IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Jahangir Hossain

CIVIL PETITION FOR LEAVE TO APPEAL NO. 4506 of 2017

(From the judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No.5673 of 2016)

Niko Resources (Bangladesh) Limited, P.O. Box 261, Bay Street, Bridgetown, Barbados and Bangladesh Office, 11 Mohakhali, C/A, 2nd Floor, Dhaka-1212 ....Petitioner

-Versus-

Professor M. Shamsul Alam and others : ....Respondents

For the Petitioner	: Mr. Mustafizur Rahman Khan, Advocate, instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record
For the Respondent Nos.1, 3 and 4	: Mr. Tanjib-ul-Alam, Senior Advocate, instructed by Mr. Md. Helal Amin, Advocate-on-Record with Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record
For the respondent No.2	Mr. A. M. Aminuddin, Attorney General (with leave of the Court)
For the respondent No.5	Not represented
Date of Hearing and judgment	: **The 18th June, 2023**

JUDGMENT

Md. Ashfaqul Islam, J: This Civil Petition for Leave to Appeal has been preferred against the judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No.5673 of 2016 making the Rule absolute.

The respondent No.1, Professor M. Shamsul Alam herein as petitioner filed the aforesaid writ petition challenging the Joint Venture Agreement dated 16.10.2003 (hereinafter referred to as JVA) between the writ respondent No.3, Bangladesh Petroleum Exploration and Production Company Ltd. (BAPEX) and 4, Niko Resources (Bangladesh) Limited, for the Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Gas Fields and Gas Purchase and Sale Agreement dated 27.12.2006 (hereinafter referred to as GPSA) between the writ respondent No.2, Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) as Buyer and a Joint Venture between the writ respondent Nos.3 and 4 (as seller) for the sale of gas from Feni Gas Field being without lawful authority and of no legal effect and thus, void ab initio, as a result of procurement through bribery, fraud, and corruption in violation of the Contract Act, 1872, the Prevention of Corruption Act, 1947 and in derogation of the Constitution of Bangladesh and also Gross negligence of the writ respondent Nos.1, Ministry of Energy, Power and Mineral Resources, 2 and 3 in their failure to seek adequate compensation for the damages caused by the 2005 blowouts at

Chattak due to the impugned JVA and not undertaking petroleum operations in a proper and workmanlike manner and in accordance with good oil-field practice as required under the provisions of the Petroleum Act, 1974 and Omissions and actions of the writ respondents in International Centre for Settlement of Investment Dispute (hereinafter referred to as ICSID) Case Nos.ARB/10/11 and ARB/10/18,Niko Resources (Bangladesh) Ltd. V. Bangladesh Petroleum exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla") misleading the ICSID Tribunals in order to act against the public interest of Bangladesh with the mala fide intention of conferring undue benefits to the writ respondent Nos.4 and 5, Niko Resources Limited.

The case, made out in the Writ Petition, in brief, is as follows:

In 1997, the writ respondent No.4 participated in Bangladesh's second bid round for Production Sharing Contracts ("PSC"), including Block 9 PSC, to develop oil and gas resources and was the least qualified, both technically and financially of seven bidders as evidenced by the report dated 28.09.1997 submitted to the writ respondent No.2, by

Arthur Anderson, a reputed international consultant. Having failed to qualify for the exploration of gas fields in Bangladesh through a competitive and transparent bidding process, the writ respondent No.4 proposed to carry out a study, partly funded by the Canadian International Development Agency (CIDA) and entered into a Framework of Understanding for Study for the Development and Production of Hydrocarbon from Non Producing Marginal Gas Fields of Chattak, Feni, and Kamta ((hereinafter referred to as "FOU") dated 23.08.1999 with the writ respondent No.3. As part of the study under the FOU, in February 2000, writ respondent Nos.3 and 4 produced a report entitled "Bangladesh Marginal Field Evaluation Chattak, Feni and Kamta, February 2000" which expressly stated that, Chattak East is an "Exploration Structure" and an "Exploration Target". The writ respondent Nos.3 and 4 stated in the Marginal Field Evaluation that, the February 2000 report concluded the requirement of the FOU and a Joint venture Contract may be executed between the writ respondent Nos.3 and 4 as stipulated in the study upon approval of the writ respondent Nos.1 and 2. After the conclusion of the study requirements of FOU, there was not, and could not have been, any binding legal obligations to

grant any rights over natural resources, through execution of the JVA, to the writ respondent No.4 without any competitive bid in a non-transparent manner simply, because, the writ respondent No.4 under the terms of the FOU was allowed to conduct a study of marginal/abandoned fields. Neither did the FOU treat Chattak East as a marginal/abandoned field.

Two years later on 01.10.2003 (i.e. 15 days before the JVA was executed on 16.10.2003), the respondent No. 4 entered into a Management Services Contract with Stratum Development Limited, a company registered in Jersey, Channel Islands represented by Mr. Qasim Sharif, a person who later became Vice President, South Asia of respondent No.4. Under the terms of the Management Services Contract the parties agreed that respondent No.4 "has executed" a JVA with respondent No.3 and that "Stratum shall invoice Niko Bangladesh for a retainer fee in the sum of US$20,000 per month effective October 1, 2003". According to clause 6 of the Management Service Contract it was agreed that the fee shall cover Stratum's fee in addition to all costs and expenses made or incurred by Stratum related to the provision of the Services such as "payments made to expedite

or secure the performance by a foreign (i.e. Bangladeshi)public official of any act of a routine nature that is part of the foreign public official's duties and functions, such as the issuance of permits or licenses" required for the Niko Project.

The Respondent No.4 had also executed a Consultancy Agreement dated 27.07.1999 with Stratum Development Limited (represented by Mr. Qasim Sharif). According to Clause 6 of the Consultancy Agreement Stratum agreed to assist in the execution of a joint venture agreement with the respondent No. 3 (BAPEX) for Kamta, Chattak and Feni Gas Fields for which respondent No.4 (Niko Bangladesh) agreed to pay a "CONSULTANCY FEE" equal to "US$0.03 per mcf (three cents per thousand standard cubic feet)" of the Niko Bangladesh's net share of established proven reserves and "a minimum initial consulting fee of US DOLLARS FOUR MILLION" within 15 days of execution of the JVA.

The Respondent No.4 (Niko Bangladesh) has admitted to having another consultancy agreement with another company called Nationwide (owned by a Bangladeshi national Mr. Salim Bhuiyan) under which, following the execution of the JVA, respondent No.5 (Niko Canada), through Stratum, paid

US$500,000 to Mr. Bhuiyan and admitted that a key part of the services provided by Mr. Bhuiyan was obtaining and arranging meetings with appropriate personnel as BAPEX, Petrobangla and the Ministry of Energy.

