

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 5527 OF 2023

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Bangladesh Power Development Board represente by its Chairman WAPDA Building, 1st Floor, Motijheel Commercial Area, Dhaka-1000.

.... Petitioner

-Versus-

Sinha Power Generation Company Limited, Head Office, Mohakhali Tower, 13th Floor, 82, Mohakhali C/A, Dhaka-1212.

....Opposite-party

Mr. Mohammad Intiaz Farooq with
Mr. Drhobo Chakra Borty, Advocates

... For the petitioner

Mr. Khairul Alam Choudhury with
Mr. Syed Mehedi Hasan and
Mr. Md. Jubair, Advocates

...For the opposite-party

**Heard on 01.09.2024, 02.09.2024 and
03.09.2024.**

Judgment on 03.09.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

At the instance of the applicant in Arbitration Miscellaneous Case No. 501 of 2019, this rule was issued calling upon the opposite-party to show cause as to why the order no. 28 dated 07.05.2023 passed by the learned District Judge, Dhaka in the said case without exercising its power to adjudicate the matter filed by the applicant-petitioner under section 7ka of the Arbitration Act, 2001 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The salient facts leading to issuance of the instant rule are:

The present petitioner as applicant originally filed an application under section 7ka of the Arbitration Act, 2001 that gave rise to the Miscellaneous Case No. 501 of 2019 seeking following reliefs:

“Wherefore it is most humbly prayed that Your Honour would graciously be pleased to:

Issue a notice upon the respondent to show cause as to why an ad-interim order should not be passed to permit the applicant to segregate the disputed amount pertaining to the cost of excessive fuel consumed by the respondent, which is USD 1,34,43,715, equivalent to BDT 113,59,93,917.5 (BDT One Hundred Thirteen Crore Fifty Nine Lac Ninety Three Thousand Nine Hundred Seventeen Point Five only), from the Reference Rental Price (RRP) and hold in a separate

bank account of BPDB, to be maintained unutilized and undrawn at all times, during the pendency of the arbitration commenced between the parties;

AND

Pass an ad-interim order to permit the applicant to segregate the disputed amount pertaining to the cost of excessive fuel consumed by the respondent, which is USD 1,34,43,715, equivalent to BDT 113,59,93,917.5 (BDT One Hundred Thirteen Crore Fifty Nine Lac Ninety Three Thousand Nine Hundred Seventeen Point Five only), from the Reference Rental Price (RRP) and hold in a separate bank account of BPDB, to be maintained unutilized and undrawn at all times, during the pendency of the arbitration commenced between the parties;

AND

Pass such further order or orders as Your Honour may deem fit and proper upon cause shown, if any, and upon perusal of the records and after hearing the parties.”

Against the said application so filed by the petitioner, the present opposite-party also filed a written objection denying all the material averments so made in the application. The said application was taken up for hearing by the learned District Judge and vide impugned order dated 07.05.2023 disposed of the Miscellaneous Case holding that, the

petitioner may file an application under section 21 of the Arbitration Act before the Arbitral Tribunal for an interim order if so advised.

It is at that stage, the applicant of the Miscellaneous Case as petitioner filed this revisional application and obtained instant rule.

Mr. Mohammad Imtiaz Farooq along with Mr. Drhobo Chakra Borty, the learned counsels appearing for the petitioner upon taking us to the revisional application at the very outset submits that, the learned District Judge has committed an error of law in not passing any interim order in spite of the fact that, section 7ka of the Arbitration Act has given absolute authority to pass interim order despite of the fact that, the dispute is pending before the Arbitral Tribunal.

The learned counsel further contends that, since on the date of passing the impugned order, the learned District Judge also reconstituted the Arbitral Tribunal so there had been no scope for the petitioner to pray for interim order before the Arbitral Tribunal.

To substantiate the said submission, the learned counsel by referring to the documents so have been annexed with the supplementary-affidavit filed by the opposite-party in particular, Annexure-‘28’ thereof also contends that, the said order explicitly shows that, the opposite-party had challenged the order reconstituting the Arbitral Tribunal dated 07.05.2023 so it is the opposite-party whose deliberate obstruction, the dispute could not be resolved rather in order to get excess amount, it has been filing complaint one after another before different forums and taking advantage of the litigations, it has been receiving excess price from the petitioner, Bangladesh Power Development Board (Precisely, BPDB).

