18 SCOB [2023] HCD 213

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)
Arbitration Application No. 19 of 2018

Agrocorp International Pte Ltd.
Vs.
Vietnam Northern Food Corporation (Vinafood1)

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

Mr. A. M. Masum, appearing in person being the power of attorney-holder of the Respondent.

The 10th October, 2020

Present:
Mr. Justice Muhammad Khurshid Alam Sarkar

Editors' Note:

In this case the petitioner is a company having the business of international commodity trading and the respondent is a state owned corporation of the Government of Vietnam. The petitioner prayed before the High Court Division for the appointment of an arbitrator from the side of the respondent for formation of an arbitration tribunal to resolve dispute between them. The respondent denied existence of any arbitration agreement between the parties. The parties had no direct communication between them rather, they communicated through Mr. Vandara Din whom the petitioner claimed as a broker of the respondent but the respondent claimed that he was petitioner's broker. The Court held that it is necessary to determine the existence of an arbitration agreement to invoke the procedure under section 12 of the Arbitration Act. Thereafter, examining all the annexure the Court found that there was no arbitration agreement between the parties and no contractual obligation arose between them from email communications. The Court also held that even in the absence of any arbitration agreement between the parties, they are at liberty to arbitrate through mutual consent. Consequently, the rule was discharged.

Key Words:
Arbitration agreement; Mutual Consent; consensus ad idem; Sections 9, 12, 17 of the Arbitration Act, 2001

Existence of an arbitration agreement is a pre-condition for invoking the power under sec 12 of the Arbitration Act:

If the parties to the arbitration have already devised a procedure for appointment of arbitrator/s, then the provisions of sub-Sections (2) to (13) under Section 12 of the Arbitration Act would have hardly any application. But in absence of any device agreed upon by the parties, the provisions of sub-Sections (2) to (13) under Section 12 of the

Arbitration Act come into play. In both the above-mentioned paths, the implied precondition is that there must be the existence of an agreement between the parties to go for arbitration. In other words, in order to make the provisions of sub-Sections (1) to (13) under Section 12 of the Arbitration Act applicable, the parties must agree to resolve any dispute through arbitration; absence of an agreement among the parties to hold arbitration shall render the aforesaid provisions of the Arbitration Act nugatory.

(Para-16)

<u>Circumstances when the parties bound themselves for arbitration:</u>

From a combined reading of the provisions of sub-Sections (1) & (2) under Section 9 of the Arbitration Act, it is crystal clear that a written arbitration agreement, either in a clause of a main contract or in a separate agreement, must exist in order to arbitrate any dispute between the parties. When (a) a written agreement containing the arbitration clause is signed by the parties or (b) if the parties through any written communication, which may be manual or digital, agree to arbitrate or (c) if one party makes a written claim containing a stipulation of holding arbitration in the event of denial of the claim and, in responding thereto, the second party though comes up with a defense as to material claim/s but remains silent about the proposal of holding arbitration, then, in those scenarios, the law of our country dictates the Courts to hold that the parties have bound themselves to go for arbitration. In addition thereto, if any special law prescribes for resolving a dispute through arbitration, either upon adopting the procedures laid down in the said special piece of legislation or in reference to the Arbitration Act, then, there shall not be any question as to having existence of any arbitration agreement. (Para-19)

<u>Absent of Arbitration agreement would not be a bar to arbitration when the parties consented mutually:</u>

In the case of international arbitration, this Court and, in the case of domestic arbitration, the District Judge Court is obligated to examine the issue as to whether there is an existence of an agreement between the parties for holding arbitration before entertaining an application under any provision/Section of the Arbitration Act. However, in absence of the arbitration agreement, if the parties decide to go for arbitration during pendency of an application under any Section of the Arbitration Act, they would be competent to proceed with arbitration in that the scheme of arbitration is founded on the mutual consent of the parties and there is no provision within the four corners of the Arbitration Act prohibiting initiation of arbitration proceeding during pendency of an arbitration application before this Court/the District Judge Court.