Mr. Salim Bhuiyan paid another politically influential person, Mr. Giasuddin Al Mamoon, an amount of Tk. 10,800,000 (Taka one crore eight lac) by Standard Chartered Bank Pay Order dated 07.01.2004. Mr. Mamoon is currently in prison following his conviction for money laundering activities in association with his business partner and close friend, Mr. Tarique Rahman, son of former Prime Minister Khaleda Zia. As part of an investigation into Niko's corrupt practices in Bangladesh, Mr. Mamoon admitted to the Royal Canadian Mounted Police ("RCMP") in interviews dated 01.11.2008 and 02.11.2008 of receiving the payments from Mr. Salim Bhuiyan for Mr. Mamoon's role as a sub-agent for Niko. Mr. Salim Bhuiyan made a statement before a Magistrate Court under section 164 of the Code of Criminal Procedure and confirmed paying Tk. 180,00,000 (one crore eighty lac taka) to Mr. Mamoon, Tk. 60,00,000 (sixty lac taka) to State Minister for Energy Mr. AKM Mosharraf Hossain, and retaining the remaining Tk. 60,00,000 (sixty lac) of Niko's fees for

himself. This was how the $500,000 consultancy fee (approximately Tk. 300,00,000) paid by respondent No.5 to Nationwide (owned by Mr. Salim Bhuiyan) was distributed. Even though the confessional statement of Mr. Salim Bhuiyan had subsequently retracted the truth of Mr. Salim Bhuiyan's statement is supported by other documentary evidence, bank records, pay orders, and most importantly the own admissions of respondent No.4.

In addition to the above, it is also evident from the banking transactions of Messrs. Selim Bhuiyan, Giasuddin Al Mamun and other parties involved in the corruption how money flowed from one account to another surrounding the date of signing of JVA. This is matter of documentary evidence and there is no scope of raising any dispute as to the fact that money had been transferred from the account of Selim Bhuiyan to the account of Giasuddin Al Mamun, as such it is crystal clear that there had been corruption in procuring the JVA.

Mr. Selim Bhuiyan has made a confessional statement in Tejgaon P.S. Case No. 20(12)2006 where he admitted to having received money from Niko and paying Mr Giasuddin Al Mammon for the Niko contracts. The payment to Mr. Selim Bhuiyan is not denied by Niko.

Mr. Moudud Ahmed, the then Law Minister, had given a legal opinion based on which the contracts were granted to Niko. At the relevant time Mr. Moudud Ahmed provided his legal opinion as Law Minister; his law firm, Moudud Ahmed & Associates, was acting as legal counsel for Niko and provided a legal opinion which was similar to the legal opinion of the Law Minister. Law enforcing authorities have discovered that Niko made payment of US$ 6,065 to Moudud Ahmed on 12 October 2000 and another payment to Moudud Ahmed, while he was Law Minister, of US$8,315 on 15 January 2002.

The facts of Niko's corruption are that at all material times, Niko Bangladesh (respondent No.4) was an indirectly wholly owned subsidiary of Niko Resources Limited of Canada (respondent No.5).

Niko Bangladesh was funded solely by Niko Canada. Typically, money was transferred from Niko Canada's accounts in Calgary, to Niko Resources Caymans then to the Niko Bangladesh accounts in Barbados and finally to the Niko Bangladesh accounts in Bangladesh. The CEO of Niko Canada sat on the Board of Directors of Niko Bangladesh.

Niko Bangladesh entered into a Joint Venture Agreement (hereinafter JVA) with BAPEX for the exploration of the Feni and Chattak gas fields on October 16, 2003. Upon signing of the JVA, Mr. Qasim Sharif became the President of Niko Bangladesh.

As a matter of corporate governance, Niko Canada closely monitored the activities of its foreign subsidiaries. The presence of the Niko Canada CEO on the Niko Bangladesh Board ensured Niko Canada's knowledge of its subsidiary's actions.

The initial RCMP investigation began in June 2005 after an official from Canada's Department of Foreign Affairs and International Trade (DFAIT) alerted the RCMP to news stories concerning a possible violation of the Corruption of Foreign Public Officials Act by Niko Resources Ltd. The Bangladeshi State Minister for Energy, AKM Mosharraf Hossain, had resigned following reports that he was gifted with a vehicle by the Canadian firm, Niko, and that this gift constituted a bribe. The matter was referred to the RCMP, Calgary Commercial Crime Section, for investigation.

RCMP had commenced the investigation and had sent letter of request to Bangladesh for investigation and legal

assistance, first on April 10, 2006 and subsequently on several occasions investigation was also joined in by United States Department of Justice through FBI, on the basis of Bangladesh request to USA, as well as Canadian request to USA. Most of the evidence were shared between the parties.

On June 24, 2011, Niko Canada pleaded guilty to a violation under Section 3(1)(b) of the Corruption of Foreign Public Officials Act in relation to the above noted investigation. Niko Canada was sentenced, fined, paid victim penalty and was subject to a probation order.

Further investigation work was ongoing following the above trial and sentencing in Canada. A further supplemental request was received by Bangladesh dated January 10, 2014 for investigation and legal assistance to RCMP from DOJ, Canada. Bangladesh had provided further assistance in connection with investigation relating to:

• Bribery of judicial officers, etc., contrary to section 119(a) of the Criminal Code of Canada; and

• Secret Commissions, contrary to section 426 of the Criminal Code of Canada; and its equivalent provisions under the laws of Bangladesh.

Bangladesh Anti-Corruption Commission has charged eleven individuals in one criminal case (known in Bangladesh as the Niko Corruption case) under Bangladesh Law for the offences committed in Bangladesh. The accused persons in the case are: 1. Former Prime Minister, Mrs. Begum Khaleda Zia; 2. Former Minister for Law Justice and Parliamentary Affairs, Mr. Moudud Ahmed; 3. Former State Minister for Energy Mr. A.K.M. Mosharraf Hossain; 4. Former Secretary in Charge, Mr. Shahidul Islam; 5. Former President of Niko Bangladesh and Managing Director, Stratum Developments Limited, Mr. Quasim Sharif,; Former Principal Secretary, Mr. Kamal Uddin Siddiqui; 7. Former Senior Assistant Secretary, Ministry of Energy, Mr. CM Yusuf; 8. Former Senior General Manager of BAPEX, Mr. Mir Moynul Haque; 9. Former Company Secretary, BAPEX, Mr. Shafiur Rahman; 10. Managing Director, One Group, Mr. Giasuddin Al- Mamun; and 11. Chairman and Managing Director, International Travel Corporation, Mr. Selim Bhuiyan.

This Division, in a verdict on March 23, 2017 cleared the way for continuing of the trial.

Bangladesh Anti-Corruption Commission (hereinafter referred to as ACC) has charged two individuals, in another

Niko related corruption case, under Bangladesh Laws for the offences of bribery committed in Bangladesh:

Former State Minister for Energy. A K M Mosharraf Hossain; and Qasim Sharif, Managing Director, Stratum Developments Limited.

The ACC investigation into the alleged bribery of foreign public officials, fraud, and the payment of secret commissions. by representatives of Niko Canada and Niko Bangladesh has thus far included witness interviews, documentary evidence collection and analysis, and the analysis of relevant financial records. The following is a summary of the investigation to date, based on evidence obtained during the course of the investigation.

From about 2006 onwards the RCMP started investigating Niko's corrupt practices in Bangladesh. The head of the RCMP investigation Corporal Duggan concluded that Niko, through Mr. Selim Bhuiyan, had agreed to pay to Mr. Giasuddin Al Mamun, friend of the former Prime Minister Khaleda Zia's son Tareq Rahman "$1 million if he helped ensure the success of the JVA." Once the JVA was executed, Mr. Qasim Sharif of Niko arranged for payment totaling Taka three crore

(approximately US$514,000) into the Standard Chartered bank account of Mr. Bhuiyan who had "political clout" with the State Minister of Energy, Mr. AKM Mosharraf Hossain. The RCMP believed that this was part payment for procurement of the JVA.

