

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

WRIT PETITION NO. 8753 OF 2015.

Terms, Issues and Phrases:

Application for gas connection for captive power and industrial Project, dedicated 150 psi 12-inch gas line connection for industrial purpose, Judicial review of the propriety of the decision to provide gas connection to others through the petitioner's dedicated line.

Naima Haider, J	TM Textiles and Garments Ltd.
Abu Taher Md. Saifur Rahnian, JPetitioner.

Vs

Bangladesh, represented by the Secretary Ministry of Power, Energy and Mineral Resources, Bangladesh Secretariat, Ramna, Dhaka and others.

Judgment on
31.10.2017.

.....Respondents.

Main Decision:

We do not find it necessary to proceed with an academic discussion on the legality of the impugned orders. We feel that justice would be best served if the Rule is disposed of with the direction upon all concerned to ensure that the petitioner is ensured the "approved gas supply and approved pressure" at all material times. No gas connection is to be provided to the other nine factories unless the "approved gas supply and the approved gas pressure" is ensured. The respondents are further directed to ensure strict compliance with the conditions set out in the aforesaid paragraph in connection with providing gas connection to the nine factories.....(Para 15).

Main Legal Issue:

Issue-1:

Whether the dispute in question should be resolved through arbitration as sought in the contract or through intervention of judicial review.

For the petitioner:	Mr. Ajmalul Hossain, QC, Senior Advocate with Mr. Md. Saifullah Mamun and Mr. Forrukh Rahman, Advocates.
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For the Respondent No. 6-14:	Mr. Prohir Neogi, Senior Advocate with Mr. A.M. Amin Uddin, Mr. Munshi Muniruzzaman, Mr. Suvra Chakraborty, Mr. Yousuf Khan Rajib, Mr. Shakib Rejwan Kabir, Mr. Anita Ghazi Rahman, Mr. Manzur Al- Matin, Mr. Taposh Bandhu Das, and Mr. Sumon Ali, Advocates.
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For the respondent No. 2:	Dr. Md. Bashir Ullah, Advocate
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Issue-2:

Whether the writ petition is maintainable or not in spite of existence of arbitration clause in the contract.

Finding-1 and 2:

In our view, dispute which compelled the petitioner to move this Division is, in strict sense, not a dispute that should be resolved by arbitration, as suggested by Dr. Md. Bashir Ullah. The dispute is not a “contractual dispute”; the dispute, it seems, relates to the propriety of the decision to provide gas connection to others through the petitioner’s dedicated line. That being the position, we think that this Division can interfere and there is no need for the petitioner to refer this matter to arbitration.....(Para 10).

Constitution of Bangladesh: Article 102: Judicial review is available in the case where, in spite of existence of arbitration clause, the propriety of a decision of the statutory authority is questioned:

In our view, dispute which compelled the petitioner to move this Division is, in strict sense, not a dispute that should be resolved by arbitration, as suggested by Dr. Md. Bashir Ullah. The dispute is not a “contractual dispute”; the dispute, it seems, relates to the propriety of the decision to provide gas connection to others through the petitioner’s dedicated line. That being the position, we think that this Division can interfere and there is no need for

the petitioner to refer this matter to arbitration.....(Para 10).

We do not find it necessary to proceed with an academic discussion on the legality of the impugned orders. We feel that justice would be best served if the Rule is disposed of with the direction upon all concerned to ensure that the petitioner is ensured the “approved gas supply and approved pressure” at all material times. No gas connection is to be provided to the other nine factories unless the “approved gas supply and the approved gas pressure” is ensured. The respondents- are further directed to ensure strict compliance with the conditions set out in the aforesaid paragraph in connection with providing gas connection to the nine factories.....(Para 15).

