10 SCOB [2018] HCD

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 5673 of 2016

Professor M. Samsul Alam, son of Late Md. Khabidur Rahman Mia, of 2/H Eastern Housing Apartment, 26/B, Topkhana Road, Segun Bagicha, Dhaka
..……Petitioner
Vs.
Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources, Bangladesh Secretariat, Dhaka and others
…….Respondents.

Mr. Tanjib-ul-Alam, with
Mr. Md. Saquibuzzaman, Advocates
… For the Petitioner

Mr. Mahbubey Alam, Attorney General, with
Mr. Ekramul Haque Tutul, DAG

Mr. Md. Mokleshur Rahman, DAG
Mr. Samarendra Nath Biswas, AAG
Ms. Farida Yeasmin, AAG
…. For the Respondent No1.

Mr. Ashraf Uddin Bhuiyan, Advocate

… For the respondent Nos.2 & 3

Mr. Rokanuddin Mahmud, with
Mr. Mustafizur Rahman Khan and
Ms. Safayat Sultana Rumey, Advocates
…For the Respondent No.4

Date of hearing: 11.04.2017, 11.07.2017, 12.07.2017, 16.07.2017, 17.07.2017, 06.08.2017, 20.08.2017, 21.08.2017 and 22.08.2017.
Date of judgment: 24.08.2017

Present:
Ms. Justice Naima Haider
And
Mr. Justice Abu Taher Md. Saifur Rahman

Article 102 of the Constitution of the People's Republic of Bangladesh, Article 51 of the United Nations Convention against Corruption:
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. … (Para 76)

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. … (Para 83)

2003 till 2006 the 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, we find that the JVA and GPSA have been procured by corruption and thus render them void ab initio. The rights and assets of the respondent No. 5 in Block 9 PSC, for which 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. …(Para 91)

Judgment

Naima Haider, J:

1. In this application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued on 09.05.2016calling upon the respondents to show cause as to why 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 respondents No.3 and No.4 should not be declared to be without lawful authority and of no legal effect and thus void *ab initio*; and why the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the respondents No.2, as Buyer, and a joint venture between respondents No.3 and No.4, as Seller, should not be declared to be without lawful authority and of no legal effect and thus void *ab initio*; and also why the assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 should not be attached and seized to provide adequate compensation for the 2005 blowouts, and/or such other or further order or orders be passed as this Court may deem fit and proper.

2. The facts leading to the issuance of the Rule, in brief, are as set out below.

The petitioner is a reputed energy expert and one of the leading activists in the protection of natural resources of the country. In light of his academic and professional experience, the petitioner serves as an advisor to the Consumer Association of Bangladesh (CAB) with regard to the energy sector and has conducted hearings at the Bangladesh Energy Regulatory Commission (BERC). Being a respected citizen of the country the petitioner is concerned about the welfare of the people and is vigilant about the duties of government authorities to act in public interest and protect the rights and resources of the people in discharging their statutory duties. The petitioner is considered an expert in the energy sector and has been vocal against corruption, fraud, and bribery and has for a long time promoted environmental causes in the interest of the public.

3. The respondent No. 1 is the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources, which has the exclusive right and authority to explore, develop, exploit, produce, process, refine and market petroleum resources within Bangladesh and to enter into any petroleum agreements with any person for the purpose of petroleum operations under the Bangladesh Petroleum Act, 1974, and entitled to delegate such of its rights and powers to statutory bodies; the respondent No. 2 is the Bangladesh Oil, Gas and Mineral Corporation (Petrobangla), a statutory corporation established under the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985 and has been authorized and entrusted with responsibilities which include, *inter alia*, to prepare and implement programs for exploration and development of oil, gas, and mineral resources and implement the Petroleum Act, 1974 and authorized to establish subsidiary corporations; the respondent No. 3 is a company incorporated under the Companies Act, a wholly owned subsidiary of the respondent No. 2, and falls within the definition of "statutory public authority" under Article 152 of the Constitution; the respondent No. 4 is Niko Resources (Bangladesh) Limited, a private company incorporated under the laws of Barbados, which entered into the JVA with the respondent No.3 and the GPSA with the respondent No.2; respondent No.5 is Niko Resources Limited, a publicly traded corporation with head office in Calgary, Alberta, Canada and the parent company of the respondent No. 4, and which owns 80% working interest in the Chattak and Feni gas fields and 60 % working interest in Block 9 gas field in Bangladesh.

4. Being aggrieved by and dissatisfied, with the inaction and the manifest and continuing failures on the part of the respondents No.1, No.2 and No. 3 to act in compliance with the Constitution and laws of Bangladesh by

(i) not treating the JVA as being without lawful authority and of no legal effect and thus void *ab initio* despite having evidence that the JVA was procured through bribery, fraud, and corruption in violation of the laws of Bangladesh;

(ii) not treating the GPSA as being without lawful authority and of no legal effect and thus void *ab initio* despite having evidence that the GPSA was procured through bribery, fraud, and corruption in violation of the laws of Bangladesh;

(iii) the *mala fide* and continuing failure of the respondents No.1, No.2, and No.3 to seek adequate compensation from the respondent No. 4 and No.5 for losses caused by two successive blowouts in 2005 in Chattak ("the 2005 blowouts") resulting from not undertaking petroleum operations in a proper and workmanlike manner in accordance with good oil-field practice as required under law;

(iv)the continuing payments being made to respondent No. 5, the beneficial owners of the respondent No. 4, circumventing in a fraudulent manner the rule and injunction issued by this Hon'ble High Court Division of the Supreme Court in the judgment dated 02.05.10 in writ petition No. 6911 of 2005, and

(v) the manifest omissions and actions of the respondents No. 2 and No. 3 in 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")* in misleading the International Centre for Settlement of Investment Disputes ("ICSID") tribunals and acting against the public interest of Bangladesh with the *mala fide* intention of conferring undue benefits to the respondent No.4, the petitioner has moved to this Court and obtained the Rule Nisi.

5. The facts, in brief, relevant for the purpose of disposal of this Rule are that in 1997 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 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 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 ("FOU")"dated 23.08.1999 with respondent No. 3. As part of the study under the FOU, in February 2000, respondent No.3 and respondent No. 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 respondents No. 3 and No.4 stated in the Marginal Field Evaluation that the February 2000 report concluded the requirement of the FOU and a joint venture contact may be executed between respondent No. 3 and No.4 as stipulated in the study upon approval of respondents No. 1 and No.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 respondent No.4 without any competitive bid in a non-transparent manner simply because 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.

6. Subsequently, the respondent No.1 issued a "Draft Procedure for Development of Marginal/Abandoned Gas Fields" where "marginal/abandoned fields" were distinguished from "gas fields" as follows:

> "In Bangladesh 22 gas fields of sizes ranging from 25 to 4000 Bcf have so far been discovered. Fifteen of these gas fields have been brought under production. Some of these fields which have been in the process of depletion for continued production over time have become commercially unviable and remained unattended. There are yet other gas fields, which have not been put under operation for want of commercial viability development under the existing techno-economic considerations, may be termed marginal/abandoned."

7. An Explanatory Note in the Draft Procedure stated that "For the purposes of these procedures Chattak, Kamta, and Feni gas fields shall be deemed to have been declared marginal/abandoned gas fields". The petitioner submits that this reference to Chattak in the Draft Procedure clearly refers to "Chattak West" since "Chattak East" had been determined in the FOU study and agreed by all parties to be an "exploration target" and clearly could not have been a "gas field" or been declared "marginal/abandoned" since Chattak East was never even explored, let alone been depleted due to production or declared commercially unviable.

8. 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 and 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.

9. 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.

10. 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.