In 2011 Niko entered into a plea bargain with the Canadian authorities and pleaded guilty to charges of providing improper benefits to Bangladesh officials to further the business objectives of its subsidiaries in Bangladesh. Niko's plea deal related specifically to giving a vehicle worth more than Canadian $190,000 to the then State Minister for Energy and Mineral Resources. Niko also pleaded guilty to paying $5000 travel and expenses for the former Minister to travel to Calgary, and then on to New York and Chicago.

Between January 2 and January 10, 2008 Canadian RCMP officer S/Sgt. Prouse and Sgt. Roussel travelled to Bangladesh and met with Bangladesh Anti-Corruption Commission (ACC) members. Information was exchanged arising out of respective investigations of Niko Canada and Niko Bangladesh.

On January 15, 2008 Selim Bhuiyan provided a witness statement to ACC Bangladesh investigators based on which it was concluded by the ACC that Selim Bhuiyan was the middleman facilitating cash payments between Qasim Sharif of Niko Resources Ltd. and Bangladesh government officials. Both Giasuddin Al Mamoon and Qasim Sharif requested Bhuiyan's assistance for Niko Resources. After the Joint Venture Agreement was signed Qasim Sharif representing NIKO paid Bhuiyan 3 crore taka at his Standard Chartered bank in Gulshan. From this money Bhuiyan paid Mamoon 1 crore 8 lac taka (approximately $200,000 US) by pay order, and at different times via cash and cheque, an additional 72 lac taka. In total Bhuiyan paid 1 crore 80 lac taka (approximately $300,000 US) to Mamoon (approximately 60%) at different times Bhuiyan paid 60 lac taka (approximately $100,000 US) to Energy Minister Hossain (approximately 20%). The balance 60 lac (approximately $100,000 US) Bhuiyan kept for his work (approximately 20%).

Under the aforesaid facts and circumstances of the case, to protect the interest of the country as a public spirited citizen and being an activist involving oil and gas sector of the country, the writ petitioner, finding no other

alternative efficacious remedy, filed the writ petition before the High Court Division and obtained the Rule.

The writ respondent No.4 contested the Rule by filing an affidavit-in-opposition on behalf of the respondent No. 1 against the application for discharging the Rule.

In due course, after hearing the parties and considering the connected papers on record, a Division Bench of the High Court Division made the Rule absolute by the impugned judgment and order dated 24.08.2017.

Feeling aggrieved, by the impugned judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No. 5673 of 2016, the writ respondent No.4 as petitioner herein filed the instant civil Petition for leave to appeal before this Division.

Mr. Mustafizur Rahman Khan, the learned Advocate appearing on behalf of the petitioner submits that, the High Court Division erred in law and upon the facts in failing to appreciate that, the ICSID Tribunals having issued in ICSID Case Nos.ARB/10/11 and ARB/10/18 on 19.07.2016, a decision pertaining to the Exclusivity of the Tribunals' Jurisdiction declaring that, the Tribunals had sole and exclusive jurisdiction with respect to all matters validly brought

before it, notably, the validity of the JVA and GPSA, including questions relating to the avoidance of these agreements on the grounds of corruption, and Bangladesh being admittedly a signatory of the ICSID Convention, under which the decisions of the ICSID Tribunals having the same binding effect as judgments of this Division, the High Court Division ought to have refrained from proceeding with the Rule.

He further submits that, the High Court Division erred in law and upon the facts in failing to appreciate that, the Rule Nisi was barred by the principles of res judicata inasmuch that, in an earlier judgment dated 17.11.2009 passed by the High Court Division in Writ Petition No.6911 of 2005 also filed pro bono publico seeking substantively the same relief, the High Court Division gave a specific finding that, the JVA was not obtained by a flawed process resorting to fraudulent means, and that, on such view of the matter, even on the basis of materials alleged not to have been before the High Court Division when passing the earlier judgment, the Rule Nisi in the subsequent case ought not to have been made absolute, but, rather, the writ petitioner,

if aggrieved, ought to have sought review of the earlier judgment.

He next submits that, it having been drawn to the attention of the High Court Division that, even before the filing of the writ petition on 09.05.2016, the writ respondent No.3 had filed a Memorial on Damages on 25.03.2016 before the ICSID Tribunal in ICSID Case Nos.ARB/10/11 and ARB/10/18 seeking, inter alia, a declaration that, the petitioner procured the JVA and GPSA through alleged corruption, a dismissal of all the petitioner's claims and compensation for losses in excess of US$ 1 billion, and the respondent Nos.1 and 2 having further filed Money Suit No.224 of 2008 pending in the Court of 1st Joint District Judge, Dhaka against the petitioner seeking damages of Tk.746.51 crores, which were all pending, the High Court Division ought to have appreciated that, the stated cause of action of the writ petition, being that, the respondent Nos.1 and 3 had failed to take any action in this regard, was patently false and misleading, and, as such, the Rule Nisi was infructuous.

He finally submits that, the High Court Division erred in law and upon the facts inasmuch that, the writ petition

was premised upon allegations of fraud and corruption which involved highly contentious and disputed questions of fact, which were in fact the subject matter of claims, suits and criminal proceedings still pending, the issues raised by the writ petitioner were not only not justiciable in the summary jurisdiction under Article 102 of the Constitution, but, also any finding with regard to these issues risked prejudicing parties in the said claims, suits and criminal proceedings as well as pre-empting the findings of such proceedings, but, the High Court Division committed serious illegality in making the Rule absolute and, as such, the impugned judgment and order passed by the High Court Division is liable to be set aside.

Per contra, on behalf of the respondent Nos. 1, 3 and 4 herein respectively Professor M. Shamsul Alam, Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX), Mr. Tanjib-ul-Alam, the learned Senior Advocate submits that respondent No.4, Niko Resources (Bangladesh) Limited have acted against the public interest of Bangladesh with the malafide intention of conferring benefits to itself. He further submits that, the writ

respondent No.5, Niko Resources Limited, Canada which committed the acts of corruption in Bangladesh, has continued to own and retain 60% of the interest in the Block 9 PSC gas field operated by Tullow Bangladesh Limited for which it had been declared to be the least qualified, both financially and technically, of all seven bidders assessed by the Arthur Anderson report dated 28.09.1997. The writ respondent No.5, through Tullow Bangladesh Limited, continued to receive payments despite not having paid the adequate compensation for the 2005 blowouts till these payments were stopped by the Rule and interim order dated 09.05.2016.

He next submits that, admittedly the writ respondent Nos.4 and 5 have committed acts of corruption in the procurement of the JVA and GPSA. The procurement of the JVA and GPSA, through bribery and corruption, renders the JVA and GPSA void ab initio under section 23 of the Contract Act. He also submits that, the writ respondents should not be allowed to give effect to the JVA and GPSA procured through corruption since "an opportunity to carry on a business dishonestly is barred under section 23 of the Contract Act inasmuch as the same is opposed to the public

policy particularly when the transaction is with the Government" as observed by this Division in the case of Ummu Kawsar Salsabil Vs. Shams Corporation (Pvt) Ltd. and others, reported in 5 BLD (AD)263 (1985).