(Para-23)

<u>Existence of consensus ad idem between the parties is necessary to form contractual obligation:</u>

It is the settled principle of the law of contract in all jurisdictions of the world that in order to treat a document or any correspondence between the parties to be a contract/agreement, the Courts must be satisfied as to the existence of consensus ad idem between the parties on the important term/s of the contract, such as the terms of

quality, price, arbitration etc, not only from the mere wordings of the document or correspondence but also from the facts on record. (Para-24)

JUDGMENT

Muhammad Khurshid Alam Sarkar, J:

1. By invoking Section 12 of the Arbitration Act, 2001, (hereinafter referred to as the Arbitration Act), the petitioner-Agrocorp International Pte Ltd, a company incorporated under the laws of Singapore having its Head Office at 10 Anson Road # 34-04/05/06, Singapore 079903 represented by its constituted attorney Mr. Mamun Siraj Ebna Rohim (hereinafter referred to as the petitioner), approached this Court with an expectation of obtaining a Direction from this Court upon the Vietnam Northern Food Corporation, which is a state-owned corporation of the Government of Vietnam (hereinafter referred to either as the respondent or as the Vinafood1), for appointment of an arbitrator from the side of Vinafood1 for formation of an arbitration tribunal towards resolution of the dispute between the parties.

2. The facts of the case, briefly, are that the petitioner is engaged in the business of international commodity trading and participated in Bangladesh Government's procurement process of 50,000 MT white rice (ATAP) under the tender quotation bearing reference No. 13.01.0000.093.46.11.17-1145 dated 14.05.2017 which was published on the website of the Director General of Food under the Ministry of Food on 15.05.2017. The petitioner decided to supply the said white rice to the Government of Bangladesh ("GoB") through the established brokering channel and, for the said purpose, the petitioner contacted Mr. Vandara Din of Chemin Jaques Attenville 14A, 1218 Geneva, Switzerland, who is known to have good relationship with Vinafood1. It was clearly conveyed to Vinafood1 by Mr. Din that the petitioner was intending to participate in GoB's tender procurement of 50,000 MT of white rice of specific requirement as per the tender terms. In such understanding, the petitioner supplied the entire tender terms and conditions through their e-Mail dated 16.05.2017 to Vinafood1 via the broker, Mr. Din. Vinafood1 then offered to supply 50,000 MT of rice as per Bangladesh Government's tender terms through their e-Mail communication dated 22.05.2017 to the petitioner via Mr. Din. Thereafter, the petitioner accepted the Vinafood1's offer dated 22.05.2017 as per the GoB tender terms. Through its return correspondence dated 28.05.2017, the petitioner informed the Vinafood1 that it had been awarded the tender and confirmed the booking with Vinafood1 who reconfirmed it through the broker. Then, the parties exchanged the draft wordings of the LC terms on 01.06.2017 and, on the same day, the petitioner confirmed appointment of surveyor of cargo and fumigator. Further, the bag markings of the cargo were also confirmed by the petitioner on 08.06.2017. Eventually, a disagreement arose between the parties regarding the delivery of the cargo which led the petitioner holding the Vinafood1 in breach of the governing agreement by its notice of breach dated 10.07.2017 and asked the Vinafood1 to resolve the dispute amicably. However, when the Vinafood1 did not supply 50,000 MT of white rice to the petitioner, the latter did not have any option other than to source the same from alternative sources to meet the agreement under the GoB tender. In this scenario, the petitioner served a notice of arbitration upon the Vinafood1 on 02.05.2018 appointing Mr. Justice SAN Mominur Rahman as its arbitrator and sought for appointment of an arbitrator for Vinafood1 to constitute the arbitration tribunal for the purpose of resolution of the dispute arising under the agreement between the parties, but the Vinafood1 failed to appoint their arbitrator within the time specified in the arbitration notice dated 02.05.2018. Hence this application.