11. 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. Mamoon stated that fifty per cent of his power came from the fact that he was close friend and business partner of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia. Mr. Salim Bhuiyan provided a statement before a Magistrate Court under section 164 of the Criminal Procedure Code 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.

12. On 23.06.2011 the respondent No.5 entered into a plea bargain with Canadian Crown Prosecution and admitted to certain acts of corruption in an Agreed Statement of Facts which reveals the following undisputed facts:

- Niko Canada (respondent No.5) is a Canadian public company which owns 100% of Niko Resources Caymans, which is a holding company. Niko Resources Caymans in turn owns 100% of Niko Bangladesh (respondent No.4) which is incorporated in Barbados.
- Niko Canada directly and indirectly provided improper benefits to a Bangladeshi public official in order to further the business objectives of Niko Canada and its subsidiaries.
- Niko Bangladesh provided the use of a vehicle costing one hundred and ninety thousand nine hundred and eighty four Canadian dollars ($190,984) to Mr. AKMMosharraf Hossain, the Bangladeshi State Minister for Energy and Mineral Resources in order to influence the Minister in dealings with Niko Bangladesh within the context of ongoing business dealings. Niko Canada acknowledged that, having funded Niko Bangladesh's acquisition of the vehicle and knowing that Niko Bangladesh delivered it as aforesaid, Niko Canada was responsible under Canadian criminal law principles for the act.
- Additionally, Niko Canada paid the travel and accommodation expenses for Minister AKM Mosharraf Hossain to travel from Bangladesh to Calgary to attend the GO EXPO oil and gas exposition, and onward to New York and Chicago, so that the Minister could visit his family who lived there, the cost being approximately$5000.Mr. AKM Mosharraf Hossain was accompanied by Mr. Salim Bhuiyan.
- On 31.12.2004, after procurement of the JVA, Niko Bangladesh began drilling operations in the Chattak-2 gas field. On 07.01.2005 an explosion occurred at the Chattak-2 gas well in the Tengratila gas field in north-eastern Bangladesh. While no people were killed, there was significant damage to the surrounding village. As an

example, a school that was located meters from the location is no longer usable. The gas fire burned for weeks and many people were forced to evacuate.

- The result was a large amount of negative press for the Niko family of companies and for the government of Bangladesh as many rumours began to circulate about the fairness of the entire JVA award process.
- Niko Bangladesh (respondent No.4) had still yet to negotiate the GPSA with Petrobangla (respondent No. 2).
- Mr. Qasim Sharif was Niko's in-country agent in Bangladesh until signing of the JVA with BAPEX in October 2003 at which time he became employed by Niko Canada as the President of Niko Bangladesh. Mr. Qasim Sharif described the bribe to former State Minister AKM Mosharraf as a "gift" and "a commonplace part of doing business in Bangladesh" and stated that "these things are done all the time" and "they give these sorts of things in these situations".
- A second major explosion occurred at Tengratila gas field on 24.06.2005.
- Niko Canada agreed to pay a fine of eight million two hundred and sixty thousand Canadian dollars ($8,260,000) plus the 15% Victim Fine Surcharge totaling nine million four hundred ninety nine thousand Canadian dollars ($9,499,000.00).
- It was agreed by Niko Canada that the "fine reflects that Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to exercise influence to ensure that Niko was able to secure a gas purchase and sales agreement (i.e. the GPSA) acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money."

13. The drilling operations of the respondent No.4 in the Chattak gas field, procured through the JVA, caused two massive blowouts leading to substantial damage to the gas fields, the environment, and the health of the people in the surrounding areas. No adequate compensation has yet been paid by the respondents No.4 or No.5 for the 2005 blowouts. On the contrary till the issuance of the Rule and interim order dated 09.05.2016 respondent No.5, through its subsidiary, had been carrying out its operations and businesses in Bangladesh, including the operations of the Block 9 PSC for which it had initially been assessed by Arthur Anderson to be the least qualified bidder.

14. On 16.06.2016 the respondent No.4 filed an application for vacating the interim order dated 09.05.2016. On 24.07.2016 the petitioner filed an application for direction for production of evidence obtained through the Mutual Legal Assistance processes between Bangladesh, Canada, and the United States. On 01.08.2016 the respondent No.4 filed an affidavit-in-opposition to the application of the petition for direction for production of evidence. On 11.08.16 the petitioner filed an application for addition of party of a consultant to the Bangladesh Anti-Corruption Commission (ACC). On 14.08.16 the respondent No.4 filed an affidavit-in-opposition to the application of the petitioner for addition of party. On 30.03.2017 the respondent No.4 filed an application for the discharge of Rule for *res judicata*. On 02.04.2017 the respondent No.1 filed an affidavit-in-opposition against the application for discharging the Rule. On 04.04.2017, the petitioner filed an affidavit-in-opposition against the application for discharge of the Rule. On 07.05.2017 Mr. Moudud Ahmed filed an application for addition of party. On 12.07.2017 the respondent No.1 filed a supplementary affidavit to the affidavit dated 02.04.2017. Through these applications, the petitioner, respondent No.1, and respondent No.4 have all brought to our attention documents and information which are relevant for the disposal of the Rule. All the applications had been kept on the record for disposal at the time of the hearing of the Rule. On 24.08.16 the respondent

No.4 filed an application to treat all its applications as its affidavit-in-opposition contesting the Rule.

15. The respondent No. 1 entered appearance by filing an affidavit-in-opposition to the application for the discharge of the Rule but did not contest the Rule. However, the respondent No.1 brought to our attention important evidence and documents gathered through Mutual Legal Assistance ("MLA") arrangements between Bangladesh, Canada, and the United States. Respondent No. 2 and No.3 did not file any affidavits in opposition contesting the Rule. The respondents No.5 also did not file any affidavit-in-opposition contesting the Rule.

16. The case of the petitioner as set out in the petition, in short, is as follows:

That the respondent No.5, having the least financial or technical capacity of seven bidders in the PSC bid round in 1997, eventually managed to procure the JVA for its subsidiary, respondent No.4,through a non-competitive and non-transparent process by resorting to fraud, bribery, and corruption. In 2011 the respondent No.5 entered into a plea bargain with the Canadian Crown Prosecution and pleaded guilty to providing illegal gratification to Bangladesh State Minister for Energy AKM Mosharraf Hossain to further the business objectives of its subsidiaries. It was admitted that the respondents No. 4 and No.5 gave a motor vehicle as bribe to the then State Minister for Energy. Respondent No.5 also admitted to paying bribes in the form of personal travel expenses for the State Minister for Energy. In exchange of the guilty plea, the Canadian authorities did not pursue the other charges of corruption. The Bangladesh Anti-Corruption Commission ("ACC") has pending criminal cases against several individuals including Mr. Qasim Sharif (the former President of the respondent No. 4), Mr. Salim Bhuiyan (agent for respondent No.4 and No.5), Mr. Giasuddin Al Mamoon (sub-agent for respondent No.4 and No.5), the former State Minister for Energy Mr. AKM Mosharraf Hossain (recipient of the bribes from respondents No.4 and No.5), and former Prime Minister Begum Khaleda Zia. The evidence in the ACC case and the evidence from the Canadian authorities show that the procurement of the JVA and GPSA was through corruption. In January 2005 the respondent No.4 started drilling operations in Chattak and caused two successive blowouts resulting in loss and damage which has now been estimated to be over United States Dollar one billion (US$1,000,000,000). Bangladesh Environment Lawyers Association ("BELA") had filed writ petition No. 6911 of 2005 before this Hon'ble Court seeking a rule, *inter alia*, as to why the JVA should not be treated as being nullity in the eye of law. The facts presented in the writ petition No. 6911 of 2005 dealt with the procedural aspects of execution of the JVA and BELA could not provide any evidence of corruption as the evidence was not available at that time. A judgment dated 17.11.2009 was passed in writ petition No. 6911 of 2005 stating that "Niko cannot avoid its responsibility of giving adequate compensation for the losses caused by two successive blowouts" and that the "Rule succeeds in part" and it was also stated that "Niko is directed to pay compensation money as per the decision taken in the money suit now pending in the Court of the Joint District Judge or as per mutual agreement among the parties. The respondents are restrained by an order of injunction from making any payment to respondent No. 10 (Niko Resources Bangladesh Limited). This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier."

