, Mr. Masum submits that the dispute resolution framework under the Act, 2003 and the Regulations constitutes a form of Alternative Dispute Resolution (ADR) specifically designed to ensure expeditious and expert adjudication. Allowing such awards to be challenged in writ jurisdiction would frustrate the very purpose of the statutory ADR mechanism and render it ineffective.

We have heard the learned counsels for both parties and have carefully examined the writ petition, the annexures thereto, the Affidavit-in-Opposition, and all other relevant materials on record. To facilitate a clear understanding of the submissions advanced by the contesting parties, the pertinent provisions of the law and Regulations are hereby reproduced for convenience:

Bangladesh Energy Regulatory Commission Act, 2003:

“40. Arbitration - Settlement by the Commission-

(1) Notwithstanding anything contained in the Arbitration Act, 2001 (Act No. 1 of 2001) or any other Act. any dispute

arising between the licencees, or licencees and consumer shall be referred to the Commission for its settlement:

Provided that a contract, executed between the Government or any of its agency and a private company, in respect of energy, immediate before this Act comes into force, the conditions of the said contract shall be applicable for the settlement of the disputes.

- (2) Commission as an arbitrator may, suo moto, take steps and award adjudication of a dispute or appoint arbitrator for settlement of dispute.*
- (3) Methods and procedures for the said settlement shall be specified by regulation's.*
- (4) Arbitrator appointed by the Commission shall submit its award to the Commission and Commission may pass an appropriate order, as follows, on the basis of it-*
 - (a) approval and implementation of the award;*
 - (b) cancellation or amendment of the award or*
 - (c) sending of the award for review of the arbitrator.*
- (5) Award or order given by the Commission shall be deemed to be the final.*
- (6) Award or order given by the Commission shall be implemented in such a way as if it is a decree of a Civil Court.*
- (7) At any time during the continuation of the proceedings under this part or any time before its commencement. Commission may make any such interim order which may be considered as appropriate by it.”*

Bangladesh Energy Regulatory Commission Dispute Settlement Regulations, 2014:

“20. Confirmation and implementation of the award.

- (1) The BERC Tribunal or Arbitral Tribunal, as the case may be, shall submit its award to the Commission and the Commission may pass appropriate order on its basis as to
 - (a) the approval and implementation of the award;*
 - (b) the cancellation or amendment of the award; or*
 - (c) sending the award to the Tribunal for review.**
- (2) An order given by the Commission under sub-regulation (1) shall be deemed to be final and be implemented as if it is a decree of a civil court.*
- (3) The Commission may require either party to notify the Commission of the compliance with the award.”*

The Petitioner challenges the Award dated 26.04.2022 passed by the BERC made under Section 40 of the BERC Act, 2003, which rejected the Petitioner’s claim and directed payment of USD 4,085,697.59 on account of excess fuel consumption. It is settled law that judicial review under Article 102 is limited in scope and does not extend to reappraisal of facts or technical findings of a specialized tribunal unless there is a jurisdictional error, violation of natural justice, or manifest illegality. The issues raised in this writ petition involve commercial and technical determinations based on

complex contractual and operational matters, which lie outside the remit of judicial review.

Section 40(1) of the BERC Act provides that notwithstanding anything contained in the Arbitration Act, 2001 or any other law, all disputes between licensees, or between a licensee and a consumer, must be referred to BERC for settlement. Section 40(2) further authorizes BERC to act as an arbitrator or appoint an arbitrator. Thus, the Commission has exclusive jurisdiction in such disputes and may either conduct the arbitration itself or act on the award submitted by an arbitral tribunal. Section 40(4) empowers the Commission to approve, amend, cancel, or remit the award for review, thereby giving BERC supervisory authority over all arbitral outcomes under its domain.

In the present case, the Petitioner relies on an earlier arbitral award dated 22.06.2019, rendered by a Tribunal under the auspices of BERC. However, in the impugned Award dated 26.04.2022, the BERC made findings in relation to the earlier Award that- “ইত্যবসরে বিরোধটি নিষ্পত্তির জন্য বিইআরসি ট্রাইব্যুনাল বেঞ্চে ১৯/০৪/২০১৭ তারিখে প্রেরণ করা হয়, যা ছিল অনাইনানুগ এবং রুটিন দায়িত্ব পালনরত কমিশনের এখতিয়ার বর্হিভূত। অনাইনুগভাবে গঠিত বিইআরসি ট্রাইব্যুনাল বেঞ্চ কর্তৃক প্রস্তুতকৃত রোয়েদাদ ২৪ জুলাই ২০১৯খ্রিঃ তারিখে (দাখিকৃত ফরওয়াডিং পত্রের তারিখঃ ২২/০৬/২০১৯খ্রিঃ) কমিশনের মাননীয় চেয়ারম্যানের নিকট হস্তান্তর হয়েছে মর্মে দেখা যায়, তবে তাতে চেয়ারম্যান বা