When we pose a question to the learned counsel with regard to the authority set out in section 7ka (6) of the Arbitration Act where an arbitral tribunal has been provided with authority over any order of District Judge (আদালত), the learned counsel then contends that, until and unless, the application so filed by the petitioner under section 7ka is disposed of, it cannot invoke authority as provided in section 7ka (6) of the Act and the petitioner rightly took resort to the provision of section 7ka of the Act.

With regard to the submission so placed by the learned counsel for the opposite-party that, similar authority has been given to an Arbitral Tribunal to pass any interim order akin to section 7ka, the learned counsel then contends that, since the authority of the learned District Judge exercised under section 7ka has not been ceased keeping pendency of the dispute before a tribunal, so the petitioner reserves every authority to obtain an interim order from the learned District Judge under section 7ka in spite of having similar authority of the tribunal in section 21 of the Act and therefore, the learned District Judge has committed an error of law innot passing any interim order sought under section 7ka and finally prays for making the rule absolute by setting aside the impugned order.

On the contrary, Mr. Khairul Alam Choudhury along with Mr. Syed Mehedi Hasan and Mr. Md. Jubair, the learned counsels appearing for the opposite-party by filing a counter-affidavit as well as supplementary-affidavit at the very outset submits that, the Miscellaneous Case so filed by the petitioner under section 7ka is not at all maintainable in view of the fact that, earlier the opposite-party initiated a Miscellaneous Case being No. 197 of 2013 where it prayed for an interim order restraining the

opposite-party herein the petitioner, from deducting any price on account of consumption of excess fuel from its monthly invoice arising out of contract no. 09764 dated 15.07.2010 and got an interim order from this court in Civil Revision No. 942 of 2013 dated 07.04.2013 and since that order has not been interfered with by the Appellate Division in its order dated 21.11.2013 in civil petition for leave to appeal no. 1482 of 2013 and ultimately the said order got sustained in the civil revision vis-à-vis in the Miscellaneous Case vide judgment and order dated 15.06.2016 and 12.03.2017 respectively so the learned District Judge has rightly passed the impugned order innot passing any interim order sought by the petitioner.

The learned counsel though submits that, the operative part of the impugned judgment can be sustained as the learned District Judge has rightly disposed of the case and referred the matter for considering of the grievance of the petitioner to the Arbitral Tribunal under section 21 of the Arbitration Act.

The learned counsel by referring to the order passed by the Arbitral Tribunal dated 12.09.2017 (Annexure-‘15’ to the counter-affidavit) also contends that, since the Arbitral Tribunal also passed ad-interim order directing the petitioner to maintain status quo on account of deducting price of excess consumption of fuel from monthly invoices of the opposite-party as has been found by the High Court Division and affirmed by the Appellate Division and that of the learned District Judge till conclusion of the arbitral proceeding, so there was no scope for the learned District Judge to pass any interim order sought by the petitioner

segregating the amount at taka 113,59,93,917.5 from the invoice (RRP) and hold the said amount in a separate bank account which is tantamount to interfere with the interim order passed earlier by the same District Judge and upheld by the Arbitral Tribunal.

The learned counsel by referring to section 7ka(6) of the Arbitration Act contends that, the said provision explicitly overrides the authority of the District Judge making its order ineffective (অকার্যকর) as a whole and partly and therefore, the learned District Judge has rightly passed the impugned order innot interfering with its earlier interim order of status quo passed in Miscellaneous Case No. 197 of 2013 and very perfectly referred the matter to the Arbitral Tribunal for consideration under section 21 of the Arbitration Act.

By taking us to the provision of section 21 of the Arbitration Act, the learned counsel further contends that, similar authority of passing an interim order as has been vested to the District Judge under section 7ka of the Act has also been assigned to the Arbitral Tribunal under section 21 and since the Arbitral Tribunal on 12.09.2017 passed an interim order maintaining status quo, so there has been no scope to pass any interim order by the learned District Judge going beyond the order of the Arbitral Tribunal.

In regard to the impugned order appeared to be a non-speaking order, the learned counsel then referred to a decision in the case of *Abdul Motaleb-Vs-Md. Ershad Ali and others reported in 18 BLD (AD) 121* and submits that, “if any order it is shown that, the court passed the order has committed any error of law resulting in an error in the decision but it has

not occasioned any failure of justice” that order cannot be interfered. With those core submissions, the learned counsel finally prays for discharging the rule.