He further submits that, the admitted facts show that, the writ respondent Nos.4 and 5 have violated a number of provisions of the Penal Code including offences related to public servants under sections 161-165, abatement under sections 107-119, criminal conspiracy under section 120, as well as offences under section 5 of the Prevention of Corruption Act, 1974. The US Dollar four million (US$ 4,000,000) Consultancy Agreement between Stratum and the writ respondent No.4 admittedly was aimed to facilitate the payment of gratification to Bangladesh Government officials. Furthermore, under the Nationwide Agreement, Mr. Salim Bhuiyan was admittedly paid US$ five hundred thousand (US$ 500,000) by the writ respondent Nos.4 and 5 as gratification for his exercise of influence over Bangladeshi Government officials. The US$ 4 million Consultancy Agreement, under which US$ 2.93 million was paid on 21.10.2003, i.e. five days after the execution of the JVA dated 16.10.2003, is admitted by NIKO to have been used for making a payment of

US$ 500,000 to Mr. Salim Bhuiyan for his influence and ability to obtain meetings with Bangladeshi Government officials. These admissions by the writ respondent Nos.4 of payments to Stratum (owned by Mr. Qasim Sharif) and then to Mr. Salim Bhuiyan are admitted facts which taint the JVA and GPSA with corruption and render them void ab initio. In addition, the Stratum Management Contract clearly violated sections 161-165 of the Penal Code since it expressly stated that, the writ respondent No.4 would pay Stratum for "payments made to expedite or secure the performance" by Bangladesh Public officials for "issuance of permits or licenses required for" the NIKO Project. The writ respondent No.4 admits that, these payments were made and banking records show that, US$ 2.93 million out of the $ 5 million was paid 5 days after the execution of the JVA. Furthermore, the agreement with Nationwide (owned by Mr. Salim Bhuiyan) constitutes violation of section 163 of the Penal Code since Mr. Bhuiyan obtained the payment of US$ 500,000 from NIKO for his exercise of "personal influence" over Bangladeshi Government officials. The writ respondent No.4 blatantly admits to paying US$ 500,000 immediately after the JVA for Mr. Bhuiyan's influence and ability to arrange meetings with

Bangladeshi Government officials which enabled the JVA to be procured.

He finally submits that, there is no res judicata of the petition with the pending ICSID cases or the previous writ Petition No.6911 of 2005 filed by BELA. This petition arises from a different cause of action and there is no uniformity of parties. The parties in the present writ petition are not the same parties before the pending ICSID arbitration cases, in particular the writ respondent No.5 (which admitted to the acts of corruption) is not a party to the ICSID proceedings and neither is the writ respondent No.1. In addition, there is no res judicata since the ICSID tribunals have not issued any final award or judgment. There is also no res judiciata of the petition with the previous judgment in Writ Petition No.6911 of 2005, since that judgment did not look into the issue of corruption and BELA did not produce any evidence of corruption. BELA tried to show that, the process of granting of the exploration rights in Chattak East, which was not a marginal/abandoned field, to NIKO under the JVA was improper since the process was non-transparent and without any competitive bidding. However, without any evidence of corruption, it was not possible to

reach the conclusion that, the JVA was executed in bad faith, through misuse of power, or in an improper manner rendering the JVA illegal and without any legal effect. Hence, the High Court Division rightly made the Rule Nisi absolute with direction and passed the impugned judgment and, therefore, he prays for dismissal of the instant leave petition.

Mr. A. M. Aminuddin, the learned Attorney General (with leave of the Court) appearing on behalf of the respondent No.2 made submissions in support of the impugned judgment and order of the High Court Division.

We have heard the submissions of the learned Advocate for the petitioner, the learned Senior Advocate for the respondent Nos.1, 3 and 4 and the learned Attorney General for the respondent No.2. We have also perused the impugned judgment and order of the High Court Division and other connected papers on record.

The moot question is whether the writ respondent Nos.4 and 5 had set up a corrupt scheme during the period of 2003 to 2006, for obtaining benefits from the Government of Bangladesh and was able to procure the Joint Venture

Agreement (JVA) and Sale Agreement for the Sale of Gas from Feni Gas Field (GPSA) through corrupt and fraudulent means.

It is admitted that the JVA and GPSA were in fact granted to the respondent No 4, Niko without any competitive bid in a non-transparent manner. Open competition and transparency are means of ensuring the public contracts are given to the best qualified person, at the best price, and not for the personal benefits of vested quarters.

It appears that in this situation the entire process of the granting of the JVA and GPSA to the writ respondent No.4 were tainted by clandestine consultancy agreements, illicit payments of exorbitant consultancy fees, and illegal gratifications being paid to Government officials and politically influential persons. In 1997 the respondent No.5 had been assessed to be the least qualified bidder and thus failed to qualify in the competitive bids conducted for granting of gas fields through Production Sharing Contracts, including Block 9 PSC. The respondent No.5 then decided to enter the Bangladesh energy market through the back door by using so-called consultancy agreements by which it agreed to make illegal payments of gratifications to Bangladesh Government officials.

It is shocking that the President of writ respondent No. 4, Mr. Qasim Sharif, who also acted as a conduit for payment of gratification to Government officials and politically influential persons in Bangladesh, would be quoted in the Agreed Statement by writ respondent No. 5 as stating that the payments of bribes to the then State Minister for Energy was to obtain and retain business interests and such a payment of bribe was "a commonplace part of doing business in Bangladesh" and a "cost of doing business". Even if bribery is considered commonplace it does not make it legal nor can it be considered a legitimate cost of doing business.

It is evident that the scheme of corruption set up by the writ respondent Nos. 4 and No.5 during 2003-2006 was for the payment of hidden consultancy fees amounting to millions of dollars received in Swiss bank accounts of companies incorporated in offshore jurisdictions, for the layering of those clandestine payments through different companies in offshore places such as Barbados and Cayman Islands, and for eventual payments of illegal gratification to politically influential people for their ability to "obtain and arrange" meetings with Bangladeshi Government officials, as was

admittedly done by Mr. Salim Bhuiyan, or to "assist in the execution" of the JVA by making payments to Bangladeshi Government officials to "expedite and secure" the performance of official duties of Government officers, as was admittedly done by Mr. Qasim Sharif. Under the laws of Bangladesh this set up of the writ respondents No.4 and No.5 cannot be treated as anything other than a scheme for bribery and corruption. This scheme has been unearthed by the international law enforcing authorities in Canada, United States, and Bangladesh acting in close co-operation for fighting the global menace of corruption.

