IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 9204 of 2013
With
Writ Petition No. 9205 of 2013

IN THE MATTER OF:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

AND
IN THE MATTER OF:
Marrine Vegetable Oil Ltd
……..Petitioner
(In Writ Petition No. 9204 of 2013)

Jasmir Vegetable Oil Limited
..... Petitioner
(In writ Petition No. 9205 of 2013)

-Versus-
Bangladesh Oil, Gas & Mineral Corporation (Petrobangla) represented by its Chairman, Kawran Bazar, Dhaka and others
…….Respondents

Mr. Probir Neoge, Senior Advocate with
Mr. Mizanul Hoque Chowdhury, Advocate
Mr. Hasan Mohammad Reyad, Advocate
Mr. Redwan Ahmed, Advocate
..... For the petitioners

Mr. Shamim Khaled Ahmed, Advocate with
Mr. Abul Nashar Azad, Advocate
..... For the respondent No. 3

Heard on: 03.12.2014, 04.12.2014, 08.12.2014, 11.12.2014, 14.12.2014, 15.12.2014 and judgment on: 08.02.2015.

Present:
Mr. Justice Moyeenul Islam Chowdhury
And
Mr. Justice Md. Ashraful Kamal

Md. Ashraful Kamal, J:

These Rules Nisi were issued calling upon the respondent No. 3 to show cause as to why the Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ providing provision to realize/charge 50%-60% of the sanction load as minimum bill from the Industrial/Power Plant consumers instead of charging bill on the actual consumption basis shall not be declared to have been made without lawful authority and is of no legal effect.

Brief facts, necessary for the disposal of these Rules, are as follows;

The petitioners are private limited companies and established industries for refining of Vegetable Oil and have been registered with all required Government Authorities including Board of investment and VAT authority and started production in the year 2005.

The petitioner Marine Vegetable Oil Ltd. (In Writ Petition No. 9204 of 2013) and the petitioner Jasmir Oil Ltd. (In Writ Petition No. 9205 of 2013) have entered into an agreement with the respondent No. 2, i.e. previously Bhakrabad Gas System Ltd, a subsidiary of the respondent No. 1 and subsequently a new company namely Karnofully Gas Distribution Company Ltd. was formed and took up the business of Gas distribution in Chittagong area. Thereafter all functions of the Bhakrabad Gas System Ltd have been transferred to Karnafully Gas Distribution company Ltd. (the respondent No. 2).

As per the agreement, the sanction load of supply of Gas to the petitioner Marine Vegetable Oil Ltd. (W.P. No. 9204 of 2013) is 400 standard Cubic Miter/ Hour and 2,80,173 standard Cubic Miter/ Month and monthly minimum load has been calculated at 1,68,104 Cubic Miter being

60% of the monthly loaded capacity for the purpose of the industry. The said minimum load has been calculated on the basis of the clause 5.7 of the গ্যাস বিপনন নিয়মাবলী ২০০৪. The petitioner also took another gas line for its captive Power Plant having sanction load of 3,22,483 Cubic meter per month and minimum load has been calculated at 1,93,489.92 Cubic Meter per month.

As per agreement, the sanction load of supply of Gas to the petitioner Jasmir Vegetable Oil Ltd (In Writ Petition No. 9205 of 2013) is 951 standard Cubic Miter/ Hour and 3,16,4933 standard Cubic Miter/Month and monthly minimum load has been calculated at 1,89,895 Cubic Miter being 60% of the monthly loaded capacity for the purpose of the industry. The said minimum load has been calculated on the basis of the clause 5.7 of the গ্যাস বিপনন নিয়মাবলী ২০০৪. The petitioner also took another gas line for captive Power Plant having sanction load of 1,13,152 Cubic meter per month and minimum load has been calculated at 67,891.20 Cubic Meter per month.

The petitioners have been paying the Gas bill regularly. But, from January 2012, the petitioner companies have been suffering from serious financial hardship and could not procure raw materials for running their industries and the production of the industries has dropped remarkably.

On 29.07.2013, the respondent No. 3 issued letter to the petitioner of both the writ petitions to pay outstanding bill. Accordingly, on 02.09.2013, they paid bill upto February, 2013 and from March 2013, the bills remained outstanding.

The respondents being public statutory authority cannot charge gas bill in excess of consumption. The petitioner in the meantime had paid huge

amount on account of minimum charge in order to avoid disconnection of the gas line, but in the meantime became financially sick.