17. In spite of the two successive blowouts in 2005 and despite not giving adequate compensation the respondent No. 4 yet again managed to procure the GPSA through corruption.

18. Following the judgment dated 17.11.2009,which prevented any payments being made to the respondent No.4 till disposal of the pending money suit for compensation for the blowouts, the respondent No. 4 in 2010 filed two arbitration cases against respondents No.2 and No.3 before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") being ICSID Case Nos. ARB/10/11 and ARB/10/18seeking payment for the gas supplied from Feni gas field and a declaration of non-liability of respondent No.4 (Niko Bangladesh)for the 2005 blowouts at the Chattak gas fields. On 19.08.2013 the ICSID tribunals issued a Decision on Jurisdiction where it relied on the judgment in writ petition No. 6911 of 2005 dated 17.11.2009 to conclude that there was no impropriety in the procurement of the JVA or GPSA. In paragraph 404 of the Decision on Jurisdiction the ICSID tribunals noted that a witness for the respondent No. 4referred to the BELA proceedings (i.e. writ petition No. 6911 of 2005) stating that the case concluded "that the contracts (i.e. the JVA and GPSA) were awarded properly and that they are valid". Surprisingly, he was not contradicted by the respondents No. 2 and No.3 or their witnesses.

19. At the outset, Mr. Tanjib-ulAlam, learned Advocate, appearing on behalf of the petitioner, submits that no evidence of corruption was produced before the ICSID tribunals by the counsel of the respondents No.2 and No.3 at the time of issuance by the ICSID tribunals of a Decision on Jurisdiction dated 19.08.2013 and by this inaction the respondents No.2 and No.3 have acted against the public interest of Bangladesh with the *mala fide* intention of conferring undue benefits to the respondent No.4.

20. The petitioner further submits that respondent No. 5, 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 submitted to the respondent No.2. The respondent No. 5, through Tullow Bangladesh Limited, continued to receive payments from respondent No. 2 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.

21. Mr. Tanjib-ulAlam submits that admittedly the respondents No. 4 and No.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 submits that the 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 in as much as the same is opposed to the public policy particularly when the transaction is with the Government" as observed by the Appellate Division of the Supreme Court of Bangladesh in *Ummu Kawsar Salsabil v Shams Corporation (Pvt) Ltd. &Ors*, 5 BLD (AD) 263 (1985).

22. Mr. Tanjib-ulAlam submits that the admitted facts show that the respondent No. 4 and respondent No.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, 1947.The US Dollar four million (US$ 4,000,000)Consultancy Agreement between Stratum and 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 respondents No.4 and No.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 21.10.03 i.e. five days after the execution of the JVA dated 16.10.03,is admitted by Niko to have been used for making a payment of US$500,000 to Mr. Salim Bhuiyan for his influence and ability to obtain meetings with Bangladeshi Government officials. These admissions by the respondent No. 4 of payments to Stratum (owned by Mr. Qasim Sharif) and then to Mr. Salim Bhuiyan are admitted facts which taint the JVA and GPSA with corruption and render them void *ab initio*. In addition, the Stratum Management Contract clearly violated sections 161-165 of the Penal Code since it expressly stated that the respondent No. 4 would pay Stratum for "payments made to expedite or secure the performance" by Bangladesh public officials for "issuance of permits or licenses required for" the Niko Project. Respondent No.4 admits that these payments were made and banking records show that US$ 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$500,000from Niko for his exercise of "personal influence" over Bangladeshi Government officials. Respondent No.4blatantly 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.

23. Mr. Tanjib-ul Alam submits that there is no *res judicata* of the present petition with the pending ICSID cases or the previous writ petition No. 6911 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 respondent No.5 (which admitted to the acts of corruption) is not a party to the ICSID proceedings and neither is 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 judicata* of the present 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.

24. Mr. Tanjib-ul Alam next submits that the respondent No.4 has argued before the ICSID tribunals that those tribunals do not have the power to carry out judicial review of Bangladesh Government actions under Article 102 of the Bangladesh Constitution. Thus, respondent No.4 cannot at the same time argue that the Bangladesh Supreme Court should also not exercise its powers of judicial review. Such a position is not maintainable since that would mean, in this case, 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 the ICSID tribunals since they have no powers to freeze or confiscate the proceeds of crime that are now being enjoyed by the respondents No.4 and No.5 in Bangladesh. ICSID tribunals may only issue a pecuniary award

and cannot punish corruption or declare invalid the unlawful exercise of executive powers. The proper and effective forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Bangladesh Supreme Court applying Bangladeshi law under Article 102 of the Bangladesh Constitution. In other words, the ICSID tribunals do not provide an equally efficacious remedy to the remedy provided under Article 102. In particular, the petitioner, respondent No.1, and respondent No. 5 (which admitted to acts of corruption) are not parties before the ICSID arbitration tribunals. The ICSID arbitration cases only relate to "investment disputes" which form the subject matter of such claims and only apply to parties to the dispute, i.e. Niko Bangladesh Limited (respondent No.4), BAPEX (respondent No.3), and Petrobangla (respondent No.2). ICSID has no jurisdiction over Niko Canada (respondent No.5) which has admitted to corruption before the Canadian courts or the Bangladesh Government officials who issued the *ultra vires* instructions to enter the JVA and GPSA. Thus, the pending ICSID arbitration cases have no effect on the constitutional powers exercised under Article 102 of the Bangladesh Constitution to judicially review *ultra vires* government actions tainted by corruption. The ICSID tribunals' decisions, as opposed to awards, are also not binding on national courts of any sovereign country exercising constitutional powers. Even ICSID awards are not final since they can be stayed and are subject to review or annulment proceedings.

25. In the affidavit in opposition dated 02.04.2017 the respondent No. 1 has produced substantial evidence of corruption gathered by Bangladesh through Mutual Legal Assistance (MLAs) requests between the Royal Canadian Mounted Police (RCMP) in Canada, the Federal Bureau of Investigation (FBI) in the United States, and the Anti-Corruption Commission (ACC) in Bangladesh. The investigation of the corruption of respondent No.4 and No.5 was initiated by the Canadian law enforcing authorities in 2005. The initial RCMP investigation began in June 2005 after an official from Canada's Department of Foreign Affairs and International Trade (DFAIT) alerted RCMP to the possible violations of the Canadian Corruption of Foreign Public Officials Act by respondents No.4 and No.5. The RCMP started investigation and had sent a letter of request to Bangladesh for investigation and legal assistance. That investigation was joined by the United States Department of Justice, through the FBI, since one of the prime actors in the corruption scheme, Mr. Qasim Sharif, was a U.S. citizen and transferred a large part of the proceeds of crime to the United States. The ACC has charged several individuals in criminal cases under the laws of Bangladesh for offences committed in Bangladesh. The criminal trials are ongoing and so is the international co-operation of the law enforcing authorities in Bangladesh, Canada, and the United States to bring the criminals to book.

