

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique
-Chief Justice

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO.18 OF 2019

WITH

CIVIL APPEAL NOS.19-20 OF 2019

(From the judgment and order dated 17.08.2017 passed by the High Court Division in Writ Petition Nos.11992-11994 of 2016).

Bangladesh Rural Electrification Board (BREB). : **...Appellant.**
(In all the cases)

-Versus-

Bangladesh Energy Regulatory Commission : **...Respondents.**
(BERC), represented by the Chairman, (In all the cases)
Dhaka and others.

For the Appellant. : Mr. Murad Reza, Senior Advocate (with
(In C.A. No.18 of 2019) Mr. Sarwar Ahmed, Senior Advocate and
Mr. Sheikh Mohammad Zakir Hossain,
Advocate) instructed by Mr. M. Ashraf-
uz-Zaman Khan, Advocate-on-Record.

For the Appellant. : Mr. Fida M. Kamal, Senior Advocate (With
(In C.A. No.19 of 2019) Mr. K. S. Salahuddin Ahmed, Advocate and
Mr. Sheikh Mohammad Zakir Hossain,
Advocate) instructed by Mr. M. Ashraf-
uz-Zaman Khan, Advocate-on-Record.

For the Appellant. : Mr. Mohammad Mehedi Hassan Chowdhury,
(In C.A. No.20 of 2019) Senior Advocate (With Mr. Sheikh
Mohammad Zakir Hossain, Advocate and
Mr. Reja-E-Rabbi Khandokar, Advocate)
instructed by Mr. M. Ashraf-uz-Zaman
Khan, Advocate-on-Record.

For Respondent No.3. : Mr. Probir Neogi, Senior Advocate
(In C.A. No.18 of 2019) instructed by Mr. Bivash Chandra
Biswas, Advocate-on-Record.

For Respondent No.3. : Mr. Tanjib-ul-Alam, Senior Advocate
(In C.A. No.19 of 2019) instructed by Mr. Bivash Chandra
Biswas, Advocate-on-Record.

For Respondent No.3. : Mr. Rokanuddin Mahmud, Senior Advocate
(In C.A. No.20 of 2019) (With Mr. Mostafizur Rahman Khan, Advocate) instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent No.4. : Mr. Sk. Md. Morshed, Additional
(In all the cases) Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

For Respondent Nos.1-2. : Not represented.
(In all the cases)

Date of Hearing. : The 25th & 26th October, 2022, 1st,
2nd and 8th November, 2022.

Date of Judgment. : The 9th March, 2023.

J U D G M E N T

Borhanuddin,J: Since these civil appeals involve identical point of law based on similar facts, other than the amount claimed and name of the projects, as such all are taken together for hearing and disposed of by this common judgment.

Aforementioned civil appeals by leave are directed against the judgment and order dated 17.08.2017 passed by the High Court Division in Writ Petition No.11992 of 2016 alongwith Writ Petition Nos.11993 and 11994 of 2016 discharging all the Rules issued in the aforementioned 3(three) writ petitions.

Facts leading to disposal of the civil appeals, in brief, are that the appellant herein as petitioner

preferred 3(three) writ petitions impugning (i) Power Purchase Agreement (PPA) dated 10.02.2000 between the petitioner and writ-respondent no.3 Summit Power Limited (SPL) (ii) Supplementary PPA-2 dated 20.03.2006 between the petitioner and writ-respondent no.3, (iii) decision dated 05.01.2016 passed by the writ-respondent no.1 in Arbitration Review Petition No.1 of 2015 and (iv) Arbitration Award dated 11.08.2015 passed by the writ-respondent no.2 in Arbitration Case No.1 of 2013 which was approved by the Bangladesh Energy Regulatory Commission (BERC) on 23.09.2015 and obtained separate Rule Nisi.

Petitioner's case is that in furtherance of the Private Sector Generation Policy of Bangladesh 1996, 03(three) Power Purchase Agreements (hereinafter referred to as 'PPA') were signed between the petitioner and Summit Power Ltd, (hereinafter referred to as 'SPL') the respondent no.3, all dated 10.02.2000, to build, own and operate three Power Generation Complexes at (i) Ashulia, Savar, Dhaka, (ii) Madhabdi, Narshingdi and (iii) Kutumbpur, Chandina, Cumilla for production of 11 MW