Being aggrieved by the said impugned Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ providing provision to realize/charge 50%-60% of the sanction load as minimum bill from the Industrial/Power Plant consumers instead of charging bill on the actual consumption basis, the petitioners preferred these two writ petitions and obtained the present Rules.

The respondent No. 3 by filling affidavit-in-opposition contended that the petitioners had entered into the said contracts with Bakhrabad Gas System Ltd. bifurcating which KGDCL i.e. the Respondent No. 3 was formed. His further contention is that clause Nos. 2, 3 and 14 of the aforesaid Contracts incorporate the impugned provisions under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ which require certain consumers/ customers of gas, including industrial consumers like the petitioners, to pay a minimum gas bill every month. Clause 5.7 of গ্যাস বিপণন নিয়মাবল ২০০৪ provides that industries, along with other categories of gas-customers such as commercial, captive power, seasonal and CNG customers, which use gas for less than 16 hours per day shall pay for at least 50% (minimum load) of the monthly load of gas sanctioned to be supplied to them and those which use gas for more than 16 hours per day shall pay for at least 60% (minimum load) of the monthly load of gas sanctioned to be supplied to them. All customers/consumers of natural gas agree in writing to such provisions before receiving gas connection from the concerned gas distribution

companies, and KGDCL, being one such gas distribution company, issues bills in accordance with the same whenever applicable.

The respondent No. 3 further stated that the petitioners started its industry from 20.04.2005, and that lack of production or financial hardship suffered by the petitioner, if any, are irrelevant and immaterial to the instant case. Respondent No.3 further stated that the petitioner as mentioned above, is under contractual obligation to pay minimum gas bills as per Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ and has admittedly paid the bills issued by KGDCL as per the said Clause 5.7 of গ্যাস বিপণন নিয়মাবল ২০০৪ till February-2013.

On 03.09.2013 the petitioners sent a letter to KGDCL wherein they promised, in clear words, that they would pay the outstanding bills in March-2013 and in April-2013 before 18.09.2013 subsequent to which they would pay the remaining outstanding bills one after another. However, instead of paying the outstanding bills, the petitioners filed the instant writ petitions on 15.09.2013 and 17.09.2013 before 18.09.2013.

Mr. Probir Neoge, Senior Advocate along with Mr. Mizanul Hoque Chowdhury, Mr. Hasan Mohammad Reyad and Mr. Redwan Ahmed the learned Advocates appearing for the petitioners submits that it does not matter if Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is law or not. He further submits that it is an executive decision of Petro Bangla and therefore it can be subject to judicial review. He further submits that the instant writ is not a writ of mandamus but certiorari. He also submits that if the petitioner had come to enforce Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪, then the argument that Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is not law would stand.

He further submits that the Respondent No. 3 acted illegally, unlawfully and arbitrarily in fixing minimum charge of the commercial/ industrial use of natural gas at the rate of 60% of total approved load of monthly use of natural gas for use of 16 hours or above daily and at the rate of 50% of total approved load of monthly use of natural gas for use of less than 16 hours daily vide clause 5.7 of গ্যাস বিপনন নিয়মাবলী 2004 because the Respondent No. 1 by way of fixing minimum charge having no nexus to the actual consumption has in effect fixed the price of gas on its own, when under section 29(2) (M) of the Bangladesh Gas Act, 2010 only the Respondent No. 2 has jurisdiction to fix the price of Gas by way of publishing the same in the official Gazette with the approval of the Government and under no provision of law the Respondent No. 1 has any jurisdiction to fix price of gas.

The said গ্যাস বিপনন নিয়মাবলী, 2004 has neither been published in the official Gazette, nor has been framed by the Respondent No. 2 and therefore, the action of the Respondent No. 1 in fixing the price of gas in the said Clause 5.7 is without lawful authority and nullity and further the action of the Respondent No. 3 charging the petitioner on the basis of said Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004 is without lawful authority and of no legal effect.

He also submits that the gas marketing policy is not law, it is an executive decision/action by a statutory public authority within the meaning of Article 152 of the constitution. The present writ petitioners are seeking judicial review of an executive decision/action namely clause 5.2 of the গ্যাস বিপনন নিয়মাবলী, 2004. An executive decision/action in the shape of policy can

well be challenged in a writ petition in the nature of certiorari. It is not the contemplation of the relevant provision of the Constitution that only a law can be challenged in certiorari. He also submits that an executive action may be challenged in certiorari if the action is unreasonable, arbitrary, irrational and unfair.