26. Mr. Mahbubey Alam, learned Attorney General, appearing on behalf of the respondent No.1 submits the evidence of corruption that has been produced before us has to be given due consideration. He submits that a conclusive case has been established from the evidence that show that respondents No.4 and No.5 obtained the JVA and GPSA through corruption. He submits that the international investigation conducted by various law enforcing agencies discovered that respondent No. 4 had entered into a Consultancy Agreement with Stratum Development Limited and agreed to pay United States Dollar four million within 15 days of execution of the JVA. Another Management Services Contract dated 01.10.2003 was signed between respondent No. 4 and Stratum fifteen days before the JVA was executed under which respondent No.4 agreed to pay a monthly fee of US$20,000 for payment of bribes to Bangladesh Government officials which is described in paragraph 6 of the Management Service Contract 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 or functions, such as issuance of permits or licenses" required for the projects of the respondent No.4 and respondent No.5 in Bangladesh.

27. Mr. Mahbubey Alam submits that the head of the RCMP investigation, Corporal Duggan, concluded that Niko, through Mr. Salim Bhuiyan, had agreed to pay to Mr. Giasuddin Al Mamoon, a friend of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia, "$1million if he helped ensure the success of the JVA". Once the JVA was executed Mr. Qasim Sharif (President of Niko Bangladesh) arranged for part payment totaling Taka three crore (approximately US$ 500,000) into the Standard Chartered Bank account of Mr. Salim Bhuiyan who also had "political clout" with the State Minister for Energy Mr. AKM Mosharraf Hossain. The RCMP conducted interviews of Mr. Mamoon during 01.11.2008 and 02.11.2008 during which Mr. Mamoon admitted that Mr. Qasim Sharif of Niko offered him $1 million for assisting Niko's projects in Bangladesh. Mr. Mamoon also stated that fifty percent of his power is because he is the "friend of Tarique Rahman". Mr.Mamoon admitted that the pay order dated 07.01.2004 for Taka one crore eight lac (Tk. 10,800,000) received by him from Mr. Salim Bhuiyan was part payment for his assistance for the Niko projects. On 15.01.2008 Mr. Salim Bhuiyan provided a statement by which he admitted that he acted as middleman to facilitate cash payments from Mr. Qasim Sharif of Niko to Mr. AKM Mosharraf Hossain, former State Minister for Energy and Mr. Giasuddin Al Mamoon. After procurement of the JVA Mr. Qasim Sharif paid Mr. Salim Bhuiyan 3 crore taka into his Standard Chartered Bank in Gulshan. From that money Mr. Bhuiyan paid Mr. Mamoon Taka one crore eight lac taka by pay order and additional Taka seventy two lac by cash. He also paid Taka sixty lac to then State Minister for Energy Mr. AKM Mosharraf Hossain and retained the remaining Taka sixty lac taka for himself.

28. Mr. MahbubeyAlam further submits that the trail of bribe payments has been traced by the RCMP, FBI, and the ACC all the way from Niko Canada, to Niko Caymans Island, to Niko Barbados's First Caribbean International Bank, to Stratum Development Limited's Union Bancaire Privée (UBP) account in Switzerland, to Mr. Salim Bhuiyan's Standard Chartered Bank account, and finally to Mr. Giasuddin Al Mamoon and the State Minister for Energy Mr. AKM Mosharraf Hossain.

29. Mr. Mahbubey Alam finally submits that there were also payments to the then Law Minister Mr. Moudud Ahmed which were discovered by the law enforcing authorities. Mr. Moudud Ahmed had provided a legal opinion that Chattak East was a marginal/abandoned field based on which the JVA was granted to the respondent No.4 while at the same time "Moudud Ahmed and Associates" was acting a legal advisor to respondent No. 4 and provided a similar opinion. Law enforcing officers discovered that respondent No.4 made payments of US$6,065 to Moudud Ahmed on 12.10.2000 and another payment of US$ 8,315 on 15.01.2002.

30. Mr. Rokanuddin Mahmud, appearing on behalf of respondent No. 4 submits first and foremost that there are currently two ICSID arbitration cases pending where the ICSID tribunals are looking at the corruption issue. Bangladesh is a party to the ICSID Convention and has international obligations under the ICSID Convention which should be taken into consideration before proceeding with the matter. Mr. Mahmud submits that the ICSID tribunals have issued a decision declaring their exclusive jurisdiction over the validity of the JVA and GPSA and decisions of ICSID tribunals have the same binding effect as a judgment

of the Appellate Division of the Supreme Court of Bangladesh due to operation of Article 53 and Article 54 of the ICSID Convention.

31. Mr. Mahmud then submits that the Rule suffers from *res judicata* since the same issue had been previously decided in the writ petition No. 6911 of 2005. The Rule was made absolute in part by judgment and order dated 17.11.2009 where the Hon'ble High Court Division held that "we do find that the JVA was not obtained by flawed process by resorting to fraudulent means". As such the same issue cannot be agitated over and over and there is no scope of revisiting the same issue of the validity of the JVA which has been settled in writ petition No. 6911 of 2005.

32. Mr. Mostafizur Rahman Khan also appearing on behalf of the respondent No. 4, firstly submits that the Rule has become infructuous. The respondent No.4 in its affidavit in opposition states that the writ petition was filed on 09.05.2016 on the essential allegation that the respondents No.1-3 (i) failed to treat the JVA and GPSA as void *ab initio* on account of having been procured through corruption, (ii) failed to seek adequate compensation from respondents No.4 and No.5 for losses caused by two successive blowouts in 2005 and (iii) continued to make payments to Respondent No.5 circumventing the judgment and order in writ petition No. 6911 of 2005. Mr. Khan submits that before the writ was field on 09.05.2016, respondents No.3 had filed a Memorial on Damages on 25.03.2016 before ICSID tribunals in ICSID Case Nos. ARB/10/11 and ARB/10/18 seeking, *inter alia*, a declaration that respondent No. 4 procured the JVA through alleged corruption, dismissal of all of the respondent No.4's claims, and compensation for losses for the blowouts to the tune of US$118 million for the respondent No.3 and US$896 million for respondent No.1 along with between US$8.4 million to 8.6 million for survey, etc. of environment and health related loss. The respondent No.1 and No.2 also filed Money Suit No. 224 of 2008 now pending in the Court of the 1st Joint District Judge, Dhaka against the respondent No.4, two of its officers, and the contractor engaged by respondent No.4 to control the blowouts seeking compensation of an amount of Tk. 746,50,83,973. Mr. Khan submits that the ICSID tribunals have already held hearings on the issue of corruption and, based on his experience with previous decisions issued, a decision on the corruption issue from the ICSID tribunals is expected within a couple of months.

33. Mr. Khan's next submission is that the allegations of fraud and corruption raised in this writ petition are disputed questions of facts. He states that only the admitted facts can be relied upon. The allegations in the charge sheet of the ACC and the allegations of the RCMP in Corporal Duggan's affidavit cannot be relied upon as evidence of the crime of corruption. They are merely investigation materials which cannot be treated as evidence of corruption.

34. Mr. Khan further submits that the retracted confessional statement of Mr. Salim Bhuiyan, or RCMP's video interview of Mr. Giasuddin Al Mamoon cannot be relied upon as evidence of corruption against the respondents No.4 and No.5 without giving them the opportunity to cross-examine Mr. Bhuiyan and Mr. Mamoon. These statements thus also cannot be proof of evidence of corruption.

35. Mr. Khan also submits that the disposal of the writ at this time will be premature. He submits that the Rule should be made absolute after the ICSID tribunals issue a decision on the corruption issue and at the time of the enforcement of a final ICSID award before the Bangladesh courts. He further submits that the Rule should also be made absolute only after the trials in the pending criminal cases, initiated by the ACC concerning the alleged

corruption in the Niko project, have been completed. If the ICSID tribunals find corruption and if the Bangladesh criminal courts find corruption then the High Court Division of the Supreme Court will be able to give a final judgment on the corruption issue. The writ petition should be held in abeyance till then, since, otherwise there may arise conflicting judgments from different courts.