Electrical Power Project based on gas; The SPL wishes to sell all net Electrical Output to the Bangladesh Rural Electrification Board (BREB) (the writ-petitioner) and the petitioner wishes to purchase the same from SPL for Palli Bidyut Samity (hereinafter referred to as 'PBS'); The parties entered into the aforesaid agreements which are solicited through tender procedure; In the mentioned PPA the tariff has been fixed in accordance with provisions of the Government Policy i.e. Private Sector Power Generation Policy, 1996 (hereinafter referred to as 'PSPGP'); In persistence of the said PPA the parties entered into three Implementation Agreements all dated 20.03.2006 relating to additional power generation complexes at the aforesaid places of 23 MW capacity; The said contract is a supplemental contract to the earlier power purchase agreement between the same parties; Thereafter, in view of the increased demand for power consumption in the country, three additional agreements i.e. three Supplemental PPA-2 (hereinafter referred to as 'the Contract') all dated 20.03.2006 were entered into between the petitioner and SPL for production of

additional electricity based on gas and as such, the context of the Substantive PPA Agreements are relevant and are to be regarded as collateral and consequential to the said contract for construing and interpreting the terms of the Contract; Since the expanded complexes started commercial operation, the SPL has been raising invoices as the Agreed Tariff (AT) of the Bulk Supply Tariff (BST), which is determined by the BERC from time to time, minus Tk.0.03/KWH; The first BST rate after entering into the contract was Tk.2.05/KWH; Hence the petitioner (BREB) had to pay Tk.2.02/KWH and continued the payment at the BST rate as fixed on 01.08.2011 which was Tk.2.8686/KWH i.e. the BREB is paying at the rate of Tk.2.8386/KWH; Now the BST rate is Tk.4.23/KWH; But the respondent no.3 SPL sent invoice for the month of June, 2010 at the tariff of 2.508/KWH while BST Tariff was 2.538/KWH and also sent invoice for the month of July, 2016 at the tariff of Tk.4.5091/KWH; Under such circumstances, the petitioner on several occasions informed the SPL that they were under instruction from the administrative Ministry not to pay any inflated

tariff in proportion to the several instances of increased BST despite the fact that during the material time in question the price of gas has not inflated nor has the production cost of electricity by gas got higher due to any impediment; The petitioner on several occasions invited the SPL to hold discussions about the present dispute and reach a settlement as to the tariff payable to the claimant under the Contract based on gas; Subsequently, on 13.08.2012 the SPL sent a notice to the BREB demanding dues whereupon the BREB, the petitioner, informed the Ministry regarding the same vide letter dated 11.11.2012 pursuant to which the Ministry by letter dated 02.06.2013 instructed the BREB to negotiate a new tariff regarding the disputed plant based on 'Indicative Benchmark Bulk Tariff' for 'Gas Based Commercial Independent Power Producer' as issued by the BERC which is Tk.2.90901/KWH; Accordingly the petitioner took steps to settle the matter and informed the SPL of the same vide letter dated 13.06.2013. But the SPL declined to recognize the fundamental basis for the construction and interpretation of the term 'Agreed Tariff' (AT); After

exchange of few correspondences respondent no.3 Summit (SPL) invoked arbitration proceeding under Section 40 of the Bangladesh Energy Regulatory Commission Act, 2003 claiming the outstanding amount alongwith the interest as per terms of the contract; The respondent BERC accordingly constituted an Arbitral Tribunal, who, upon determination of 7(seven) points passed an award dated 11.08.2015 infavour of the respondent no.3 Summit (SPL); The petitioner, BREB, thereafter preferred a review petition against the Award dated 11.08.2015 before the BERC under Regulation 22 of the Bangladesh Energy Regulatory Commission (BERC) Dispute Settlement Regulation, 2014; After hearing the parties the review petition was rejected by order dated 05.01.2016 holding that:

"all the issues as contained in the review petition are adequately addressed in the Award that was earlier approved by the Commission. The Tribunal addressed all the issues of the present review petition. Therefore, the review petition of Bangladesh Rural Electrification Board (BREB) placed before the Commission is rejected."

Under such circumstance, the present petitioner, BREB, impleading 3(three) respondents and one proforma respondent moved the High Court Division in the above mentioned writ petitions invoking Article 102 of the Constitution impugning the aforesaid contracts, the Award and the decision of the Commission in review and obtained 3(three) separate Rule Nisi.

The writ-respondent no.3 opposed the Rule by filing an affidavit-in-opposition, contending interalia, that the reliefs sought by the petitioner are not justiciable in an application under Article 102 of Constitution inasmuch as the petitioner prayed for declaration to the effect that the agreements between the petitioner and respondent no.3 namely Power Purchase Agreement dated 10.02.2000 and Supplemental Power Purchase Agreement (PPA-2) dated 20.03.2006 and an arbitration award passed by the Arbitral Tribunal constituted by the writ-respondent no.1 are illegal and without lawful authority, but the issues contained in the prayer portion of the writ petitions are purely commercial disputes for which there are separate forum and the legality, validity or