Mr. Neogi also submits that whether by signing the contract where gas marketing policy, 2004 with its impugned Clause 5.7 is included, the petitioners is barred by the principle of waiver to press its case. Waiver operates in the form of estoppel. By pleading waiver, the adversary tries to say that a party has waived it. So he is estopped from pleading it. Finally, he submits that for certiorari, no specific legal right of petitioners has to be shown to maintain a writ petition. For mandamus, earlier view required establishment of legal rights of the petitioners, but the present position of constitutional and administrative law does not require it. All that required is that a person is going to be adversely affected by the impugned action.

Mr. Shamim Khaled Ahmed with Mr. Abdul Nasar Azad, the learned Advocates appearing for the respondent No. 3 submits that the Petitioner's abovementioned conduct of agreeing under the Contracts to pay minimum bills as per Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004, and then of having already paid bills as per the said Clause 5.7, and finally agreeing to pay the remainder of bills as per the said Clause 5.7, shows the petitioner's acceptance of Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, 2004 which, under the settled principles of acquiescence, amounts to conduct disentitling the petitioner to any relief.

Mr. Shamim Khaled Ahmed also submits that with regard to KGDCL demanding “bill without providing goods/services” are denied. KGDCL has never denied the petitioner the monthly load of gas that was sanctioned to be supplied to the petitioners under the contracts and the said sanctioned amount of gas always there for consumption which, however, the petitioners intentionally left unutilized for reasons best known to themselves. Furthermore, Mr. Ahmed submits that that Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ does not provide for charging bill without supplying gas, rather it requires gas consumers to pay a minimum bill for the minimum amount of gas the consumers confirm they will purchase every month out of the total load of gas that is sanctioned to be supplied to them and which is always there for consumption and the petitioners had full knowledge of such provision before agreeing to take gas from KGDCL.

He also submits that the provision of minimum charge on sanctioned load of gas under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ has been brought into effect in order to ensure that the huge amount of capital invested by gas distribution companies are recovered in time and so that fixed costs, such as costs for, inter alia, distribution system maintenance, safety and inspection programs, customer service, metering, billing etc, are covered which otherwise payments from low-spending gas-consumers, to whom Clause 5.7 is applicable, would not cover. If such costs, expenditures and liabilities are not met every month then not only will every aspect of the entire gas distribution process be adversely affected in terms of safety, efficiency and overall workability, but also a number of illegal gas connections and unaccounted gas usage will increase owing to which the Government will

lose revenue. He also submits that the number of cases of meter-tampering that is being done by gas-consumers so that they can pay only the minimum or average gas bills is overwhelmingly large, and if there was no provision for payment of minimum gas bills at all then such consumers would get away without paying anything for the unaccounted amount of gas that they would steal, meaning thereby that the Government would lose much more revenue than they are losing now.

He also submits that the challenging the requirement to pay minimum bill under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ which has been incorporated into the contracts as a term vide clause Nos. 2, 3 and 14 of the contracts, is against public interest and public good, and issuance of the writ prayed for would work injustice and perpetuate illegality.

He further submits that because the provisions under Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪ have their binding effect on the writ petitioners through the aforesaid clause Nos. 2, 3 and 14 of the contracts and therefore by challenging the legality of Clause 5.7 of গ্যাস বিপণন নিয়মাবলী ২০০৪, the petitioners are actually purporting to challenge the legality and / or validity of the said clause Nos. 2, 3 and 14 of the Contracts and given that the petitioners are purporting to impeach their contractual obligations under the said clause.

Mr. Shamim Khaled further submits that the petitioners did not disclose in the instant writ petitions that it had sent the abovementioned letter dated 03.09.13 to KGDCL promising to pay the outstanding bills within the given period of time, which is clear suppression of the material fact.

He also submits that in addition to the scope to seek remedy under a civil court's ordinary original jurisdiction, the petitioners are bound to refer the instant dispute in respect of the terms of the Contracts to arbitration as per clause No. 17 of the Contracts, and therefore the instant writ petition is not maintainable due to the availability of alternative remedies.

Mr. Shamim Khaled Ahmed submits that the provisions for minimum gas bill were brought into effect for valid reasons and out of necessity and the said provisions are applicable to all industrial customers/consumers of natural gas of Bangladesh meaning that the petitioners have not been discriminated against by KGDCL in any manner. He also submits that the burden of proof of showing that the said clause 5.7 of গ্যাস বিপনন নিয়মাবলী, or any other provision for that matter, is violative of the Petitioners fundamental rights is on the petitioners themselves and it has failed to discharge such burden and to disclose how their rights have been infringed.

He finally submits that the grounds formulated in the writ petitions are illegal, misleading and not sustainable in law and submits that in the facts and circumstances and legal position stated above, the Rule is liable to be discharged with cost.