Cases cited and/or relied on:

Nuruddin Vs. Titas Gas 3 BLC (AD) (1998) 231

JUDGMENT

NAIMA HAIDER, J:

1. In this application under Article 102 of the Constitution, Rule was issued calling upon the respondent to show cause as to why the impugned Letter No. 1 bearing Reference No. জোবিঅ/ভালুকা/৭৫৭.৬/৮৯৯ dated 30.03.2015 (Annexure-’K’ to the Writ Petition) and the impugned Letter No. 2 bearing Reference No. জোবিঅ/ভালুকা/৭৫৭.৬/১০২৫ dated 01.07.2015

(Annexure-'O' to the Writ Petition) should not be declared to be without lawful authority and are of no legal effect and/ or such other or further order or orders passed as to this Court may seem fit and proper.

2. The relevant facts, in brief, are as follows: The petitioner is engaged in the business of manufacturing and exporting knit products. The petitioner uses gas as a raw material in the manufacturing process. The petitioner applied for gas connection for both Captive Power and Industrial Project. The petitioner's requirement, amongst others, was pressure of 50 PSIG. Although the respondents provided the said gas connection, the respondents could not consistently provide the approved quantity of gas. The respondents could also not ensure continuous gas pressure of 50 PSIG. Thereafter, the petitioner, by its letter dated 19.06.2012 applied for dedicated 150 psi 12-inch gas line connection from the respondent No.2's "Dhanua Town Bordering Station" to the petitioner's factory. The dedicated line was to ensure that approved gas supply and the approved pressure are maintained. The petitioner undertook to pay the cost of such dedicated line. The respondent No.2 by its letter dated 04.07.2012 approved the increased load and also approved the construction of the dedicated pipeline. The petitioner thereafter requested for confirmation and assurance from the respondent No.2 regarding, among others, of undisturbed gas connection. The petitioner also requested the respondents not to provide any gas connection to anyone from the said dedicated gas line. The respondent No. 2 by its letter dated

25.10.2012 provided such assurance by stating

"আপনার ধনুয়া টিবিএস-এ নির্মিতব্য আরএমএস হইতে ভালুকাছ মেসার্স টিএম টেক্সটাইল এন্ড গার্মেন্টস লিমিটেড এর আঙ্গিনা পর্যন্ত ১২"X১৪০ পিএসআইজি গ্যাস বিতরণ লাইন হইতে অন্য কোন গ্রাহককে গ্যাস সংযোগ না প্রদানের অনুরোধ করিয়াছেন। এই বিষয়ে আপনাদের জানানো যাইতেছে যে, আপনাদের বর্তমান ও ভবিষ্যৎ চাহিদা বিবেচনায় আনুমানিক ৮ এমএমসিএফডি গ্যাস সরবরাহ নিশ্চিত না করিয়া উক্ত গ্যাস বিতরণ লাইন হইতে অন্য গ্রাহককে গ্যাস সরবরাহ করা হইবে না।"

3. The petitioner started the construction work of the dedicated pipeline from "Dhanua Town Bordering Station" to the petitioner's factory. M/S ARKO Engineering Limited was appointed for the said purpose for approximately Taka 20,43,44,289. When the construction work was completed, the respondent authority conducted successful examination of the said pipeline. Thereafter, gas was supplied to the petitioner's factory through the dedicated line. However, in contradiction with the previous assurances, the respondent authority requested the petitioner to sign two Gas Sale Agreements. The said agreements were signed on standard template and there was no room for negotiation. The petitioner came to know that the respondent-authority is planning to give gas connection to nine (9) other industries through the petitioner's dedicated line given that their location was closer to the dedicated line. The petitioner requested the respondents at several times, not to provide such gas connections. The respondents paid no heed thereto. The respondents, to the contrary, approved the

gas connections of the said factories from the dedicated line of the petitioner. Experts from Hong Kong concluded that the gas pressure would be very low if gas supply is given through the dedicated line. Despite this, the respondents proceeded with providing gas connections to other factories through the dedicated line.

4. Finding no other alternative efficacious remedy the petitioner has moved this Court and obtained the instant Rule Nisi.

5. The respondent nos. 2 and 6-14 enter appearance by filing Affidavit-in-Opposition. The respondents points out that the petitioner would not be affected as a result of the new gas connections through the dedicated line. The respondents have tried to illustrate this through mathematical statistics. The respondents also contend that since the pressure of the present gas flow is 120 PSIG which is less than the approved pressure, it would make no difference if gas is supplied to the others.