enforceability of the said contracts can only be adjudicated by arbitration as contemplated in the respective agreements; The contract i.e. the Supplemental PPA-2 dated 20.03.2006 executed between the petitioner and writ-respondent no.3 is an independent power purchase agreement as solemnly executed commercial contract entered into by the competent party after the same being approved by the Government and any terms of it cannot be waived, modified or altered unilaterally by one of the parties on the dictation of the superior authority; The contract, amongst others, deals with the Tariff in Effect of the Expanded Complex replaces the relevant commercial price of the Substantive PPA by calculating Tariff in Effect on the basis of 'Agreed Tariff' expressed in Taka per kilowatt-hour (Tk/KWH); The 'Agreed Tariff' is defined and stipulated as BST minus Tk.0.03; BST or Bulk Supply Tariff is also defined in the Contract specifically to mean the Bulk Supply Tariff (Tk/KWH) in effect for the Billing Month; While making payment against the invoice for the month of November, 2011, the petitioner declined to pay the contractual amount as

invoiced by the respondent no.3 and paid an amount which is substantially lower than the invoice as per the Contract without informing respondent the reasons for deduction; After repeated requests and reminders, by a letter dated 30.04.2012 the BREB informed the respondent that they were directed by the Ministry of Power, Energy and Mineral Resources not to give effect to the Bulk Supply Tariff as prevailing at the time in calculating Agreed Tariff; The respondent no.3 replied vide letter dated 14.05.2012 that there was no scope to vary or modify the 'Agreed Tariff' on the basis of direction of the Ministry or otherwise but BREB did not reply; Thereafter the respondent no.3 caused a legal notice to be served upon the petitioner on 12.03.2013 demanding payment of outstanding dues but without any response; Then the respondent no.3 invoked the arbitration proceeding as per the provision of Section 40 of the Bangladesh Energy Regulatory Commission Act, 2003 and the regulations framed thereunder; The Arbitral Tribunal constituted by the Bangladesh Energy Regulatory Commission (hereinafter referred to as 'Commission')

after hearing the parties passed an award directing BREB to pay as per terms and conditions of the Contract; The award was approved by the BERC on 23.09.2015 and being aggrieved the petitioner filed an application for review before the Commission and upon hearing, the Commission has been pleased to reject the application for review and uphold the award passed by the Tribunal and as such the Rule is liable to be discharged.

A Division Bench of the High Court Division upon hearing the parties and on perusal of the materials on record, discharged all the Rules by the impugned judgment and order dated 17.08.2017.

Being aggrieved by the said judgment and order of the High Court Division, the writ-petitioner BREB, filed three Civil Petitions for Leave to Appeal Nos.1223-1225 of 2018 before this Division invoking Article 103 of the Constitution.

After hearing the learned Advocates for the respective parties, leave was granted by this Division vide order dated 01.11.2018.

Consequently, these civil appeals arose.

Mr. Fida M. Kamal, learned Advocate appearing for the appellant in Civil Appeal No.19 of 2019 submits that pursuant to the Private Sector Power Generation Policy of Bangladesh, 1996, revised in 2004, (Policy) and on the basis of Public Private Partnership (PPP) 3(three) agreements were executed on 10.02.2000 for power purchase (Power Purchase Agreement) and to meet the enhanced demand of electricity in rural areas 3(three) Supplemental PPA-2 were made by the parties in respect of 3(three) expanded complex of the site in the year 2006 determining conditions/clauses containing an '*Mutatis Mutandis*' proviso which has the effect of incorporating the terms and conditions of the Substantive PPA dated 10.02.2000 that clearly manifests the '*Supplemental Agreement*' is not a separate and Independent Commercial Contract rather the '*Supplemental Agreement*' was only extension of the Substantive PPA dated 10.02.2000. He also submits that in the Supplemental Power Purchase Agreement (PPA-2) there is no provision for arbitration as such the Arbitration Clause No.15.3 of the Substantive

Power Purchase Agreement shall prevail which is apparent from the proviso of Sections 40(1) and 27(3) of BERC Act, 2003 and as such Arbitral Tribunal constituted by the BERC had no jurisdiction to arbitrate the dispute according to BERC Dispute Settlement Regulation, 2014 and the arbitration, if any, should have proceeded according to the Rules of Arbitration of the International Chamber of Commerce (ICC Rules) in Dhaka and/or Singapore as such the award passed by the Arbitral Tribunal in Arbitration Case No.01 of 2013 is liable to be declared without lawful authority. He next submits that in Substantive Power Purchase Agreement of 2000, the rate of electricity was Tk.1.65 per KW/H which was increased up to Tk.2.12 per KW/H in the year 2005 and the said contract has been extended in the year 2018 for 5 years at the rate of Tk.2.95 per KW/H but the respondent no.3 according to the formula of BST minus Tk.0.03 now asking Tk.4.33 per KW/H using the same complex as per Land Lease Agreement and using uninterrupted gas supplied by the Government as well as reaping other benefits which is not only unjust but also tantamounts to unjust enrichment as such the

agreements are liable to be declared without lawful authority. He lastly submits that the Supplemental Power Purchase Agreement (PPA-2) is not an Ordinary Commercial Contract inasmuch as generation of electricity is a sovereign function as per allocation of business amongst the different Ministries and the said function is being performed by the respondent no.3 SPL as an agent of the Government and also reaping other benefits executing Land Lease Agreement and Implementation Agreement with the Government and as such the agreements cannot be termed as commercial contract considering the entire facts and circumstance.