We have gone through the writ petitions, annexures therein and affidavit-in-opposition.

It is necessary to quote the Article 102 (2) of the Constitution which states:

> *"(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-*
> *(a) on the application of any person aggrieved, make an order-*
> *(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic*

> *or of a local authority, has been done or taken without lawful authority and is of no legal effect."*

For a person to seek remedy under the writ of certiorari he must show that he is aggrieved by an act done or proceeding taken which the High Court Division may declare to have been done or taken without lawful authority. There must be a nexus between such person's grievance and the act or proceeding that is under challenge inasmuch as the person must be aggrieved by the act or proceeding under challenge.

In the instant case, Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ is under challenge but the petitioners are not aggrieved by the same because গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no compelling or binding effect upon the petitioners since admittedly the same is not law or has no force of law. Therefore, a nexus between the petitioners' grievance and Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ by itself cannot be established that the petitioner can seek remedy under Article 102 (2) (a) (ii) of the Constitution, and therefore it is wrong on the part of the petitioner to claim that even if clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ has no force of law, the same can still be challenged under writ of certiorari.

The writ petitioner did not disclose in the writ petition that it had sent the aforesaid letter dated 03.032013 to KGDCL promising to pay the outstanding bills within the given period of time and therefore the same amounts to suppression of material fact and disentitles the writ petitioners to any relief under the principle of acquiescence.

Admittedly, the writ petitioners have paid the minimum gas bills issued by KGDCL as per the provisions under Clause 5.7 of গ্যাস বিপনন

নিয়মাবলী, ২০০৪, incorporated into the Contracts vide clause Nos. 2, 3 and 14 of the Contracts, till February-2013. On 03.09.2013 the writ petitioners sent a letter to KGDCL wherein they promised, in clear words, that they would pay the outstanding bills of March-2013 and April-2013 (which were also minimum bills) before 18.09.2013 subsequent to which they would pay the remaining outstanding bills one after another. However, instead of paying the said outstanding bills as promised, the writ petitioners filed these writ petitions on 15.09.2013, three days before 18.09.2013 which is tantamount that the petitioners have not come up before this Court with clean hands, therefore, they cannot get any remedy from any court of law.

Moreover, challenging the requirement to pay minimum bill under Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ which has been incorporated into the Contracts as a term vide clause Nos. 2, 3 and 14 of the Contracts, is against public interest and public good.

The only way a nexus between the petitioners' grievance and Clause 5.7 of the গ্যাস বিপনন নিয়মাবলী, ২০০৪ can be established is to treat clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ as a contractual term because the said clause 5.7 which is directly incorporated as a contractual term under clause No. 14 of the contract for supply of natural gas, will have a compelling and binding effect upon the petitioner which is necessary to show grievance. Therefore, it is safe to conclude that the petitioner has come to the writ forum challenging a contractual term because otherwise a writ of certiorari would not lie in the first place.

Apart from that the provision under Clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ have their binding effect on the writ petitioners through the aforesaid Clause Nos. 2, 3 and 14 of the Contracts and therefore, by challenging the legality of clause 5.7 of গ্যাস বিপনন নিয়মাবলী, ২০০৪ the petitioner is actually purporting to challenge the legality and / or validity of the said clause Nos. 2, 3 and 14 of the contracts.

The contracts in question contain a clause providing inter-alia for settlements of dispute by reference to arbitration (Clause 17 of the Contracts). The Arbitrators can decide both questions of fact as well as questions of law.

Where the contracts themselves provide for a mode of settlement of disputes arising therefrom, there is no reason why the parties should not follow and adopt that remedy instead of invoking the extraordinary jurisdiction of the High Court Division under Article 102.

In the present case, clause 17 of the contracts dated 03.02.2009 entered into between the petitioners and the KGDCL contains an arbitration clause. The petitioners are trying to interpret the contracts in the writ petitions in a manner which is impermissible, particularly when the petitioners are having a remedy to go for arbitration under the contracts signed by them. The petitioners having signed the contracts with open eyes after reading the terms and conditions, it is unconscionable to raise these kinds of contention in the writ petitions.

In the light of the above findings, we are of the firm view that these writ petitions are not maintainable and the petitioners have to go for

arbitration in terms of clause 17 of the contracts, if they have any grievance at all.

In the result, both the Rules are discharged. The ad-interim order granted earlier by this court are hereby vacated accordingly. There is no order as to costs.

Communicate this judgment and order at once.

Moyeenul Islam Chowdhury, J:

I agree.