36. Mr. Khan makes a submission that even if the allegations of corruption are accepted, the trail of money stops at Mr. Giasuddin Al Mamoon. He argues that Mr. Salim Bhuiyan and Mr. Mamoon were both businessmen and the payments made from Mr. Salim Bhuiyan to Mr. Mamoon could be for some other business instead of the Niko projects. He claims that there is no evidence of direct payment to a Bangladesh public official from Niko. The evidence of payments to State Minister AKM Mosharraf Hossain by Mr. Salim Bhuiyan is only in the charge sheet and in Mr. Salim Bhuiyan's confessional statement which has subsequently been retracted.

37. Mr. Khan then submits that the Agreed Statement of Facts only related to the 2005 period but the JVA was signed on 16.10.2003. There is no agreed statement in relation to the procurement of the JVA and as such the admitted acts of corruption would not invalidate the JVA. Respondents No.4 or No.5 have never admitted to any corruption in relation to the JVA. He further notes that in the Agreed Statement it is admitted that Niko Canada (respondent No.5) made the payment to the Bangladeshi Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement (GPSA) acceptable to Niko, as well as to ensure that Niko was dealt fairly in relation to claims for compensation for blowouts. Mr. Khan admits to the payment to the Energy Minister for the GPSA but argues that the invalidity of the GPSA cannot affect the validity of the JVA since they are two separate contracts. He then submits that even though it is admitted payments were made to the State Minister for Energy the Canadian Crown prosecution was unable to prove that any influence was obtained as a result of providing the benefits to the Minister. He submits that the GPSA was obtained in 2006 and not during the 2005 period for which respondent No.5 has admitted to the corruption. Thus, there is no causal link between the 2005 corruption and the GPSA in 2006.

38. Mr. Khan's final submission is that the JVA and GPSA are commercial contracts entered into by respondent No. 3 and respondent No.2 respectively as corporate entities. These contracts are not sovereign contracts entered into by the State of Bangladesh and thus they cannot be the subject of judicial review.

39. Mr. Tanib-ul Alam, in reply, submits that the issue in the writ petition is in essence the validity of the Government's decision to award the JVA and GPSA. The rendering of the JVA and GPSA void *ab initio* is ancillary to the finding that the exercise of the Government powers was procured by corruption and *ultra vires*. In addition, since the JVA and GPSA were approved by the Government and could not have been executed without Government approval there is no scope of treating them merely as commercial contracts. In addition, the ICSID tribunals have recognized that they have no powers over third parties or the courts of Bangladesh exercising jurisdiction even in the ICSID tribunals' own decision. The jurisdiction of the ICSID tribunals in this case is purely based on contract and the state of Bangladesh is not a party to the pending ICSID arbitration cases. Public law issues such as corruption and judicial review of Government actions tainted by corruption are strictly speaking outside the ambit of these ICSID arbitration cases and the jurisdiction of the ICSID tribunals, especially since the contracts containing the arbitration clauses are void *ab initio*

and thus never existed. For this reason, the ICSID tribunals should defer to the Supreme Court of Bangladesh's findings in this writ petition. Corruption goes to the root of the contracts and renders the arbitration clauses in the contracts null and void, leaving the ICSID tribunals without any jurisdiction.

40. Mr. Tanjib-ul Alam further submits that Article 53 and Article 54 of the ICSID Convention does not support the submissions of the respondent No.4 that a decision of an ICSID tribunal has the same binding effect as a judgment of the Appellate Division of the Supreme Court of Bangladesh. If the JVA and GPSA are void *ab initio* then the pending ICSID arbitration cases are without any legal basis and enforcement of any eventual ICSID award would be against the public policy of Bangladesh.

41. Mr. Tanjib-ul Alam submits that the respondents No.4 and No.5 in their submissions, as well as in the Agreed Statement, have admitted that bribes were paid for obtaining the GPSA. They also admit to the charge that they paid bribes to retain their investments in Bangladesh, which must refer to the retention of the JVA. Niko admits that it arranged for trips to Canada for Mr. AKM Mosharraf Hossain who was accompanied by Mr. Salim Bhuiyan. Niko also admits that Mr. Salim Bhuiyan's function was to arrange meetings with Bangladeshi Government officials by using his social status for which he was paid US$500,000. It is admitted that it was Mr. Salim Bhuiyan who was effective in breaking the deadlock regarding Chattak East and granting the JVA to the respondent No.4 through the use of his influence and abilities. This admission alone constitutes violations of sections 162 and 163 of the Penal Code. The submission of the respondent No.4 that the trail of money stops at Mr. Giasuddin Al Mamoon does not help the respondent No.4 since direct payment to Government officials is not required for corruption. In any event everyone in Bangladesh knows what power Mr. Giasuddin Al Mamoon wielded during the period concerned. Adverse inferences can easily be drawn from payments during that period to a politically influential person such as Mr. Mamoon. Most importantly, during none of the submissions made by the respondent No.4 has corruption been denied and no evidence has been produced to rebut the substantial evidence of corruption that has been produced.

42. Mr. Tanjib-ul Alam finally submits that just rendering the JVA and GPSA void *ab initio* will not suffice to compensate Bangladesh for the loss and damages caused by the blowouts in 2005. The assets of respondent No.5, which instigated, abetted, and perpetrated the corruption to obtain and retain its investments in Bangladesh, has to be seized. These assets include the shareholding interests of respondent No.5 in Tullow Bangladesh Limited concerning Block-9 PSC which should be attached and seized as proceeds of crime as well as to provide adequate compensation for the 2005 blowouts.

43. We have considered the submissions of the learned advocate for the petitioner Mr. Tanjib-ul Alam, the learned Attorney General Mr. Mahbubey Alam, and the learned Advocates for the respondent No. 4 Mr. Rokanuddin Mahmud and Mr. Mustafizur Rahman Khan. We have also perused the writ petition, applications, and affidavits in opposition filed by the parties, perused the relevant annexures annexed thereto, and considered the legal authorities and texts provided.

44. The point for adjudication in the instant writ petition is whether during the period 2003 to 2006, the respondent No.4 and No.5 had set up a corrupt scheme 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.

45. The Constitution of Bangladesh entrusts the Executive branch of the Government with the sacred duty of the guardianship and management of State properties. In exercise of this function the Government officials have to exercise their executive powers with integrity, honesty, transparency, accountability, and, most importantly, in public interest. The Executive has constitutional powers to enter into or award public contracts but all such powers must be exercised in public interest only and cannot be influenced by extraneous factors such as illegal gratifications or personal benefits. If the exercise of Executive powers is tainted by extraneous factors such as personal benefits or gratifications, or procured through fraud and corruption, then such actions are *ultra vires* and liable to be declared to be done without lawful authority and of no legal effect, i.e. void *ab initio*. Any contract arising from the *ultra vires* exercise of Government power is liable to be declared void *ab initio*.

46. It is admitted that the JVA and GPSA were in fact granted to the respondent No.4 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 processes of the granting of the JVA and GPSA to the 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 respondentNo.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 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 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.

47. Corruption is a menace that must be eradicated and cannot ever be condoned under any circumstance. The Appellate Division of the Bangladesh Supreme Court has clearly observed in ***Abdul Mannan Khan vs. Government of Bangladesh***, Civil Appeal No. 139 of 2005 along with Civil Petition for Leave to Appeal No. 596 of 2005 paragraphs 1419:

> "If there is any natural stigma on our nation, it is corruption … In fact, corruption is taking the shape of a menace; all development works are being hindered because of corruption for which good governance is also suffering a setback. Because of corruption, the bulk of the poor people of the country are deprived of their due share in the development of the country. And we all should create social awareness against corruption as well as put resistance against corruption".