6. Mr Ajmalul Hossain QC, Senior Advocate for the petitioner at the outset submits that the dispute in question is not a dispute that should be referred to arbitration and hence the writ petition is maintainable. He further submits that the position taken by the petitioner is not controverted. The only issue for determination is whether the respondents are at liberty to permit others to use the dedicated line of the petitioner when such use may affect the gas supply and gas pressure to the petitioner's factory.

7. Mr. Probir Neogi, Senior Advocate, with Mr A. M. Amin-Uddin, Senior Advocate appearing on behalf of the respondent Nos. 6-14 points out that the pipeline in question has a capacity of 15,70,000 CFT/Hr, whereas, the approved load of the petitioner is 1,43,470 CFT/Hr, i.e. a fraction of the total load. Hence, 'there is a surplus capacity of 14,26,530 CFT/Hr in the said pipeline. 90.86% of the capacity of the pipeline remains to be utilized. Even if the approved load of the petitioner is increased to 3,33,334 CFT/Hr, which is enough to meet the future demands of the petitioner, there will still be a surplus supply of 12,36,666 Cft/Hr. The total demand of the nine industries for which connections were approved stands at 11,07,741 CFT/Hr. Therefore, even after giving connection to the nine factories, there would be surplus capacity. As a result, the petitioner would not be prejudiced and the petitioner's fundamental rights would not be infringed. Mr. Neogi's submission was adopted by the learned Counsels appearing for the other- respondents.

8. Dr. Md. Bashir Ullah, the learned Advocate appearing on behalf of the respondent no.2 submits that there are certain factual aspects involved in the writ petition and therefore, it should be addressed by the Energy Regulatory Commission of Bangladesh. Dr. Bashir Ullah further submits that the petitioner entered into contractual arrangement and therefore, disputes should be resolved by the arbitrators in light of the arbitration clause in the agreements. On these counts, the learned Advocate submits that the Rule

should be discharged and reliance be placed upon the decision of our Hon'ble Appellate Division in the case of *Nuruddin Vs. Titas Gas*, reported in 3 BLC (AD) (1998) 231.

9. We have considered the submissions of the learned Counsels appearing for the petitioner and the respondents. We have also perused the writ petition, the Affidavit in Opposition and the documents annexed thereto.

10. In our view, dispute which compelled the petitioner to move this Division is, in strict sense, not a dispute that should be resolved by arbitration, as suggested by Dr. Md. Bashir Ullah. The dispute is not a "contractual dispute"; the dispute, it seems, relates to the propriety of the decision to provide gas connection to others through the petitioner's dedicated line. That being the position, we think that this Division can interfere and there is no need for the petitioner to refer this matter to arbitration.

11. The reports prepared by BUET and OSAKA Engineering Ltd are helpful in understanding the factual position. For ease of reference, we set out below the relevant parts of the reports:

BUET

Total capacity of the gas line, as claimed by TITAS gas, as 1,570,000 cft/hr is correct if Titas Dhanua Station gas pressure is 140 psi and atmosphere pressure supply to TMBD site. However; if 45 psi pressure is to be maintained at

TMBD site, gas line capacity will be reduced to 1,440,000 cft/hr.

It is clear that gas consumption figures as mentioned in the drawing are feasible. If the supply is less than 140 psi, gas supply figures will be less than the desired values.

Technically it is possible to install automatic gas control valve at TMBD to throttle the gas supply to other factories in case TMBD RMS intel pressure goes down a certain value of 45 psi.

Gas pipeline can supply a certain amount of gas depending the supply pressure to guarantee a supply of 333333 cft/hr supply to other has to be reduced or supply pressure at TBS has to be boosted.

OSAKA:

Gas can be supplied from existing TMBD dedicated 12"x140 PSIG pipeline to TMBD and the other nine factories as per their gas requirement (TMBD: 333,334 scf/hr, the other nine factories: 1,107,741 scf/hr,) only if the pressure at TITAS Dhanua TBS, which is the TMBD pipeline start point can be maintained to 140 psi or above.