Mr. Murad Reza, learned Advocate appearing for the appellant in Civil Appeal No.18 of 2019 submits that the provisions of 1996 policy as well as the Substantive PPA of 2000 were drafted by keeping consistency with the International Power Purchase Agreement and as such by replacing the Standard Tariff described under the 1996 policy and agreed upon in Substantive PPA of 2000, incorporation of *'Agreed Tariff BST minus Tk.0.03 at the relevant billing month'* in the Supplementary PPA-2

requires exclusion being a foreign object and should be replaced accordingly for effective protection of the parties. He also submits that the term BST minus Tk.0.03 is ultra-vires as it goes against public policy and public interest. He next submits that the Supplemental PPA-2 is not a separate and independent commercial contract that would transpire from Clauses 1.3, III, IV, V, IX, XII etc of the Supplemental PPA-2 which clearly shows that the Supplemental Power Purchase Agreement (PPA-2) is a continuation of the substantive agreement. He further submits that pursuant to Sections 24 and 25 of BERC Act, 2003 Government have the following power:

'the Government shall have the power of giving policy directives for the development and overall planning in energy sector'

and in that view of the matter, it is the Government i.e. the Ministry has got exclusive power to give any policy directive which is binding upon the BERC and all the parties thereto and as such BERC exceeded its jurisdiction in giving the award in question ignoring the directives of the Ministry. He again submits that pursuant to proviso of Section 40(1) of the BERC Act,

2003 the provision for ICC arbitration as stipulated in Clause 15.3 of the Substantive Agreement shall apply in absence of any provision for arbitration in the Supplemental PPA-2 in this matter and thus the arbitral proceeding and the arbitration award are liable to be declared without lawful authority. He next submits that Section 40(4) of the BERC Act, 2003 requires that the award passed by the Arbitration Tribunal constituted by BERC is to be approved by the Commission (BERC) and therefore the process before the BERC cannot, under any circumstances, be equated with an Arbitration Proceedings initiated under the general principles of Arbitration as such the Arbitral Proceeding and the award given by the Arbitration Tribunal constitute by BERC is liable to be declared without lawful authority.

Mr. Mohammad Mehedi Hassan Chowdhury, learned Advocate appearing for the appellant in Civil Appeal No.20 of 2019 submits that in Clause XII(a) of the Supplemental PPA-2 contains an '*Mutatis Mutandis*' proviso which has the effect of incorporating the terms and conditions of the Substantive PPA dated 10.02.2000 albeit

subject to excluding the terms and conditions which have been modified and/or altered under the Supplemental PPA-2 and since the disputed Supplemental PPA-2 does not contain any Arbitration Clause in it, the provisions contained in Clause 15.3 of the Substantive PPA dated 10.02.2000 would be applicable in respect of the disputed Supplemental PPA-2 that any dispute arising out of or in connection with the Supplemental PPA-2 shall finally be settled by Arbitration under the ICC Rules and as such the jurisdiction invoked by respondent no.3 SPL under Section 40 of the BERC Act, 2003 is liable to be declared without lawful authority. He again submits that the jurisdiction of BERC can only be invoked in respect of dispute between licensee or licensees and consumers as per Section 40 of the BERC Act, 2003 but the Supplemental PPA-2 executed by the Bangladesh Rural Electrification Board (BREB) and Summit Power Limited (SPL) cannot be looked into in isolation, since the same is backed by the Substantive Power Purchase Agreement, the Implementation Agreement (executed by the Government with SPL) as well as the Land Lease Agreement as such state of affairs

becomes apparent upon perusal of Sub-Clause (e) to Clause XIII: Fuel Supply and Delivery to the Supplemental PPA-2 which absorbs the guarantee offered to SPL, as contained under Clause V(a) to the Implementation Agreement and therefore the BERC is ousted from exercising its jurisdiction in respect of the present dispute due to the legal bar imposed vide Section 40(1) of the BERC Act, 2003 (refrain from adjudicating contracts of statutory nature) and as such the arbitration proceeding as well as the award passed by the Arbitral Tribunal constituted by the BERC is liable to be declared without lawful authority. He further submits that the SPL after executing and reaping all the benefits from the Government cannot misinterpret Clause 15.4 of the Substantive Power Purchase Agreement of 2000 that the contract is a purely commercial contract and the disputed Clause of BST minus Tk.0.03 is binding upon the parties with an ulterior motive for unjust enrichment by the then concerned official of BREB who later on awarded by SPL appointed as its Managing Director and as such this particular Clause should be struck-out by replacing the

same with an appropriate Clause in light of the policy of 1996 as well as the Substantive Power Purchase Agreement of 2000.