As regards the question of becoming the rule infructuous since the writ Respondent Nos.2 and No.3 has already taken steps against the writ Respondent No.4 and brought claims before the ICSID Tribunal and in a money suit claiming compensation for the blowouts, the High Court Division clearly observed that neither the pending ICSID arbitration cases nor the money suit offers an equally efficacious remedy than that of a writ jurisdiction. Under Article 102 (2) (ii), if no other equally efficacious remedy is provided by law, on the basis of an application of any person aggrieved, it may make an order declaring that any act done

or proceeding taken by a person performing functions in connection with the affairs of the Republic, has been done or taken without lawful authority and is of no legal effect. The writ respondent No.4 itself argued before the ICSID tribunals that ICSID does not have the power to carry out judicial review of Bangladesh Government actions as exercised by the High Court Division under Article 102 of our Constitution. Writ Respondent No.4 cannot at the same time argue that the High Court Division should also not exercise its powers of judicial review. The writ respondent No.4 cannot be allowed to blow hot and cold at the same time. The position of the writ respondent No.4 is not maintainable since that would lead to an unacceptable situation where no court or tribunal would have the power to review the ultra vires exercise of government authority tainted by corruption. The judicial review powers of the Bangladesh Supreme Court also cannot be exercised by an ICSID tribunal since ICSID tribunals have no powers to seize the proceeds of crime being enjoyed by the writ respondents No.4 and No.5 in Bangladesh. ICSID tribunals may only issue a pecuniary award but cannot punish corruption or declare invalid unlawful exercise of executive powers. The proper

forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Supreme Court of Bangladesh applying law of the land under Article 102 of the Bangladesh Constitution. It is clear that respondent No.5 (Niko Canada), the parent company which actually pleaded guilty to acts of corruption in Bangladesh and which initiated the corruption scheme, is not even party to the pending cases before the ICSID tribunals. The ICSID tribunals have no powers over the assets of writ respondent No.5 in Bangladesh.

The next question is whether the allegations brought in the writ petition are disputed questions of facts. In this regard the High Court Division holds that there is no disputed question of fact as such since, in addition to admitting to making payments of bribes to the then State Minister for Energy AKM Mosharraf Hossain for obtaining and retaining business interests in Bangladesh for its subsidiaries, the writ respondent No.4 brazenly admits to making payments of over US$ 4 million to Mr. Qasim Sharif and US$ 500,000 to Mr. Salim Bhuiyan for their services in making "payments to Government officials" and for "arranging

meetings with Government officials". Despite the many layers used to hide the payments and the channelling of these payments through numerous offshore bank accounts, the law enforcing agencies in Bangladesh, Canada, and the United States must be commended for their united and effective work in tracing the trail of the corrupt payments from Niko Canada (respondent No.5), through Barbados bank of writ respondent No.4, then through Swiss bank account of Niko's agent and President Mr. Qasim Sharif, to Mr. Salim Bhuiyan, and finally to the eventual recipients in Bangladesh. Having been caught red handed the writ respondent No.4 attempts to classify these corrupt payments as legitimate consultancy fees paid for services such as arranging meetings with Government officials and payments to expedite the performance of official functions. These payments are clearly illegal under the laws of Bangladesh. If these kinds of payments were permitted by law, then there would have been no way of checking corruption. All payments of bribes would have been packaged as payment of consultancy fees.

The typical argument of Mr. Khan that even if the allegations are accepted, there is no corruption since the trail of payments stop at Giasuddin Al Mamoon does not hold

good. We cannot agree with this submission that there has to be a direct payment to a Bangladesh Government official for there to be corruption. This submission is not supported by the laws of Bangladesh, particularly the Penal Code. We note that section 162 of the Penal Code deals with "Taking gratification, in order, by corrupt or illegal means, to influence public servant". Under section 162 of the Penal Code private individuals, such as Mr. Salim Bhuiyan or Mr. Giasuddin Al Mamoon, taking bribes to influence a public servant by corruption or illegal means is a crime. Similarly, section 163 of the Penal Code deals with "Taking gratification, for exercise of personal influence with public servant". Taking or giving gratification to private individuals for their personal influence with public servants is also a crime. Thus, under the laws of Bangladesh there is no requirement that only direct payments to a Government official can constitute corruption. It would be sufficient if the gratification is extracted on a promise of exercise of personal influence with an official, to bring the offence within the mischief of this section 163 of the Penal Code. Proof of actual exercise of personal influence with an official is not necessary. The US$ 500,000 payment

admittedly made by respondents No.4 and No.5 to Mr. Salim Bhuiyan for his so-called ability to "arrange meetings" with Government officials through his social and political connections would clearly falls under the prohibitions of sections 162 and 163 of the Penal Code. Similarly, if the payment trail reaches Mr. Giasuddin Al Mamoon, then those payments were clearly for his exercise of personal influence and political clout over Bangladeshi Government officials. These facts, though not vital or essential for disposal of this petition, support the totality of the evidence of the corrupt scheme set up by the respondents No.4 and No.5 to acquire their investments in Bangladesh during 2003 to 2006.

The Penal Code of Bangladesh clearly defines what constitutes bribery. Section 161 of the Penal Code deals with "Public servant taking gratification other than legal remuneration in respect of an official act". Under section 161 of the Penal Code any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act amounts to bribery. Giving anything whose value can be estimated in money is bribery. Under section 161 three things are necessary to constitute bribe - (i) the receiver of bribe must be a public servant;

(ii) he must receive or solicit an illegal gratification; and (iii) it must be received as a motive or reward for doing an official act which he is empowered to do. There is no need to show, as the respondent No.4 argues that the bribes paid to State Minister AKM Mosharraf Hossain actually influenced his decisions to act in favour of Niko.

The relevant extract of the case of Anti Corruption Commission vs. Mohammad Shahidul Islam and Ors as cited in 68 DLR AD 242 may profitably be quoted here to reiterate the observations of this division in the context of bribery by one of the legislators (Mr. AKM Mosharraf Hossain as in the instant case) as a public servant holding a public office:

> "*It appears to us the Anti-Corruption Commission Act is applicable in respect of public servant as well as "any other person". The Prevention of Corruption Act, 1947 and Anti Corruption Commission Act and Criminal Law Amendment Act, 1958 are the enactments which are meant for the benefit of the public. The main aim of those Acts are eradiction of the Corruption which is permeating every nook and corner of the country.*
>
> ***Grahm Zellic*** *in an article "Bribery of Members of Parliament and the Criminal Law" published in Public Law, 1979, has cited the observations of Sir Issac J, which are in the following words :-*

> *"When a man becomes a Member of Parliament, he undertakes high public duties. Those duties are inseparable from the position; he cannot retain the honour and divest himself of the duties. The position, independent of the Member, is subsisting, permanent and substantive and will be filled by others after him; this is provided by law; and it is certainly of a more, rather than less, public character, Erskine May in fact speaks of "Corruption in the Execution of their office as Members. There is nothing to stop a Court, therefore, holding that membership of Parliament constitutes an office……."*

Benjamin Franklin *has said-*

"Let honesty be as the breath of thy soul; then shall thou reach the point of happiness, and independence shall be thy shield and buckle, they helmet and crown; then shall thy soul walk upright, nor stoop to the silken wretch because he hath riches, nor pocket an abuse because the hand which officers it wears or ring set with diamonds"

Thomas Jefferson *said-*

"The whole of Government consists in the art of being honest."