3. By filing an affidavit-in-opposition, the Vinafood1 states, amongst others, that Mr. Vandara Din is not a broker or agency of the Vinafood1, rather he was acting as a broker or agency of the petitioner. It is stated that there was no direct communication between the petitioner and the Vinafood1. The e-Mail correspondences between the Vinafood1 and the said Vandara Din were 'mere request for information' and the Vinafood1 only provided the required information as an invitation to enter into negotiations. It is further stated that the Vinafood1 did not receive the complete tender documents through e-Mail attachment and did not agree to any 'Arbitration Clause'. The Vinafood1 offered Mr. Vandara Din for rice on 22.05.2017 and Mr. Vandara Din responded thereto on 28.05.2017 subject to the condition of getting tender. Subsequently when the Vinafood1 made new offer to Mr. Vandara Din on 29.05.2017 in respect of quality of rice, shipment and payment, the petitioner declined such offer through its agent Mr. Vandara Din on 19.06.2017 and, therefore, there was no contract between the petitioner and the Vinafood1.

4. Mr. Tanjib-ul Alam, the learned Advocate appearing for the petitioner, takes me through a series of the e-Mail correspondences between Vinafood1 and Mr. Din and, also, between the petitioner and Mr. Din, and submits that Mr. Din is a commissioned broker for the Vinafood1 and there was an agreement between Mr. Din and the Vinafood1 to pay USD 2 per MT as commission to Mr. Din for successful closure of the contract between the petitioner and Vinafood1 regarding the supply of white rice under the GoB tender and, therefore, Mr. Din clearly acted as a commissioned agent of the Vinafood1 for the concerned transaction for his brokering service. By taking me through the GoB tender terms and the e-Mails dated 22.05.2017, he agitates that Vinafood1 has clearly and without any ambiguity accepted and incorporated the entire terms and conditions, including the Arbitration Clause, of the GoB tender terms with the agreement to supply white rice to the petitioner.

5. Mr. Alam, the learned Advocate for the petitioner, then, submits that pursuant to the Vinafood1's failure to provide the agreed goods to the petitioner resulting in breaching the governing contract, when the petitioner sent its offer to settle the dispute through letter dated 10.07.2017, Vinafood1 ought to have resolved the dispute amicably and, thereafter, having received no response, when the petitioner served notice of arbitration dated 02.05.2018 upon the Vinafood1, it was incumbent upon the Vinafood1 to appoint an arbitrator from its part. He contends that since both parties unequivocably have agreed that any dispute if not settled amicably *shall* be referred to arbitration to be convened in Dhaka, Bangladesh in compliance with the Arbitration Act, therefore, having received no response from the Vinafood1 regarding formation of tribunal, the petitioner has been compelled to file the instant application under Section 12 of the Arbitration Act.

6. Then, he takes me through the provisions of Sections 3, 9(1) and 9(2) of the Arbitration Act and submits that as per Section 3 of the Arbitration Act, the provisions of the Arbitration Act shall apply where the place of Arbitration is in Bangladesh and, as per Section 9(1) of the Act, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and, as per section 9(2) of the Arbitration Act, an arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in a document signed by the parties or an exchange of letters, telex, telegrams Fax, e-Mail or other means of telecommunication which provide a record of the agreement. He submits that since the arbitration agreement between the petitioner and respondent is clearly in writing within the meaning of Section 9(2) of the Arbitration Act, as it was contained in e-Mails exchanged between the parties, all the provisions of the Arbitration Act are applicable for resolution of the dispute between the petitioner and the respondent. In

support of the above submissions, Mr. Tanjib-ul Alam refers to a catena of case-laws of the Indian jurisdiction which are (i) Sundaram Finance Ltd. Vs NEPC India Ltd. [1999] 1 SCR 89, (ii) Ador Samia Private Limited Vs Peekay Holdings Limited and others AIR 1999 SC 3246, (iii) Konkan railway Corpn. Ltd. and others Vs Mehul Construction Co. AIR 2000 SC 2821, (iv) Nimet Resources Inc. and others Vs Essar Steels Ltd. AIR 2000SC 3107, (v) Wellington Associates Ltd. Vs Kirit Mehta AIR 2000 SC 1379, (vi) GEI Industrial Systems Ltd. Vs Bharat Heavy Electricals Ltd. AIR 2012 MP44, (vii) M. Dayanand Reddy Vs A.P. Industrial Infrastructure Corporation Limited and others AIR 1993 SC 2268, (viii) State of Orissa and others Vs Damodar Das AIR 1996 SC 942 and (ix) Raipur Alloys & Steel Ltd. and others Vs Union of India and Others 1993 RLR 285.