Mr. Sk. Md. Morshed, learned Additional Attorney General appearing for the respondent no.4 Government of the People's Republic of Bangladesh, represented by the Secretary, Power Division, Ministry of Power, Energy and Mineral Resources in support of the Appellant's case submits that incorporation of the term 'Agreed Tariff' BST minus Tk.0.03 at the relevant billing month, (disputed term) in the Supplemental PPA-2 clearly stands in violation of the provisions of not only the Private Sector Power Generation Policy of Bangladesh, 1996 but also Clause 1(c) of the Implementation Agreement (IA) as well as Article X of the Substantive Power Purchase Agreement and the term incorporated into the agreement by SPL through misrepresentation with a view to make unjust enrichment and also allows SPL to produce electricity by using natural gas in return such steep rate from state oriented institution like BREB which is undoubtedly an 'unfair term' and liable to be struck-out. He also

submits that the disputed BST minus Tk.0.03 rate cannot be applied in respect of the Supplemental PPA-2 because the SPL is enjoying various facilities under contracts of the Substantive PPA as well as the Implementation Agreement (IA) which offers exemption from VAT and Tax including Customs duty and receiving uninterrupted supply of gas at the lower rate available and as such allowing the SPL to charge at the rate of disputed BST minus Tk.0.03 in respect of the Supplemental PPA-2 is to endorsing it to get undue benefit tentamounts to unjust enrichment. He next submits that the SPL after reaping all the benefits under the substantive contracts executed with the Government cannot offer misinterpretation to the effect that the disputed term in Supplemental PPA-2 is binding on the parties as it is an independent commercial contract entered into by a statutory authority in its own capacity and whereas the Supplemental PPA-2 of 2006 in its title contains the term 'Supplemental' being executed without any tender being called upon (in an unsolicited manner) coupled with the several terms/clauses contained therein referred to the Substantive PPA of 2000 and as

such the Supplemental PPA-2 of 2006 is only the extension of the Substantive PPA of 2000. He further submits that the Supplemental PPA-2 dated 20.03.2006 in its Clause XII: other provisions; at Sub-Clause(a) contains an 'Mutatis Mutandis' proviso which has the effect of incorporating the terms and conditions of the Substantive PPA and since the Supplemental PPA-2 does not contain any arbitration clause in it and therefore the provision of Clause 15.3 of the Substantive PPA termed 'Arbitration' would also be applicable and therein Sub-Clause(a) to said Clause 15.3 stipulates that any dispute arising out of or in connection with this agreement:

"shall finally be settled by Arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC Rules)"

and therefore BERC is ousted from exercising its jurisdiction in respect of the present dispute due to the legal bar imposed vide Section 27(3) read with Section 40(1) of the Act, 2003.

On the contrary Mr. Probir Neogi, learned Advocate appearing for the respondent no.3 in Civil Appeal No.18

of 2019 submits that the purpose and objectives of BERC Act, 2003 being the establishment of an Independent and Impartial Regulatory Commission for the energy sector, the Government cannot have power and jurisdiction to dictate the Commission and to change/alter/modify the Commission's decision and as such the plea of BREB is legally unacceptable that they have stopped payment in terms of the contract under the direction of the Ministry, though BREB is a party to the contract, not the Government. He also submits that the Supplemental PPA-2 entered on March, 2006 is a complete, self-contained and full-fledged new agreement in view of the stipulations of Clause XII(a) which unambiguously makes it clear that Substantive PPA of 2000 and Supplemental PPA-2 are totally two different and distinct contracts. Regarding jurisdiction, learned Advocate submits that a plain reading of the proviso to Section 40(1) of the BERC Act, 2003 clearly shows that the settlement of the disputes arising out of a contract, executed before the Act came into force but in the instant case dispute relating to refusal of BREB to make payment as per 'Agreed Tariff' of

BST minus Tk.0.03 arises out of Supplemental PPA-2 which was executed after the BERC Act, 2003 came into force as such appellant's contention regarding maintainability of the arbitration held by BERC is not sustainable in law. He next submits that the writ petition was not maintainable in respect of the prayers to declare illegal (i) the Substantive PPA of 2000 executed between the petitioner and respondent no.3 and (ii) Supplemental PPA-2 of 2006 between the petitioner and respondent no.3 in view of Sections 35 and 36 of the Specific Relief Act contemplating the provisions for rescission of contract. He further submits that the appellant after submitting to the jurisdiction of statutory arbitration of BERC under Section 40 of the BERC Act, 2003 and after filing and losing a review under Regulation 22 of the Bangladesh Energy Regulatory Commission Dispute Settlement Regulation, 2014 cannot question the legality of the arbitration proceeding as well as 'award' given by the Arbitral Tribunal constituted under the BERC Act. He lastly submits that BREB being a statutory body established by a statute cannot escape its contractual

obligation to make payment taking plea of Government's order.