J.A.G. Griffith *in "Parliament" Functions, practice and procedure, has cited* ***Edmund Burke*** *while Commenting on the functions of the Members of Parliament. Accordingly to him, "It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication, with his constituents. Their wishes ought to have great weight with him, their opinion, high respect, their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs- and*

> *above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.....your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you, if he sacrifices it to yours opinion."*

In addition, the Stratum Management Services Contract is clearly in violation of section 161 since its stated aim was to make payments to Bangladesh Government officials for the procurement of Niko's projects in Bangladesh. There is no need to show additionally, as the respondent No.4 suggests, that these payments of bribes in fact influenced the Government officials who received the bribes. If that was the case, no one would be able to show corruption since one would need to go into the mind of the recipient of the bribe to determine if that person was influenced by the bribe. Respondent No.4 and No.5 were parties to and aided and abetted the commission of these crimes in Bangladesh to illegally procure the JVA and GPSA. The respondents No.4 and No.5 have also clearly committed the offences of abetment under the Penal Code by entering into agreements with Stratum and Nationwide for the procurement of the JVA. Just

the act of offering a bribe is an offence, regardless of whether the official accepts the offer.

In this connection reliance can be placed on the case of Anti-Corruption Commission vs. Mehadi Hassan, 67 DLR (AD) 137, where it has been held that:

> "*The allegations of abetment against respondent No. 1 of all the criminal petitions in manipulating the tender for sale of abandoned properties have been prima facie found to be true in the police report submitted by the investigation officer duly empowered by the Anti-Corruption Commission. Admittedly, respondent No. 1 of all the criminal petitions participated in the tender for sale of the properties in question and he is a beneficiary of the illegal transaction. Moreover, respondent No. 1 of all the criminal petitions was involved in the alleged illegal transaction for purchasing the case properties either in his own name or in favour of his organization or in the name of his designated person from the principal accused. The aforesaid elements certainly attract the ingredients of abetment in manipulating the tender for sale of the abandoned properties.*

There is no merit in the contention of Mr. Khan that the JVA and GPSA are commercial contracts entered into by respondent No. 3 (BAPEX) and respondent No. 2 (Petrobangla) as corporate entities and therefore these contracts are not sovereign contracts entered into by the State of Bangladesh

which may be subjected to judicial review. We do not agree with these submissions since the JVA and GPSA were clearly executed through the exercise of Executive authority to grant rights over public resources to a private party, respondent No.4. The respondent Nos. 2 and No.3 clearly fall within the definition of "statutory public authority" under Article 152 of the Constitution.

We cannot agree with the submissions that the writ petition is not maintainable due to res judicata effect of the judgment in writ petition No. 6911 of 2005. Res judicata requires uniformity of causes of action and parties. The petition before the Supreme Court of Bangladesh arises from a different cause of action and there is no uniformity of parties. There was no cause of action arising from the corruption and bribery in writ petition No. 6911 of 2005. The parties in the present writ petition are also not the same parties.

As the High Court Division comprising of Mr. Justice A.B.M. Khairul Haque and Mr. Justice A.T.M. Fazle Kabir had observed in Bangladesh Italian Marble Works Limited vs. Government of Bangladesh 62 DLR 70:

> *"It is obvious and apparent that the issues in Writ Petition No. 802 of 1994 and the issues in the present Writ Petition are altogether different. The decision of the Court in Writ Petition No. 802 of 1994 was in respect of the Notification dated 24.5.1977. The Court summarily rejected the petition praying for handing over the concerned property in favour of the petitioner- company. But no Rule was issued and no issue could be said to be finally decided in the said writ petition, either in respect of the aforesaid notification or any of the Martial Law Proclamations etc. and its ratification, confirmation and validation by the Constitution (Fifth Amendment) Act, 1979. Under the circumstances, on both these two grounds, the contention that the present petition is barred under the principle of res judicata, has got no substance".*

Similarly, the apex court in the case of Dr. Syed Matiur Rob vs. Bangladesh, (reported in 42 DLR (AD) (1990) 129) had decided in a civil case the issue of resjudicata and held that:

> *"The previous judgment is no doubt admissible to show the assertion of the petitioner but it cannot bind respondent no. 4 nor the Government in view of the fact that the new issues that have been raised in these cases had no occasion to be considered in the previous proceedings instituted at the instance of a third party where the present appellant himself did not make any assertion as to his status or claim."*

In the case of Begum Khaleda Zia vs. Anti-Corruption Commission 69 DLR AD 181 it has been held:

> *"The High Court Division has come to a finding that it appeared from the confession of co-accused that bribe was given to the then State Minister for Energy and Mineral Resources, AKM Mosarraf Hossain, Selim Bhuiyan and Giasuddin Al Mamun to ensure that the 'JVA' is to be finalized and singed which clearly comes within the ambit of definition of criminal misconduct given in section 5(1) of the Prevention of Corruption Act, 1947. The High Court Division has held that in the instant case, the issue is determination of criminal liability of the writ-petitioner in respect of the alleged offence under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947, that is, criminal breach of trust by public servant and abetment of the offence that took place in the process of executing the 'JVA'. The High Court Division has noted that abetment under section 109 of the Penal Code is such an offence which can be inferred from the conduct of the accused and attending circumstances of the case.*
>
> *This High Court Division correctly held that the present case is quite distinguishable from the other case which was already quashed by the High Court Division."*

Such a view has also been expressed by this Division in the case of M/s. Hyundai Corporation vs. Sumikin Bussan Corporation and others 54 DLR AD 88 in the following manner:

> *".....transparency in the policy/decision making as well as in the functioning of the public bodies is desired, for more than one reasons and particularly in the matter where financial interest of the State is involved transparency of the decision making authority is a recognized matter."*

In light of this background, from the undisputed facts and materials presented, it is clear to us that the writ respondent Nos.4 and 5 were engaged in corruption in procuring their investments and exploration rights in Bangladesh during the period 2003 to 2006. There was corruption not just under the laws of Bangladesh Penal Code but even according to World Bank's own definition of corruption. The World Bank's Integrity Vice Presidency defines corruption as follows: "A corrupt practice is the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Example: A supplier agrees to pay "kickbacks" to a senior government official through an agent it hires as a sub consultant to perform "business development and marketing" services but without any deliverables. This agent is connected to a senior government official who is demanding a "commission" from every bidder as the official has influence over the bid evaluation

committee and can steer the award of the contract to any bidder willing to pay. This supplier builds in the kickback amount as a percentage of the contract value, and pays for it from the funds it receives from the World Bank Group-financed project. Project financing costs are artificially inflated by these practices, and the supplier recovers costs by providing less expensive and lower quality goods. The transactions are result of corrupt practice outright.

In the case of Osimuddin Sarker Vs. State reported in 13 DLR 197/ PLD (Dac) 798, it has been observed:

> *"Section 162-Taking gratification- It is necessary in order to substantiate an offence under section 162 to show that the of being money that was accepted was intended for the purpose paid by way of gratification as a motive or reward for inducing by corrupt or illegal means as public servant but it is not necessary that the gratification must have been intended to be paid to the person who accepted the money. It is sufficient if the person accepting the money knows that the object for which the money is to be used is for the purpose of paying it by way of a gratification as a motive or reward for inducing a public servant."*

The World Bank's definition of corruption does not require a direct payment to a Government official, the same way sections 162-163 the Bangladesh Penal Code does not make

it a requirement that the payment has to be made to a Government official. In this case, the writ respondents No.4 admits that its parent, respondent No.5, agreed to and did pay Mr. Salim Bhuiyan US$ 500,000 for his social and political connections and his ability to arrange meetings with senior government officials in Bangladesh. Mr. Bhuiyan performed these services without any tangible deliverables, other than getting Government approvals for Niko's projects. The admitted payments made to agents and Government officials in Bangladesh were clearly built into the prices of the contracts entered into by writ respondent No.5 through its subsidiaries. The eventual prices to be paid by Bangladeshi consumers for the gas to be supplied by writ respondent No.5 were thus artificially inflated by these corrupt payments, to take into account the fees paid to Niko's on the ground agents and Bangladeshi government officials.