48. Government contracts procured for the benefit of private parties through bribery and corruption are clearly against the "public policy" of Bangladesh and such contracts are rendered without lawful authority, of no legal effect, and void *ab initio*. Corruption, being a

public policy issue, is not something that can be confirmed or condoned by a court as it is forbidden by law and is a crime. Contracts granting rights over properties of the State which have been procured by corruption, and benefits derived from such corruptly procured public contracts are to be treated as "proceeds of crime" and liable to be confiscated and returned back to the State. In ***Biswanath Bhattacharya vs. Union of India*** (UOI) AIR2014SC1003, the Supreme Court of India discussed the confiscation of proceeds of crime:

> "41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. 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."

49. The scheme of corruption set up by the respondents No. 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 though 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 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 the purposes of fighting the global menace of corruption.

50. The respondent No.4 has submitted that the Rule has become infructuous since the Respondents No.2 and No.3 has already taken steps against the Respondent No.3 and brought claims before the ICSID Tribunal and in a money suit claiming compensation for the blowouts. This submission is somewhat misconceived. The Rule has three parts - (i) why the JVA should not be declared to be void *ab initio;* (ii) why the GPSA should not be declared to be void *ab initio* and (iii) why the assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 PSC should not be attached and seized to provide adequate compensation for the 2005 blowouts. Neither the pending ICSID arbitration cases nor the money suit offers an equally efficacious remedy to the remedy of a writ jurisdiction. Under Article 102 (2) (ii), if we are satisfied that no other equally efficacious remedy is provided by law, on the basis of an application of any person aggrieved, we 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 respondent No.4 itself argued before the relevant ICSID tribunals that ICSID does not have the power to carry out judicial review of Bangladesh Government actions as exercised by us under Article 102 of the Bangladesh Constitution. Respondent No.4 cannot at the same time argue that we should also not exercise our powers of judicial review. We agree that the respondent No.4 cannot be allowed to blow hot and cold at the same time. The position of the 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 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 Bangladesh Supreme Court applying Bangladeshi law under Article 102 of the Bangladesh Constitution. ICSID tribunals may benefit from our finding and there does not need to be any conflict since we are not infringing on the jurisdiction of the ICSID tribunals. However, it may be noted that the corruption and illegality is at the heart of the contracts containing the arbitration agreements. If enforcement of any final arbitral award is sought in Bangladesh the Bangladeshi courts, at the time of making a decision whether to enforce an award arising from such contracts, would have to balance the public policy considerations of giving effect to the illegal contracts with the public policy consideration of recognizing the finality of ICSID arbitral awards. Regarding the third part of the Rule, 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 respondent No.5 in Bangladesh. For these reasons, we cannot agree with the respondent No.4 that the Rule is infructuous.

51. The respondent No.4 also submits that the allegations in the writ petition are disputed questions of facts. We are of the view that we do not need to rely on any disputed question of fact in this situation 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 respondent No.4brazenly 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 channeling of these payments through numerous offshore bank accounts, the law enforcing agencies in Bangladesh, Canada, and the United Stated 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 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 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.

52. Regarding the submission of the respondent No.4 that some of the evidence cannot be relied upon because the respondent No.4 has not been allowed to cross-examine Mr. Giasuddin Al Mamoon, Mr. Salim Bhuiyan, or Corporal Duggan, who all made statements adverse to respondent No.4, we are of the view that it is not necessary for us to rely on these statements since there are other undisputed facts and evidence such as bank records, contracts for payments to Government officials, and the own admissions of respondent No.4 that establish the entire chain of corrupt payments. Furthermore, we have noted the admissions of the respondents No. 4 and No.5 regarding the payments made in 2005 to State Minister AKM Mosharraf Hossain in order to get the GPSA as well as in 2003 to Mr. Salim Bhuiyan for arranging meetings for procurement of the JVA. The undisputed facts and the undisputed

documentary evidence is adequate for us to reach the inevitable conclusion that the JVA and GPSA were procured by corruption, through the set up of a corrupt scheme during the period 2003 to 2006, thus rendering the JVA and GPSA without law authority and of no legal effect, i.e. *void ab initio*.

53. We also cannot agree with the argument of the respondent No.4 that the disposal of the writ petition is premature and that we have to wait for the pending ICSID cases and the criminal cases to finish before we may dispose the Rule. Regarding the pending criminal cases, we are not getting into the merits of the allegations against the individuals concerned since that is the task of the criminal court where ACC's criminal case is pending. Mr. Mahbubey Alam, the learned Attorney General has submitted that payments were made to Mr. Moudud Ahmed while he was holding the office of the Law Minister and issued a legal opinion for his former client, Niko. The alleged conflict of interest for Mr. Moudud Ahmed, in issuing a legal opinion as Law Minister in favour of a former client, and then also receiving payments into his bank account from that client, is for Mr. Ahmed to answer in the pending criminal case. Similarly, allegations of the payments received by the other accused including Mr. AKM Mosharraf Hossain, Mr. Qasim Sharif, Mr. Salim Bhuiyan, and Mr. Giasuddin Al Mamoon are for them to defend in the pending criminal case where the standard of proof is beyond reasonable doubt, the burden of proof is on the prosecution, and the witnesses and accused can all be cross-examined. We find no merit in the argument that a writ petition challenging the improper use of Executive powers has to wait for a pending criminal case against the Government officials who have also been criminally charged for criminal misconduct arising from the same facts. If that argument was valid then the ICSID tribunals would also have to wait till completion of the criminal cases till making any finding of corruption. The finding of corruption is not the exclusive domain of the criminal courts or arbitral tribunals, though only criminal courts may impose criminal sanctions.

54. We also find no merit in the argument that a writ petition has to be kept in abeyance till the arbitration cases concerning investment disputes, between respondent No.4 on one side and respondent Nos. 2 and No.3 on the other, are completed. Article 102 grants us the power and duty to declare void *ab initio* any public contract or project obtained by the abuse of power, bribery, and corruption. The clearly admitted facts, along with the undisputed documents showing the trail of payments, and Niko's own admissions of making payments of "consultancy fees" to agents to influence Bangladesh Government officials establish the fact of corruption which would render the JVA and GPSA void *ab initio*. We are of the view that respondent No.4 and No.5 clearly engaged in corruption. We also note from the ICSID tribunals' decision on jurisdiction that the ICSID tribunals relied on the judgment in writ petition No. 6911 of 2005 to find jurisdiction, when no evidence of corruption was produced either before the ICSID tribunals or the High Court Division Bench issuing the judgment in writ petition No. 6911 of 2005. We trust the ICSID tribunals would similarly find our findings and observations in this writ petition useful and give it due regard, particularly since the validity of the JVA and GPSA are governed by the laws of Bangladesh.

55. The respondent No.4 has taken us through the decision of the ICSID tribunals regarding their exercise of exclusive jurisdiction dated 19.07.2016. The respondent No.4 has also noted that Bangladesh is a party to the ICSID Convention and thus all organs of the state of Bangladesh, including national courts, are bound by that decision on exclusive jurisdiction dated 19.07.2016. The respondent No.4 points to Article 54 of the ICSID Convention as the basis for making their argument. Article 54(1) of the ICSID Convention states:

> "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

56. Mr. Khan has referred to Article 54 of the ICSID Convention to argue that the decision dated 19.07.2016, issued after the issuance of the Rule on 09.05.2016, is binding on us as an organ of the State of Bangladesh. Mr. Mahmud has also referred to Article 54 of the ICSID Convention to submit that the decision dated 19.07.2016is to be treated as a final judgment of the Appellate Division of the Supreme Court of Bangladesh. However, these arguments appear misconceived and misleading for a number of reasons. The ICSID tribunals do not provide an equally efficacious remedy as that provided under Article 102 of the Constitution of Bangladesh. In particular, the petitioner, respondent No.1 (Ministry of Energy and Mineral Resources) and respondent No. 5 (Niko Canada, which pleaded guilty to acts of corruption in Canada) are not before the ICSID tribunals. The ICSID arbitration cases only relate to "investment disputes" which forms the subject of such claims and only apply to parties to the dispute, i.e. Niko Bangladesh Limited (respondent No.4), BAPEX (respondent No.3), and Petrobangla (respondent No.2). ICSID has no jurisdiction over Niko Canada (respondent No.5) which has admitted to corruption before the Canadian courts or the Ministry of Energy (respondent No.1) which issued the *ultra vires* instructions to enter the JVA and GPSA. Thus, the pending ICSID arbitration cases have no effect on our constitutional right and duty to judicially review *ultra vires* government actions tainted by corruption. A leading commentator on ICSID, Christopher Schreuer, states in his book, The ICSID Convention: A Commentary, 2nd Edition, Cambridge University Press:

> "The binding nature of the [ICSID] award is inherent in the concept of arbitration. It is often expressed in terms of *res judicata.* Since arbitration is based on an agreement between the parties and this agreement includes a promise to abide by the resulting award, the award's binding force is based on the maxim *pactasuntservanda* (p. 1099, para 10)
>
> Consent to [ICSID arbitration] by a constituent subdivision or agency [such as respondent No. 2 or No.3] of a State does not amount to consent by the host state itself (see Art. 25, paras. 311-318). Since it is the constituent subdivision or agency that is party to the proceeding under these circumstances, the effect of the [ICSID] award's binding force under Art. 53 would be upon that entity. The host state, not being a party to the proceeding, would not be subject to obligation under Art. 53 [of the ICSID Convention]. (p. 1100, para 14)
>
> Only final awards under the [ICSID] Convention (see Art. 48, paras. 22-30) are subject to recognition and enforcement. Decisions preliminary to awards such as decisions upholding jurisdiction under Art. 4, decisions recommending provisional measures under Art. 47, and procedural orders under Art. 43 and 44 are not awards. They are not by themselves subject to recognition and enforcement (p. 1125, para 30).
> …
> The obligation to enforce extends only to the pecuniary obligations imposed by the award. It does not extend to any other obligation under the award such as restitution or other forms of specific performance or an injunction to desist from certain course of action (p. 1136, para 72).

57. It is clear that the decision dated 19.07.2016, issued after the issuance of the Rule on 09.05.2016, is not a final award. In fact, no award has yet been issued by the ICSID tribunals. There is no support for the proposition that the ICSID tribunals' decisions are binding on us in our exercise of the powers of judicial review. We note that even ICSID awards may be reviewed or annulled by the ICSID system and only the pecuniary obligations imposed by a final award are treated as binding on the parties to the arbitration cases. In this case there is no award to enforce as yet. Thus, we cannot agree with the respondent No.4 that the writ petition should be kept in abeyance till the time of the enforcement of any final ICSID award.

58. In another authoritative book called *Guide to ICSID Arbitration* published by Kluwer Law International, and authored by Reed, Paulsson, and Blackaby it has been noted in Chapter 5, page 97:"An ICSID award binds only the parties to the dispute, not third parties. Not all ICSID decisions are awards, let alone final awards. Procedural decisions are not final awards".

59. In ***Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*** (ICSID Case No. ARB/98/8), one of the first ICSID tribunals to issue a "decision" stated:

> "The conclusions of the Tribunal … in relation to other matters which were submitted to the Tribunal for its decision in the course of the proceedings, were published in the form of "Decisions", to be incorporated into our Final Award by reference in due course. The Tribunal adopted this course because the ICSID Arbitration Rules contain no provisions which permit or even contemplate "Partial" or "Interim" awards, and, indeed, it seemed to the Tribunal that the Rules contemplated only one, Final Award. The course which the Tribunal adopted was not challenged or objected to by either party".

60. For these reasons we find no merit in the arguments of the respondent No.4 that the decision dated 19.07.2016 is binding on us in the same way as a judgment of the Appellate Division of the Supreme Court.

61. Mr. Khan argues that, even if the allegations are accepted, there is no corruption since the trail of payments stop at Giasuddin Al Mamoon. 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$ 500,000payment 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. Mr. Mamoon openly claims that 50% of his power came from being a close friend of Mr. Tarique Rahman, son of the former Prime Minister Khaleda Zia. Mr. Mamoon has also been convicted of money laundering along with his close friend and business associate, Mr. Tarique Rahman. These facts, though not vital or essential for disposal of the Rule, 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.

62. We cannot agree with the submission of the respondent No.4 that the Agreed Statement of Facts cannot be relied upon since it only related to the 2005 period while the JVA was signed in 2003 and the GPSA in 2006. Mr. Khan submits that there is no causal link between the admitted corruption and the JVA or GPSA. However, it is clear and admitted in the Agreed Statement that Niko Canada (respondent No.5) made the payment to the Bangladeshi Energy Minister AKM Mosharraf Hossain to exercise his influence to ensure that respondent No.4 was able to secure a gas purchase and sales agreement (GPSA) acceptable to Niko, as well as to ensure that Niko was dealt fairly in relation to claims for compensation for blowouts. It is particularly important to note that the respondent No.5 pleaded guilty to the charges that "Niko Canada did, in order to obtain and retain an advantage in the course of business" provide bribe to Bangladesh officials. These words "obtain" and "retain" are significant. They imply that the bribe in 2005 was paid not only to "obtain" a future benefit such as the GPSA in 2006 but also to "retain" a past benefit such as the JVA in 2003. Corruption payments does not have to be simultaneous with the benefits procured. Bribe payments may be made for a past benefit, a future benefit, or to retain a benefit. We are unable to agree that bribery alone would not taint the procurement process of the JVA and GPSA but there must be shown that the bribery simultaneously and actually caused the benefit being bestowed to the bribe giver. If that was the law then many corrupt actors would be able to get away with corruption merely by taking the bribe at a time before or after the illegal benefit was bestowed or stating that the bribery did not actually cause the benefit being bestowed.

63. 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 is estimable 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. 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 additionally show, 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 clearly also committed the offences of abatement 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.

64. We find no merit in Mr. Khan's submission 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 of 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.

65. We cannot agree with the submissions of Mr. Mahmud and Mr. Khan 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.

66. In light of this background, from the undisputed facts and evidence presented, it is clear to us that respondents No.4 and No.5 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.

67. 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 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 respondent No.5 through its subsidiaries. The eventual prices to be paid by Bangladeshi consumers for the gas to be supplied by 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.

68. The JVA and GPSA are also void *ab initio* under the Contract Act. Section 23 of the Contract Act clarifies what considerations and objects are lawful and what are not. Section 23 states:

"The consideration or object of an agreement is lawful, unless-

- it is forbidden by law; or
- is of such a nature that, if permitted, it would defeat the provisions of any law; or
- is fraudulent; or
- involves or implies injury to the person or property of another; or
- the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

69. 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" of Bangladesh. Public contracts procured by corruption are obviously against the "public policy" of Bangladesh. Mr. Mahmud has submitted since the JVA and GPSA has already been performed and gas has already been supplied to respondent No. 2, the only option here is to provide restitution to the respondents No.4 and No.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 respondent No.4 or No.5 from the JVA GPSA 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.

70. In ***K N Enterprise v Eastern Bank Limited*** 63 DLR (2011) 370 paragraph 36 it was stated:

> "…there is an old maxim, "*ex turpi causa non orituractio*" i.e. a person cannot found an action on his own fraudulent behavior. There is another old maxim, "*frausominacorrumpit*" meaning …fraud vitiates everything."