Mr. Tanjib-ul-Alom, learned Advocate appearing for the respondent no.3 in Civil Appeal No.19 of 2019 submits that the Substantive PPA of 2000 and Supplemental PPA-2 of 2006 are two Independent Agreement inasmuch as the terms of the agreements would not be possible to be interpreted to operate the two independent complexes i.e. the 10 MW complex and expanded complex for 18 MW. He also submits that the use of the word '*Mutatis Mutandis*' reinforces the fact that these are separate agreements inasmuch as if the Supplemental PPA-2 was part of the Substantive PPA, then the phrase '*Mutatis Mutandis*' would not have been necessary to use which is evident from the fact that the Supplemental PPA-1 did not include the Clause of '*Mutatis Mutandis*' because it amended certain terms relating to O&M contract of the 10 MW complex overriding the terms of the Substantives PPA and formed part and parcel of the same. He next submits that in the instant case a contract entered into by the Government as a sovereign and by referring a decision of this Division

he submits that if the contract is entered into by the Government in the capacity as sovereign then writ jurisdiction can be invoked for breach of such contract, inasmuch as Constitution gives the power directing a person performing any function in connection with the affairs of the Republic or making of an order that any acts done or preceding taken by a person performing function in connection with the affairs of the Republic then he can invoke the jurisdiction. He lastly submits that appellant now trying to make out a case that the Supplemental PPA-2 obtained through undue influence but this allegation has been brought by the appellant for the first time in the supplementary concise statement and as such this plea is not maintainable at this stage.

Mr. Rokanuddin Mahmud with Mr. Mustafizur Rahman, learned Advocates appearing for the respondent no.3 in Civil Appeal No.20 of 2019 adopting the submissions made by the learned Advocate for the respondent no.3 in Civil Appeal No.18 of 2019 submits that the phrase '*Mutatis Mutandis*' is used within contracts to incorporate terms and conditions from one agreement into a different and

separate agreement and as such the use of the phrase in Supplemental PPA-2 reinforces the fact that the Substantive PPA of 2000 and Supplemental PPA-2 of 2006 are separate agreements, if the Supplemental PPA-2 was part of the Substantive PPA of 2000 then the phrase '*Mutatis Mutandis*' would not have been used and the independent character of the two agreement can also be seen from the fact that Substantive PPA expired in 2018 (and subsequently renewed) but such expiry did not have any bearing on the Supplemental PPA-2 which did not expire but continued. He further submits that the appellant is barred by the doctrine of waiver, acquiescence and estoppel from raising any objection as to jurisdiction of the Arbitral Tribunal constituted by BEREC at this belated stage inasmuch as by participating in the proceeding of Arbitration Tribunal the appellant has consented to the proceeding by conduct and it is settled that any objection regarding jurisdiction is required to be taken at the earliest possible opportunity and certainly not after the award has been passed.

Heard the learned Advocate for the respective parties and perused the papers/documents contained in the paper books.

The appellant herein as writ-petitioner invoked Article 102 of the Constitution praying for declaration that the (i) Power Purchase Agreement (PPA) dated 10.02.2000, between the writ-petitioner and writ-respondent no.3 Summit Power Limited (SPL) (ii) Supplemental PPA-2 dated 20.03.2006, between the writ-petitioner and writ-respondent SPL (iii) arbitration award dated 11.08.2015 passed by the writ-respondent no.2 in Arbitration Case No.1 of 2013 which was approved by the Bangladesh Energy Regulatory Commission (BERC) on 23.09.2015 and (iv) decision dated 05.01.2016 passed by the writ-respondent no.1 in Arbitration Review Petition No.1 of 2015.

It appears that the Substantive PPA and Supplemental PPA-2 executed on 10.02.2000 and 20.03.2006 respectively are acted upon. It may be mentioned here that on the date of execution of Substantive Power Purchase Agreement, two more agreements, namely, Land Lease Agreement and

Implementation Agreement were also executed. Power Purchase Agreement and Land Lease Agreement were executed between the writ-petitioner and writ-respondent no.3 and the Implementation Agreement on the very same date executed between the writ-respondent no.4 Government of Bangladesh and writ-respondent no.3. These agreements, therefore, are all linked contracts and by these contracts necessary equipments were imported from abroad by the SPL and released the same by receiving fiscal benefits, concessions, financial arrangement, guarantee and other benefits under the Implementation Agreement.