7. He next submits that since the Arbitration Act has been made applicable by the parties through their mutual agreement, if the respondent wishes to challenge the existence of the validity of this arbitration agreement, then, under Section 17 of the Arbitration Act, the respondent may do so before the tribunal, for, as per Section 17(a) of the Arbitration Act, the tribunal may rule on the question as to whether there is existence of an arbitration. He professes that none of the provisions of the Arbitration Act specifically puts a precondition of having existence of an arbitration agreement for approaching this Court. In this connection, the learned Advocate Mr. Tanjib-ul Alam having referred to the case of Md. Hazrat Ali Vs Joynul Abedin 1986 BLD (AD) 45, quotes that "*no Court can be supposed to have inherent power to disregard express provisions of law wherever they exist*". He submits that in the backdrop of operation of Section 17(a) of the Arbitration Act, which expressly makes provision for examination of the issue as to whether there is existence of any arbitration agreement, the aforesaid issue should be examined by the arbitral tribunal and, therefore, this Court should refrain from examining the same. He strenuously argues that if this petitioner fails to satisfy the arbitral tribunal as to existence of any arbitration agreement, the arbitration application will be rejected at the peril of the petitioner, for, the arbitration tribunal usually passes an order of appropriate costs if an arbitration application fails. He submits that since the respondent is not going to suffer any loss if the arbitration tribunal is formed, this Court should exercise its discretionary power in formation of the arbitral tribunal. Mr. Alam then takes me through Section 20 of the Arbitration Act and submits that if Vinafood1 feels aggrieved by the Order/Decision of the arbitration tribunal on the issue of jurisdiction, it will be competent to file an application for determining the jurisdiction of the arbitral tribunal before this Court. Lastly, he submits that since the parties to the arbitration agreement failed to determine the number of arbitrators pursuant to the offer given by the petitioner through its notice of arbitration dated 02.05.2018, the tribunal shall consist of three arbitrators as per Section 11(2) of the Arbitration Act.

8. By making the above submissions, the learned Advocate for the petitioner prays for appointment of an arbitrator on behalf of the respondent-Vietnam Northern Food Corporation (Vinafood1) towards formation of an arbitral tribunal.

9. Mr. AM Masum appears in person as the power of attorney- holder of the Vinafood1 and, at the very outset of making his submissions, places the case of Corona Fashion Vs Milestone Clothing 2019(1) 15 ALR 38 and submits that it is a well-settled principle that the Court must satisfy itself about the prima facie existence of an arbitration agreement to assume its jurisdiction for appointing arbitrator under Section 12 of the Arbitration Act and it is a fundamental requirement for the petitioner to establish prima facie existence of an arbitration agreement; otherwise it will be against the public policy which the Legislature never intended. By taking me through the provisions of Section 5(1) of the Arbitration Act, 1996 of

UK and Article 1(3) of the Arbitration and Alternative Dispute Resolution Act, 1999 of Indonesia, the learned Advocate for the Vinafood1 strenuously argues that as per the aforesaid foreign laws on arbitration, an arbitration agreement shall mean a written agreement in the form of an arbitration clause entered into by the parties and therefore mere an e-Mail correspondence between the parties is not sufficient to establish an arbitration agreement.

10. He then takes me through the provision of Section 7 of the Contract Act, 1872 (shortly, the Contract Act) and submits that as per Section 7 of the Contract Act, in order to convert a proposal into a promise, the acceptance must be absolute and unqualified and the same provision has been well-settled in the leading case of Raipur Alloys & Steel Ltd. and others Vs Union of India and others 1993(1)ARBLR447 (Delhi). He submits that in the present case, there is no such unconditional offer and acceptance and no arbitration agreement exists and as such the appointment of arbitrator after allowing this application is against public policy.