If the intel pressure of TMBD pipeline at TITAS Dhanua TBS decreases below 140 psi, there will be a possibility not to be able to cover total gas requirement from TMBD

and the other nine factories as above."

12. The importance of dedicated line is clear from the aforesaid. The petitioner spent a significant amount for the construction of the dedicated line, in compelling circumstances. We would have thought that the petitioner never intended this pipe for "common use". That being said, we cannot rule out the possibility that the petitioner might have also been open to the idea that the line may be used for others only on the strict condition that the use would not, in any way, affect the petitioner's gas supply and the gas pressure.

13. The Counsel for the petitioner provided a solution: the petitioner would be agreeable to the gas connection from its dedicated line, if it is ensured that the approved quantity and the approved pressure is maintained through installation of Automatic Pressure Regulated Gas Flow Control Valve. The learned Counsel further points out that the petitioner agrees to the recommendation on installation of Automatic Pressure Regulated Gas Flow Control Valve, subject, to the conditions of installation, set out below:

"No gas connection shall be given to any other factory/consumer from the upstream of TMBD 12-inch 140 PSIG dedicated gas line before the point of its connection to the intel of factory RMS 01 TM Textile & Garments Limited from this gas line.

Gas connection to other factories/consumer may be made from downstream of TMBD 12-inch 140 PSIG dedicated gas line after the point of its connection to the intel of factory RMS of TM Textile & Garments Limited from this line with condition that such connection can only be made through an Automatic Pressure Regulated Gas Flow Control Valve which will work automatically to maintain a gas pressure of 40 PSIG or more at the intel of factory RMS of TM Textile situated within its factory premises. This Automatic Pressure Regulated Gas Valve shall work in such a way that the Gas pressure the intel of factory RMS of TM Textile falls below 40 PSIG; this Gas Valve will automatically throttle/reduce gas supply/flow to other factories and shall ensure & maintain a Gas Pressure of minimum 40 PSIG at the intel of factory RMS of TM Textile.

Such Automatic Pressure Regulated Gas Flow Control Valve shall be procured & installed by TM Textile and its operation, maintenance & supervision will be under control of TM Textile. However, Titas Gas Transmission & Distribution company Limited shall give necessary assistance for interconnection of this Gas Valve with the Main 140 PSIG gas line as necessary.

No other factories shall be given gas connection from the downstream of 12-inch 140 PSIG TMBD dedicated gas line through the Automatic Pressure Regulated Gas Valve except those factories as mentioned in the Titas Gas Letter No. ZBO/Bhaluka 75 7-6/889 Dated 30.03.2015.

Before giving gas connection to the above factories as mentioned in TITAS Letter dated 30.03.2015 noted above, all necessary expansion modification works of TMBD RMS situated within TITAS Dhanua TBS shall be done by TITAS Company as it is mentioned in the same TITAS Gas Letter dated 30.03.2015.

TITAS Company shall ensure to maintain always a Gas Pressure of 140 PSIG or above at the entry point of 12-inch 140 PSIG TMBD dedicated gas line from the outlet of TMBD RMS situated at TITAS Gas Dhanua TBS."

14. The learned Counsels for the respondents conceded that the suggestion is workable. It was further contended that in the interest of justice, this Division should pass order that would safeguard the petitioner and would, at the same time, benefit the nine factories.

15. That being the case, we do not find it necessary to proceed with an academic discussion on the legality of the impugned

orders. We feel that justice would be best served if the Rule is disposed of with the direction upon all concerned to ensure that the petitioner is ensured the "approved gas supply and approved pressure" at all material times. No gas connection is to be provided to the other nine factories unless the "approved gas supply and the approved gas pressure" is ensured. The respondents are further directed to ensure strict compliance with the conditions set out in the aforesaid paragraph in connection with providing gas connection to the nine factories.

16. With the above observation, we are inclined to dispose of the Rule without any order as to costs.

17. Communicate the Judgment and Order at once.

Abu Taher Md. Saifur Rahnian, J

I agree.