Thereafter, the SPL commenced operation by using gas at the lowest rate available supplied by the Government and the writ-petitioner purchased the electricity from the SPL as per Substantive PPA of 2000. To meet the increased demand of electricity, the BREB and the SPL executed 3(three) Supplemental Agreements known as Supplemental PPA-2, which are subject matter of these appeals, containing the clause of BST minus (Bulk Supply Tariff) Tk.0.03/KWH which was not in the Substantive PPA of 2000. When the SPL demanding higher tariff taking the

advantage of the clause, dispute arose between the parties. The writ-petitioner informed the matter to the concern Ministry and the Ministry asked the writ-petitioner to stop payment on the basis of the 'Clause' and asked the petitioner to negotiate with the SPL to determine a new Tariff based on '*Indicative Bench Mark Bulk Tariff for Gas Based Power Producer*' but the SPL was reluctant to negotiate as proposed and invoked arbitration proceeding under Section 40 of the Bangladesh Energy Regulatory Commission Act, 2003 claiming the outstanding amount alongwith interest. The BERC constituted an Arbitral Tribunal and upon determination of points passed an award dated 11.08.2015 infavour of the SPL. The writ-petitioner preferred a review petition against the award before the BERC under Regulation 22 of the Bangladesh Energy Regulatory Commission (BERC) Dispute Settlement Regulation, 2014. Upon hearing, the review petition was rejected vide order dated 05.01.2016.

We have gone through the Substantive PPA of 2000 wherefrom it appears that in the agreement there is a chapter under Article XIII regarding 'Termination' of the

agreement by which both the parties of the agreement can terminate the agreement by giving notice to the other party. It may be mentioned here that the disputed Supplemental PPA-2 dated 20.03.2006 in its 'Clause XII: other provisions', at Sub-Clause(a), contains an '*Mutatis Mutandis*' proviso which has the effect of incorporating the terms and conditions of the Substantive PPA dated 10.02.2000 and since the disputed Supplemental PPA-2 does not contain any termination clause in it as such the provision contained under Article XIII of the Substantive PPA would be applicable for terminating the agreement by the parties. Since there is a termination clause in the Substantive Agreement which is also applicable for the Supplemental PPA-2, the writ-petitioner can take recourse of the same. Article 102 of the Constitution empowers High Court Division to issue certain order and directions, etc. where there is no other equally efficacious remedy.

As it is stated above the Supplemental PPA-2 dated 20.03.2006 in its 'Clause XII: other provisions', and Sub-Clause(a) contains an '*Mutatis Mutandis*' proviso that

has the effect of incorporating the terms and conditions of the Substantive PPA dated 10.02.2000 and since the disputed Supplemental PPA-2 does not contain any arbitration clause in it and therefore the provision contained under Clause 15.3 the Substantive PPA dated 10.02.2000 termed 'Arbitration' would be applicable and therein Sub-Clause(a) to said Clause 15.3 stipulate that any dispute arising out of or in connection with this agreement:

"shall finally be settled by arbitration under the Rules of arbitration of the International Chamber of Commerce (ICC Rules)"

and therefore BERC had no jurisdiction to adjudicate the present dispute. The relevant provision contained in Clause 15.3 of the Substantive Agreement 2000 regarding arbitration is reproduced below:

"15.3 Arbitration

(a) Subject to other provisions of this Section 15.3, any dispute arising out of or in connection with this agreement and not resolved following the procedures described in Sections 15.1 and 15.2 shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules') by one or more

arbitrators appointed in accordance with the ICC Rules.

- (b) Any arbitration shall be conducted in Dhaka, Bangladesh, and unless otherwise agreed by the parties, the number of arbitrators shall be one; provided, however, that if a party desires that the arbitration be conducted outside of Bangladesh, the arbitration shall be conducted in Singapore and the company shall pay all costs of the arbitration as and when incurred by REB, including the out of pocket costs of the arbitration of both parties in excess of the costs that would have been otherwise incurred by REB had the arbitration been conducted in Dhaka, Bangladesh. The arbitrator shall resolve any disputes as to whether a costs would have been incurred in connection with the arbitration in Dhaka, Bangladesh (the 'Base Costs') or was associated with the removal to Singapore (the 'Incremental Costs'). The arbitrator may order that REB bear its own Incremental Costs in part or in full if he finds that REB's claim or defense in the arbitration was spurious and without any merit whatsoever, and REB shall pay the amount ordered; provided, however, that if a matter in dispute involves a sum of ten million dollars (\$10,000,000) or more, or the validity or enforceability of this agreement, or the termination of this agreement, arbitration shall, unless otherwise agreed by the parties, be conducted in Singapore, and, in such case, each party shall pay its own costs of

arbitration as and when incurred, unless such costs are ordered by the arbitrator to be paid by one party, in which case they shall be paid by such party.

(c) No arbitrator appointed pursuant to this Section 15.3 shall be a national of the jurisdiction of either party or any shareholder or group of shareholders owning directly or indirectly ten percent (10%) or more of the Ordinary Share Capital or of Bangladesh, the United Kingdom, the United States, nor shall any such arbitrator be an employee or agent or former employee or agent of the company or any such person.

(d) Each party hereby agrees to be bound by any final decision or award of any arbitrator(s) duly appointed under this agreement."