11. He submits that the instant application under Section 12 of the Arbitration Act for appointment of an arbitrator on behalf of the Vinafood1 was filed on the basis of Terms and Condition (T & C) No. 16 of the Tender Agreement of the GoB, but the Vinafood1 is not a party to the Tender Agreement and, thus, the instant application is not maintainable as there is no agreement as per Section 9 of the Arbitration Act between the petitioner and the Vinafood1 to settle their dispute through arbitration. Mr. Masum then refers to the case of Trang Ice & Cold Storage Co. Ltd Vs Amin Fish Farm 46 DLR (1994) 39 and submits that it is the well-settled principle that a stranger to a contract cannot sue the other party, for, the terms of a contract can be enforced only by the contracting parties and not by any third party.

12. He finally submits that it is the established principle of law that no Court should refer the parties to arbitration without a joint memo or a joint application of the parties, when there is or was no arbitration agreement between the parties and, thus, in the absence of an arbitration agreement between the parties, a written consent of the parties by way of joint memo or joint application is necessary for the Court to refer the parties to arbitration and, in this case, since the Vinafood1 has not consented to arbitration, the instant application under Section 12 of the Arbitration Act to appoint an arbitrator on behalf of the Vinafood1 is not maintainable.

13. By putting forward the above submissions, the learned Advocate for the respondent prays for discharging the Rule with an exemplary cost.

14. Upon hearing the learned Advocates for both the sides, on perusal of the petitioner's application as well as the affidavit-in-opposition filed by the sole respondent together with their annexures and having read the relevant statutory laws and case-laws cited from the various Law Journals, it appears to this Court that the only legal issue requires to be adjudicated upon is whether this Court is obligated to look into the existence of an arbitration agreement in an application under Section 12 of the Arbitration Act. If the answer to the above question is found in the affirmative, in that event, it would be incumbent upon this Court to embark upon the factual aspect of this case with an aim to dig out as to whether there is existence of any arbitration agreement between the petitioner and the respondent.

15. It would be of great use for an effective disposal of this case if, at least, a few provisions of Section 12 of the Arbitration Act are quoted hereinbelow:

> **12. Appointment of arbitrators-**(1) Subject to the provisions of this Act, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
> (2) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
> (3) Failing any agreement referred to in sub-Section (1)-
> (a) In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made upon request of a party-
> (i) By the District Judge in case of arbitration other than international commercial arbitration; and
> (ii) In case of international commercial arbitration, by the Chief Justice or by any other judge of the Supreme Court designated by the Chief Justice
> (b)In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall be the Chairman of the arbitral tribunal.
> (4) ....
> (5) ....
> (6) ....
>
> (7) Where, under an appointment procedure agreed upon by the parties-
> (a) A party fails to act as required under such procedure; or
> (b) The parties, or the arbitrators, fail to reach an agreement under the same procedure; or
> (c) A person or any third party fails to perform any function assigned to him under that procedure, unless the agreement on the appointment procedure provides other means to take the necessary measure for securing the appointment, a party may apply to-
> (d) ....
> (e) ....
> (8) ....
> (9) ....
> (10) ....
> (11) ....
> (12) ....
> (13) ....
> (underlined by me)

16. From a plain reading of Section 12 of the Arbitration Act, which consists of as many as 13 (thirteen) sub-Sections, it appears that the whole provisions are about the procedures of appointment of arbitrator or arbitrators. If the parties to the arbitration have already devised a procedure for appointment of arbitrator/s, then the provisions of sub-Sections (2) to (13) under Section 12 of the Arbitration Act would have hardly any application. But in absence of any device agreed upon by the parties, the provisions of sub-Sections (2) to (13) under Section 12 of the Arbitration Act come into play. In both the above-mentioned paths, the implied precondition is that there must be the existence of an agreement between the parties to go for arbitration. In other words, in order to make the provisions of sub-Sections (1) to