Be that as it may, we have considered the submission so advanced by the learned counsel for the petitioner and that of the opposite-party at length. We have also carefully gone through the impugned judgment and order and those of the documents so appended with the revisional application and the counter-affidavit as well as supplementary-affidavit filed by the opposite-party.

Since the fact with regard to obtaining an interim order by the opposite-party by filing a Miscellaneous Case being No. 197 of 2013 is not disputed one and the order of status quo it obtained from this court and was upheld by the Appellate Division so we are not inclined to dwell on those admitted facts. It is also admitted position that, following formation of Arbitral Tribunal comprising Mr. Justice Md. Awlad Ali, Mr. A. K. M. Fazlul Karim and Mr. Mir Md. Awlad Hossain an order was passed on 12.09.2017 on an application filed by the opposite-party under section 21 of the Arbitration Act which is akin to the order of the learned District Judge passed dated 12.03.2017 in Miscellaneous Case No. 197 of 2013. So if the amount of USD 1,34,43,715 equivalent to BDT 113,59,93,917/5 is segregated from the future monthly invoices (RRP) and hold in a separate bank account as has been sought in the case, it will tantamount to interfere with the order dated 12.03.2017 passed in Miscellaneous Case No. 197 of 2013 initiated by the present opposite-party which was upheld by the Appellate Division and finally maintained

by the Arbitral Tribunal dated 12.09.2017. Under what circumstances, the alleged amount will be segregated has been stated in paragraph no. 24 to the petition of Miscellaneous Case No. 501 of 2019 (Annexure-‘A’ to the revisional application) and we find from that paragraph, the said amount was given earlier to the opposite-party following interim order passed by the Arbitral Tribunal now sought to be deducted from the invoice to be issued subsequently by the opposite-party which clearly runs counter to the order passed by the Arbitral Tribunal.

Now we would like to examine the veracity of the impugned order. Though in the impugned judgment and order, the learned District Judge has very elaborately discussed the case of the parties to the Miscellaneous Case which appears to us totally irrelevant but at the fag-end of the impugned judgment, he out of the blue found that the petitioner can get the remedy from the Arbitral Tribunal under section 21 of the Arbitration Act which we find to be reasonable though fact remains, on that very date, the learned District Judge reconstituted the Arbitral Tribunal on the back of termination of the Chairman of earlier constituted tribunal.

Now question remains, whether after reconstitution of the Arbitral Tribunal, the petitioner could make their grievance under section 21 of the Arbitration Act to the tribunal instead of invoking jurisdiction to the District Judge under section 7ka of the Act or not. The answer is resounding “yes” because even though it has challenged the propriety of reconstitution of the Arbitral Tribunal on 10.03.2024 by filing a Civil Revision No. 1051 of 2024 (Annexure-‘28’ of the supplementary-affidavit) that is, nearly after 10 months of reconstitution of the tribunal

dated 07.05.2023. So the submission placed by the learned counsel for the petitioner cannot be taken as cogent who submitted that, there has been no scope to go to the tribunal at that stage, since the tribunal was reconstitution on that very date of passing the impugned order. Rather, from the attitude of the petitioner, it exemplifies that, it has been dragging the dispute innot taking appropriate step to get proper remedy. Since the remedy sought by the petitioner in its application under section 7ka for segregating the amount which the opposite-party has already received from the petitioner and if an interim order is passed as sought will definitely interfere with the order passed by the District Judge and upheld by the Appellate Division vis-à-vis maintained by the Arbitral Tribunal. So, there has been no scope to segregate the amount from the earlier invoice and hold it in a separate account. On top of that, such kind of interim order cannot be passed by the learned District Judge invoking section 7ka of the Act since the dispute is now in *seisin* before the Arbitral Tribunal and section 7ka (6) will thus definitely come as bar. So, the grievance of the petitioner invariably has to be adjudicated by the Arbitral Tribunal where it can seek its remedy. However, we find the decision cited by the learned counsel for the opposite-party to be applicable here in view of passing slipshod order by the learned District Judge which is under challenge in this revision.

Regard being had to the above facts and circumstances, we don't find any illegality or impropriety in the impugned judgment and order which is thus liable to be sustained.

Accordingly, the rule is discharged however without any order as to costs.

Let a copy of this judgment be communicated to the court concerned forthwith.

Md. Bashir Ullah, J:

I agree.