(Emphasis supplied)

While considering the question whether the arbitral procedure prescribed in the agreement for reference to a named arbitrator can be ignored, it is also necessary to keep in view of Section 43 of the Arbitration Act, 2001 which provides that an arbitral award may be set aside by the court if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. The legislative intent is that the parties should abide by the terms of the arbitration agreement if the arbitration agreement provides for

arbitration by a named Arbitrator, the court should normally give effect to the provisions of the arbitration agreement.

The term 'jurisdiction' is a term of art; it is an expression used in a variety of senses and draws colour from its context. Therefore, to confine the term 'jurisdiction' to its conventional and narrow meaning would be contrary to the well settled interpretation of the term. The expression 'jurisdiction', as stated in Halsbury's Laws of England, Volume 10, Paragraph 314, is as follows:

"Meaning of 'Jurisdiction': By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means."

Again, in American jurisprudence, Volume 32A, Paragraph 581, it is said that:

"Jurisdiction is the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to

declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause."

The Supreme Court of India, in the case of *S.B.P. and Co. vs. Patel Engineering Ltd. and ors.*, reported in (2005) 8 SCC 618, observed that:

"An arbitral tribunal so constituted, in terms of Section 16 of the Arbitration and Conciliation Act, 1996 has the right to decide whether it has jurisdiction to proceed with the arbitration, whether there was any agreement between the parties and the other matters referred to therein."

Furthermore, as per the provision of Section 44 of the Arbitration Act, 2001 the award passed by Arbitral Tribunal shall be enforceable under the Code of Civil Procedure in the manner as if it were a decree of the Court. For better understanding, Section 44 of the said Act is reproduced below:

44. Enforcement of arbitral award- *Where the time for making an application to set aside the arbitral award under Section 42 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the Court."*

The Supreme Court of India, in the case of *Foreshore Co-operative Housing Society Limited and others vs. Praveen D. Desai and others*, reported in (2015) 6 SCC 412, observed that:

"It is well settled that essentially the jurisdiction is an authority to decide a given case one way or the other. Further, even though no party has raised objection with regard to jurisdiction of the court, the court has power to determine its own jurisdiction. In other words, in a case where the Court has no jurisdiction; it cannot confer upon it by consent or waiver of the parties."

In the case of *Md. Selim Hossain vs. Shahabuddin Ahmed and others*, reported in 11 ADC (2014) 291, this Division held:

"mere failure to raise objection as to the jurisdiction of a Court to hear and try a suit or a case or in other words, mere surrendering to the jurisdiction of a Court jurisdiction cannot be conferred to a Court if it is found that the Court which heard or disposed of the suit or the case had no jurisdiction to hear such suit or case as the case may be. Because the decree or order passed by a Court without jurisdiction is a nullity and such nullity, in no way is curable or immune from being challenged. So, in the instant case, if the writ-petitioner

failed to take any objection against the disposal of the suit by the Artha Rin Adalat, the decree passed therein shall not get the seal of validity or shall not be immuned from attack or being challenged."

In the case of *Hiscox vs. Outhwaite*, reported in (1991) 2 Lloyd's Law Reports 1, it is stated:

"No act of the parties can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body. Nor again can a party submit to, so as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing. The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: The Supreme Court may by statute, lack of jurisdiction to deal with a particular matter - in this case matters including superannuation claims under Section 8 but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not)."

Thus, it is the settled principle of law laid down the Apex Court of various jurisdictions including our jurisdiction by a long line of decisions that the

question of jurisdiction cannot be conferred to a court/tribunal if it is found that the court/tribunal has no jurisdiction to try the suit/case as the case may be.

The Substantive PPA and the Supplemental PPA-2 originated from the Private Sector Power Generation Policy of Bangladesh, 1996 and the subsequent Land Lease Agreement and Implementation Agreements executed between the Government and SPL which are indeed sovereign contracts and the Supplemental PPA-2 originated therefrom cannot be termed as commercial contract. Further it would transpired from the perusal of Supplemental PPA-2 that different clauses of the agreement referred to the Substantive PPA in various ways, and as such it is clear that the Supplemental Power Purchase Agreement-2 is a continuation of the Substantive PPA of 2000 and it is not a fresh contract.

Considering the discussions made above, we are of the view that the Arbitral Tribunal constituted by the BERC had no jurisdiction to arbitrate the dispute referred by the SPL pursuant to the Clause 15.3 of the Substantive Agreement dated 10.02.2000 executed between the parties

and as such arbitration proceeding and award passed by the said Tribunal are liable to be declared without lawful authority and of no legal effect.

Accordingly, all the civil appeals are allowed.

The impugned judgment and order dated 17.08.2017 passed by the High Court Division in Writ Petition Nos.11992-11994 of 2016 are hereby set-aside.

No order as to costs.

C.J.

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