কমিশনের কোন কর্মকর্তার স্বাক্ষর নেই। দাখিলকৃত রোয়েদাদ প্রাক্তন কমিশন প্রাপ্ত হয়ে বিইআরসি আইন, ২০০৩ এর (ধারা ৪০(৪) মতে গ্রহন না করে মূল বিরোধীয় বিষয়ে শুনানীর জন্য ১৪/১১/২০১৯খ্রিঃ তারিখ ধার্য করে আদেশ প্রদান করেন যা ১৭/১০/২০১৯ খ্রিঃ তারিখের স্মারক নং- ৬৬৫৭ এর মাধ্যমে সংশ্লিষ্টদের অবহিত করা হয়।”

(Underlined by us.)

This clearly demonstrates that the BERC did not simply “approve” the earlier Award under Section 40(4) of the BERC Act. The earlier Award was never approved or adopted under Section 40(4) of the BERC Act, 2003, and thus did not attain finality or binding legal effect. BERC further held that the proceedings initiated by the previous Commission were not concluded in accordance with the statutory requirements, thereby rendering the earlier Award without legal force and non-est in the eye of law. Therefore, the BERC exercised its statutory authority to rehear the matter and issued a fresh Award dated 26.04.2022. Such action falls squarely within the Commission’s powers under Section 40(4) of the Act and Regulation 20(1) of the BERC Dispute Settlement Regulations, 2014. Accordingly, the allegation that BERC acted without jurisdiction is entirely without merit.

Section 40(5) of the Act declares that an award or order of the Commission shall be deemed final. Section 40(6) further provides that such award or order shall be implemented as if it were a decree

of a civil court. Likewise, Regulation 20(2) affirms that the BERC's order on an award is final and binding. The law thus explicitly excludes further adjudication except in circumstances involving jurisdictional overreach, malafides, or breach of natural justice. The High Court Division is not an appellate forum over such final determinations of fact and law by a statutory authority acting within its mandate.

The framework under the BERC Act and its regulations is designed to function as a specialized form of ADR, providing for expert determination of disputes in the energy sector. The Petitioner's attempt to reopen the matter under writ jurisdiction undermines this statutory scheme and defeats the legislative intent to provide a final, technical resolution mechanism. Allowing such intervention would render Section 40(1) otiose and frustrate the purpose of establishing a sector-specific regulatory management.

Where a statutory tribunal such as the BERC is vested with exclusive jurisdiction to adjudicate disputes under a specialized legislative scheme, including the authority to cancel, amend, or reissue an award under Section 40(4) of the BERC Act, 2003 and Regulation 20(1) of the BERC Dispute Settlement Regulations, 2014, any decision or award rendered thereby constitutes a specialized or expert award. Such awards, having been passed by a

body possessing sector-specific expertise and procedural safeguards, are not subject to appellate-like reappraisal under the writ jurisdiction of the High Court Division. Judicial interference under Article 102 of the Constitution is limited only to cases where it is established that the Commission acted without jurisdiction, in violation of the principles of natural justice, in the absence of evidence, by ignoring material evidence, or with malafide intent. In the absence of such specific and well-founded grounds, intervention by the Court would be unwarranted.

Moreover, mere disagreement with the outcome of the review does not constitute a valid ground for judicial intervention. In the absence of any manifest illegality or malafide intent, the dismissal of the Review Petition warrants no interference by this Court under Article 102 of the Constitution.

In light of the statutory framework under Section 40 of the BERC Act, 2003, and Regulation 20 of the BERC Dispute Settlement Regulations, 2014, and having regard to the nature of the dispute as well as the findings recorded by BERC in its Award dated 26.04.2022, we find no infirmity in the decision-making process that would warrant interference under Article 102 of the Constitution. No case has been made out to establish that BERC acted without jurisdiction, in violation of the principles of natural

justice, or in excess of its lawful authority. The Rule, therefore, fails.

Accordingly, **the Rule is discharged**, without any order as to costs.

Let a copy of this judgment be communicated forthwith.

(Justice Md. Toufiq Inam)

Mohammad Ullah, J:

I agree.

(Justice Mohammad Ullah)

Sayed/B.O.
Ashraf/A.B.O.