71. In ***Engineer Mahmudul-ul Islam and others v. Government of the People's Republic of Bangladesh and others***, 2003 23 BLD 80, in a judgment upheld by the Appellate Division, the High Court Division of the Bangladesh Supreme Court stated:

> "36. …A decision of the State may not be permitted to be challenged in a Court of Law but the implementation of such decision by the executive authority of the State without due diligence, without due application of mind, without reasonableness,

> without fairness, with arbitrariness and or in favour of a private party against public interest is liable to be challenged in the Court of Law. Any misuse of power by any executive benefiting a private party in dealing with any State property is both unreasonable and against public interest. Every activity of the government has a public element in it and it must therefore be guided by public interest and with reason. If the government awards a contract or leases out any of its property or grants any targets, the same is liable to be tested for its validity on the ground of reasonableness and public interest and if fails it would be unconstitutional and invalid. A government functionary, as mentioned above, cannot act as it pleases in dealing with State properties or largess in its absolute and unfettered discretion. When a government action is found to be unreasonable or lacking in the quality of public interest, such action is invalid."

72. The price of corruption is high for the victims of the corruption. Corruption is a cancer for our society which has to be eradicated if we are to obtain full measure of benefit of our economic progress. The dire consequences of corruption for the people of Bangladesh have been painfully made evident in this case. Gas fields had been handed over to respondents No.4 and No.5, who had failed to qualify through a competitive bidding process, in exchange of payments of a few million dollars to a handful of greedy and corrupt individuals. The eventual blowouts and the destruction of two gas fields have caused damages of over US$ 1 billion. Unfortunately, respondents No.4 and No.5 are yet to pay for their crimes committed about 14 years ago.

73. Greed of a few should not be allowed to trump over the interest of the public. A clear message of deterrence needs to be sent out to the corrupt investors and their agents. Investors should be made aware that if they break the laws of Bangladesh by indulging in corruption then their investments would not be protected by the laws of Bangladesh. Corrupt investors not only harm the people of Bangladesh but also harm the genuine interests of honest investors who are forced out of the market by the corrupt players.

74. The clear and convincing evidence of corruption produced before us is the product of international law enforcement co-operation through the use of Mutual Legal Assistance (MLAs) arrangement between Bangladesh, Canada, and the United States under the United Nations Convention Against Corruption ("UNCAC"). Radha Ivory, a leading commentator on the issues of corruption and asset recovery, has stated in the book *Corruption, Asset Recovery, and the Protection of Property in Public International Law,* published by Cambridge University Press at pp. 101-102: "that state parties to the anti-corruption treaties signaled their willingness to prosecute and punish local misuses of power or office for private gain. Simultaneously, they identified the conduct that generates or involves assets that may become the subject of cooperative confiscation efforts under those conventions or related MLATs. …States are required or encouraged to ensure that persons may be deprived of illicit wealth, to assist each other with such confiscations, and to cooperate when disposing of confiscated assets". Radha Ivory also notes at pp. 122-123 that "the anti-corruption treaties expressly require their state parties to empower their competent authorities, judicial or executive, to identify, restrain, and permanently remove illicit wealth belonging to an offender or a third party. … state parties possess considerable discretion to determine when and how they regard either fact [i.e. the offence and the connection between the thing and the offence] as established."

75. Bangladesh is a party to the United Nations Convention against Corruption (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. The relevant provisions of Article 31 UNCAC provides:

> "***Article 31. Freezing, seizure and confiscation***
>
> 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
>
> 2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
>
> 3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
>
> 4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
>
> 5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
>
> 6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
>
> 7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
>
> 8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
>
> 9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
>
> 10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party."

(**Emphasis given**)

76. As a legally binding international anti-corruption agreement, UNCAC provides a comprehensive set of measures to be 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 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 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."

77. 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.

78. In ***Dr. Mobashir Hassan and Others vs. Federation of Pakistan*** PLD 2010 Supreme Court 265 the Supreme Court of Pakistan, while discussing the corruption and confiscation, agreed with the following:

> "129. …A perusal of UN Convention Against Corruption indicates that the state had responsibility to develop and implement or maintain effective, coordinated anti-corruption policies; to take measures to prevent money laundering; to take measures for freezing, seizure and confiscation of proceeds of crime, derived from offences established in accordance with the Convention, or the property the value of which corresponds to that of such proceeds, property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention, etc.; State parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to' corruption; as well as affording to one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the Convention; prevention and detection of transfers of proceeds of crime."

79. In ***Biswanath Bhattacharya vs. Union of India*** *(UOI)* AIR (2014) SC 1003, the Supreme Court of India discussed the confiscation of proceeds of crime:

> 41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. 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 Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

80. 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 respondent No.5 clearly benefitted from this

corrupt scheme. Otherwise, there is no explanation as to how 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 respondent No.5 could not have obtained its exploration rights in Bangladesh. We are of the view that respondent No.5 should be deprived of its properties in Bangladesh which they have obtained through bribery and corruption. 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 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. 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 respondent No. 5 which are within the jurisdiction of Bangladesh and are, thus, subject to seizure and confiscation.

81. 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.

82. We are of the view that there are also a number of public policy reasons for the assets of respondents No.4 and No.5 to be seized, confiscated, and returned back 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.

83. The primary purpose of confiscation of the assets of the respondents No.4 and No.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 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 respondents No.4 and No.5 is thus important for the confidence of the public in the rule of law.

84. 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.

85. 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 dismissed 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.

86. 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 under Article 102 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.

87. 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.

88. The respondent No.1 is directed accordingly to take necessary steps to return these assets of the respondent No.4 and No.5 to the State. The rights and assets of respondents No.4 and No.5, being obtained through corruption, are ill-gotten wealth and unlawfully obtained from the State of Bangladesh. Respondents are directed to ensure that none of Niko's ill-gotten assets can be dissipated, transferred, or sent out of Bangladesh. The purpose is to strip respondent No.4 and No.5 of any benefits obtained through corruption.

89. The respondents No.1, No.2 and No.3 are being directed to expeditiously seek adequate compensation for the damages caused by the 2005 blowouts and also take necessary

steps to recover any proceeds of crime that may have already been siphoned off or taken out of Bangladesh by the respondent No.4 and No.5. To this end, the respondent No.1 are directed to effectively and expeditiously pursue the long pending Money Suit and seek adequate compensation from respondents No. 4 and No.5 for the damages caused by the 2005 blowouts. The respondents No.1, No.2, and No.3are further directed to take steps to recover the value of the benefit obtained by the respondent No.4 and No.5 through the bribery and corruption, including recovery of all direct and indirect payments received by the respondents No.4 and No.5 from Bangladesh as a result of their corruption. No payments can be made to respondent No.4 and No.5 by the respondents No.1, No.2 or No. 3 till these steps are completed.

90. The respondent No.1 is further directed to seize and cancel the exploration rights of respondent No.5 or any of its subsidiaries obtained though corruption during the period 2003 to 2006, including the rights under the JVA, GPSA and the Block 9 PSC and either develop these gas fields themselves or, if not possible, reallocate them to competent companies through a fair, transparent and open bidding process.

91. In light of the above, we conclude that from 2003 till 2006 the 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, we find that the JVA and GPSA have been procured by corruption and thus render them void *ab initio*. The rights and assets of the respondent No.5 in Block 9 PSC, for which 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 respondent No. 4 and No.5 in Bangladesh, obtained from the State through the corrupt scheme, shall revert back to the State.

92. In view of the above observations, we are inclined to hold that the Rule deserves merit and is bound to succeed.

93. Accordingly, the Rule is made absolute. 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 respondents No.3 and No.4 is declared to be without lawful authority and of no legal effect and thus void *ab initio* and the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the respondents No.2, as Buyer, and a joint venture between respondents No.3 and No.4, as Seller, are also declared to be without lawful authority and of no legal effect and thus void *ab initio*. The assets of respondents No.4 and No.5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9 are hereby attached.

94. There is, however, no order as to costs.