The JVA and GPSA having been procured by corruption would be void under section 23 of the Contract Act as being opposed to "public policy". Bribery and corruption are anathema to the concepts of rule of law and accountability and clearly against the "public policy". Public contracts

procured by corruption are obviously against the "public policy" of Bangladesh.

Now we would like to appreciate relevant academic perspective of the issue. The following observations by Professor Abdullah Al Faruque, a prominent law academic and a scholar of the Human Rights, Energy and Environmental Law, in his article ***'Relationship between Investment Contract and Human Rights: A Developing Countries' Perspective'***, *in: Sharif Bhuyan, Phillip Sands and Nicolach Scriver (eds.) International Law and Developing Countries, Brill Publisher, Leiden (2013) 120-153* is relevant to this context:

> *"Many investment contracts involve essential public service sectors such as water, oil and gas, electricity, transport, waste disposal and telecommunications, which invariably involve a public interest dimension and directly touch on the enjoyment of human rights……Lack of transparency breeds corruption. Corruption in revenue management of natural resources agreements may have corrosive effect on realization of human rights and welfare of the host population("Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices," 24(1) Journal of Energy and Natural Resources Law (2006) 66-103). Corruption increases the costs of investments and disputes arising out of corruption in investment contracts may result in decisions rendering them void or voidable on the ground of violation of international public policy. For instance, in the case of World Duty Free Company Ltd. v. Republic of Kenya, where the tribunal had to decide on the validity of a lease contract, it was held that a private investor had bribed the Kenyan head of state. The arbitrators held that*

the contract was void because it violated "international public policy (ICSID ARB/00/7, para. 138)."

In this context the learned Counsel of the petitioner Mr. Mustafizur Rahman Khan has submitted since the JVA and GPSA has already been performed and gas has already been supplied to writ respondent No. 2, the only option here is to provide restitution to the writ respondent Nos.4 and 5 for the gas supplied. We cannot agree that a party which engages in corruption and illegally procures natural resources belonging to the State, through payments of unlawful gratification to public officials or payments to politically powerful persons for their influence over government officials, can benefit from such illegal conduct or that the courts should assist them in enjoying the fruits of their crimes. It is a well-established legal principle that no one can benefit from one's own wrong. In such a situation we see no scope of offering any restitution or benefit to the writ respondent No.4 or No.5 from the JVA and GPSA which are in fact proceeds of crime and are not contracts which can be protected under the laws of Bangladesh. We are of the view that the JVA and GPSA, being procured through corruption, are contrary to the laws of Bangladesh and cannot be protected by any court of law.

In this context we may again infuse the observations of this Division made in the case of Anti Corruption Commission vs. Mohammad Shahidul Islam and others 68 DLR AD 242:

> *"Corruption by public servants has now reached a monstrous dimension in Bangladesh. Its tentacles have been grappling even the institutions established for the protection of the State. Those must be intercepted and impeded the orderly functions of the public officer, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyze the functioning of such institutions and thereby hinder the democratic polity. Hence, the laws should be so interpreted which would serve the object of the Acts. The founding fathers of the Constitution envisioned the legislators as men of character, rectitude and moral uprightness whose sole object was to serve the public with dedication, to be open, truthful and legal. We are reminded here of the memorable words of* ***H.G. Wells****. He was of the view:*
>
> *"The true strength of rulers and empires lies not in armies or emotions, but in the belief of men that they are inflexibly open and truthful and legal. As soon as a Government departs from that standard, it ceases to be anything more than "the gang in possession" and its days are numbered."*
>
> *Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operative public institution."*

The institutions of the State should not condone bribery and corruption by powerful vested quarters as doing so would be in violation of the general principles of law, justice, equity, and good conscience in view of the judgments in Ekushey Television Ltd. and another vs. Dr. Chowdhury Mahamood Hasan and others 22 BLD (AD) 163. This Division held:

> *"Many in Bangladesh subscribe to the view point that while doing something Bangladesh should always be concerned about the adverse impact it might have on foreign investors in this country. But law has its own way and is inclined to speak in its own language. When money talks judiciary must not balk. Syndicated bridge-financing for the Ekushey Television by some foreign and local banks and the investment by the U.S.A. finance company is neither a contribution to philanthropy nor an effort to do something for the noble cause of free media. It is a simple case of investment, and like every investment the investment in ETV has its own risk. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantive legal principle in this regard is that every person subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle. The submission of Dr. Kamal Hossain is, therefore, bereft of any substance."*

Bangladesh is a party to the United Nations Convention against Corruption (hereinafter referred to as UNCAC). UNCAC require their state parties to enable confiscation of instrumentalities, proceeds, and property of corresponding value to proceeds of convention offences. UNCAC calls for national efforts to criminalize conduct and prevent criminals from gaining profit, the most frequent motivation for the crime. An effective deterrent against corruption is the seizure, confiscation and return of the proceeds of corruption. UNCAC contains elaborate mechanism and procedure for seizure, confiscation and return of assets.

While writing the foreword of this Convention Former Secretary-General of the UN Kofi A. Annan noted that:

> *"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding*

inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."

As a legally binding international anti-corruption agreement, UNCAC provides a comprehensive set implemented by state parties to prevent, combat, and prosecute corruption. On ratification, the UNCAC created legal obligations for Bangladesh and those have to be enforced through the Executive branch and/or the Judiciary of Bangladesh. Thus, Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime, a fundamental principle of the UNCAC. As such all proceeds of crime acquired by the writ respondents No.4 and No.5, through the use of a corrupt scheme, are to be returned to the state of Bangladesh. Article 53 mandates provisions for the direct recovery of corruption assets, including laws permitting private civil causes of action to recover damages owed to victim states and the recognition of a victim state's claim as a legitimate owner of stolen assets. Article 54 of the UNCAC

enunciates mechanisms for recovery of property through international cooperation in confiscation. It requires State Parties to give effect to any confiscation order for corruption proceeds issued in another State Party, and to "consider taking such measures as may be necessary to allow confiscation...without a criminal conviction." We find support for our decision to confiscate the assets of the respondents No.4 and No.5 in the principles laid down in UNCAC.

There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of the Constitution which prevent the State from arbitrarily depriving a subject of his property. It may be noted that according to the Arthur Anderson Report dated 28.09.1997 Niko was the least qualified of all the companies which were competing to get exploration rights to the Block 9 PSC gas fields. Niko Canada (respondent No.5) nonetheless eventually ended up with the same exploration rights in the form of 60% ownership of Block 9 PSC after it had set up the

corrupt scheme during 2003 to 2006. The writ respondent No.5 clearly benefitted from this corrupt scheme. Otherwise, there is no explanation as to how writ respondent No.5, which was found to be the least qualified of seven bidders for the PSC Block 9 in 1997, eventually ended up with obtaining 60% of the exploration rights to the same Block 9. The preponderance of evidence of corruption leads us to the conclusion that but for the corrupt scheme in place the writ respondent No.5 could not have obtained its exploration rights in Bangladesh.

We are of the view that writ respondent No.5 should be deprived of its properties in Bangladesh which they have obtained through bribery and corruption. Writ Respondent No.5 has clearly already benefitted from the crimes committed in the form of exploration and production rights under the JVA, GPSA, and the Block 9 PSC. The value of the benefit obtained by writ respondent No.5 include all direct and indirect payments made to the respondent No.5 in relation to the JVA, GPSA, and the Block 9 PSC. Writ Respondent No.5 unlawfully benefitted by obtaining property of the State through the commission of offences under the Penal Code. The direct and indirect

assets of the writ respondent No. 5 which are within the jurisdiction of Bangladesh and are, thus, subject to seizure and confiscation.

We are mindful that any seizure, confiscation and return of assets leading to the deprivation of property without compensation is to be implemented with great caution. Nonetheless, in this particular situation, our task has been greatly facilitated by the blatant admissions of corruption by both the respondents No.4 and No.5, the evidence of the trail of the corrupt payments uncovered by several international law enforcing agencies working together, and the contracts entered into by Niko which manifestly aim to facilitate corruption of Bangladesh public officials. The consultancy contracts are clear evidence that a corrupt scheme was set up by which regular payments were being made by the respondent No.5 to Bangladesh officials and politically influential people for the business benefits of its subsidiaries in Bangladesh. These manifest and flagrant violations of the laws of Bangladesh render all the investments of the respondent No.5 in Bangladesh tainted by corruption.

We are of the view that there are also a number of public policy reasons for the assets of writ respondents Nos.4 and 5 to be seized, confiscated, and returned to the state of Bangladesh, the ultimate victim of the corruption. The aims of the confiscation are to recover the proceeds of crime, return the assets to the State, deny criminals the use of ill-gotten assets, and deter and disrupt further criminality.

The primary purpose of confiscation of the assets of the writ respondents No.4 and 5 is to prevent them from financially benefitting from the fruits of their illicit actions. This deprivation is an important aspect of the penalty imposed on writ respondents No.4 and No.5 for engaging in corrupt practices in Bangladesh. The confiscation of the assets will also deter others from engaging in similar corruption in keeping with the old adage 'crime does not pay'. It is morally wrong to let the corrupt enjoy their ill-gotten wealth. The corrupt cannot be allowed to live handsomely off the profits of their crimes while millions of law-abiding citizens work hard to earn a living.

The confiscation of the assets of writ respondents No.4 and No.5 is thus important for gaining confidence of the public in the rule of law. The confiscation and return of the assets to the State will result in some form of restorative justice. The people and the state would be able to obtaining at least some financial benefit or compensation from the scourge of the crime of corruption committed by the respondents No.4 and No.5. Hardship and suffering has been inflicted by the respondents No.4 and No.5 on the citizens such as the victims of the 2005 blowouts. The return of the assets to the State would also help to reimburse the State for the human and financial resources expended in fighting and pursuing the corrupt activities of respondents No.4 and No.5. Confiscation of these assets prevents the assets being used to fund further bribery and corruption. Given the culture of corruption within the companies and the scheme of corruption that was set up by the respondent No.4 and No.5, and in light of the audacity with which they have showed in the payments of bribes as normal business practices, there is no guarantee that similar practices would not be attempted again.

Criminals are becoming more and more sophisticated while states such as Bangladesh have to work hard to fight them within the constraints of the limited resources of a developing nation. Corrupt international companies hide behind corporate veils and depend heavily upon the barriers of sovereignty to shield themselves and the evidence of their crimes from detection. Companies such as the respondent No. 4 and No.5 which orchestrate transnational crimes and then disperse and conceal the proceeds of their illicit activities the world over cannot be allowed to continue to act with impunity while committing fraud and corruption. In this particular case, the international community of the law enforcing agencies through mutual legal assistance has managed to uncover the sophisticated corruption scheme of the respondents No.4 and No.5. It has been established that the properties of respondents No.4 and No.5 in Bangladesh were obtained as a result of their general criminal conduct through the setting up of a scheme of corruption. In such a situation, there is a duty upon us to confiscate these assets.

Politically influential persons and Government officials who illegally enrich themselves through the abuse of power, and unscrupulous investors who facilitate such corruption, deprive the State of its property and hinder the economic development of the country. The laws of Bangladesh envisage the creation of a fair and just society in which crime does not pay. The Constitution empowers us with the duty to ensure that this vision is achieved by declaring any ultra vires exercise of Government authority of no legal effect and also declaring void any resultant contract procured through illegal acts such as corruption.

The Agreed Statement in paragraph 2 states that the respondent No. 5 provided the bribes to Bangladesh's State Minister of Energy "in order to further the business objectives of Niko Canada and its subsidiaries". The preponderance of evidence of corruption leads us to conclude that the assets of the respondent No.5 and its subsidiaries in Bangladesh, obtained through the corrupt scheme in place from 2003 to 2006, are to be treated as tainted by corruption and proceeds of crime. As such all the assets of the subsidiaries of No.5 including the

assets and rights under the JVA, assets and rights under the GPSA, and the assets and shareholding interests in Block-9 PSC are attached and seized. These assets of the respondent No.4 and No.5 are being seized as proceeds of crime as well as to provide compensation to the victims of the 2005 blowouts.

In light of the above, it is found that from 2003 till 2006 the writ respondents No.4 and No.5 had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Based on the undisputed facts, the JVA and GPSA have been procured by corruption and thus render them void ab initio. The rights and assets of the writ respondent No.5 in Block 9 PSC, for which writ respondent No.5 was found to be the least qualified of seven bidders in 1997, have also been obtained through this corrupt scheme and are thus being seized and confiscated as proceeds of crime as well as to provide compensation for the 2005 blowouts. All the rights, assets, and property of the writ respondent No. 4 and 5 in Bangladesh, obtained from the State through the corrupt scheme, shall revert back to the State.

In overall review and considering the gravamen of the entire incident which stretched over the years during 2003 to 2006 in particular involving NIKO as the protagonist, can be well perceived in the words of Lord Atkin in the case of Liversidge v Anderson and Another [1942] AC 207; [1941] 3 All ER 338:

> *"In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It be changed, but they speak the same language in war as in peace."*

Now, conceptually it is possible to draw a sharp line that none would be spared, how high so ever, when there is corruption in whatever manner and wherever that has been committed.

Fortified with the discussion as made above and taking into consideration everything we hold that the High Court Division has rightly declared the Joint Venture Agreement for the Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Fields (JVA) dated 16.10.2003 between the writ respondent Nos.3 and 4 to be without lawful authority and of no legal effect and thus, void ab initio and also legally declared the Gas Purchase

and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the writ respondents No.2, as Buyer, and a Joint Venture between the writ respondent Nos.3 and 4, as Seller, to be without lawful authority and of no legal effect and thus, void ab initio and attached the assets of writ respondent Nos.4 and 5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9.

The judgment and order passed by the High Court Division is elaborate, speaking and well composed. Nothing is left unsaid. It is absolutely an excellent pursuit of in-depth scrutiny. We are not inclined to interfere with the same.

Accordingly, the civil petition is dismissed without any order as to costs.

CJ.

J.

J.

J.

The 18th June,2023
Ismail/B.O.word-**