(13) under Section 12 of the Arbitration Act applicable, the parties must agree to resolve any dispute through arbitration; absence of an agreement among the parties to hold arbitration shall render the aforesaid provisions of the Arbitration Act nugatory. While the wordings '............ *the parties are free to agree on a procedure*.............' used in sub-Section (1) under Section 12 of the Arbitration Act sufficiently imply that if in the arbitration agreement a procedure for appointment of the arbitrator/s has been adopted by the parties to the arbitration agreement, they shall be at liberty to proceed with the said provision, the expressions '*in an arbitration with a sole arbitrator..........*' and *'in an arbitration with three arbitrators ....'* employed in sub-Sections (3)(a) and (3)(b) under Section 12 of the Arbitration Act respectively amply suggest that if the arbitration clause contains provision regarding appointment of sole arbitrator or three arbitrators, the provisions enshrined in the sub-Sections subsequent to sub-Section (1) are applicable. Again, by the wordage *'where under an appointment procedure agreed upon by the parties..........'* engraved in sub-Section (7) to Section 12 of the Arbitration Act, the Legislature pinpoints to the fact that when there is an agreement between the parties containing a provision regarding appointment procedure and if either (a) a party fails to act as required under such procedure or (b) the parties/arbitrators fail to reach an agreement under the same procedure or (c) a person/any third party fails to perform any function assigned to him under that procedure, then, a party may apply to the High Court Division in the case of international arbitration and to the Court of the District Judge in the case of local arbitration and the High Court Division/the District Judge, as the case may be, shall appoint the Chairman of the tribunal along with the other arbitrators.

17. So, from the examination of the provisions of Section 12 of the Arbitration Act, it emerges that without having existence of an arbitration agreement between the parties, the entire provisions of Section 12 of the Arbitration Act would have no application.

18. Since the Head Note of Section 9 of the Arbitration Act is titled as 'arbitration agreement', perusal and examination of the provisions of Section 9 of the Arbitration Act appears to be a must-to-do work for this Court for a conclusive adjudication of the issue in hand. Section 9 of the Arbitration Act is, therefore, reproduced below:

> **9. Form of arbitration agreement**-(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. (2) An arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in-
> (a) a document signed by the parties;
> (b) an exchange of letters, telex, telegrams Fax, E-mail or other means of telecommunication which provide a record of the agreement; or
> (c) an exchange of statement of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
>
> *Explanation*-The reference in a contract is a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

19. From a combined reading of the provisions of sub-Sections (1) & (2) under Section 9 of the Arbitration Act, it is crystal clear that a written arbitration agreement, either in a clause of a main contract or in a separate agreement, must exist in order to arbitrate any dispute between the parties. When (a) a written agreement containing the arbitration clause is signed by the parties or (b) if the parties through any written communication, which may be manual or digital, agree to arbitrate or (c) if one party makes a written claim containing a stipulation

of holding arbitration in the event of denial of the claim and, in responding thereto, the second party though comes up with a defense as to material claim/s but remains silent about the proposal of holding arbitration, then, in those scenarios, the law of our country dictates the Courts to hold that the parties have bound themselves to go for arbitration. In addition thereto, if any special law prescribes for resolving a dispute through arbitration, either upon adopting the procedures laid down in the said special piece of legislation or in reference to the Arbitration Act, then, there shall not be any question as to having existence of any arbitration agreement.

20. It has been argued before this Court that Sections 9 and 12 of the Arbitration Act do not specifically state about having existence of an arbitration agreement as a precondition for making any application before this Court, rather there is a specific provision, namely, Section 17 of the Arbitration Act, empowering the arbitration tribunal to deal with the question. This Court, however, finds it to be completely a misconceived argument, for, while enforceability or operation of Sections 12 and 17 depends upon the existence of an arbitration agreement, the discussions/examination of different forms of arbitration agreement under Section 9 of the Arbitration Act would be in the scenario only when the parties would be showing willingness from their respective sides to tie the knot of relationship of arbitration. In fact, Section 17 of the Arbitration Act states that the tribunal may rule on its own jurisdiction and, in doing so, the arbitration tribunal may examine the 'validity' of an arbitration agreement. And, the question of validity of an arbitration agreement may arise only when there is an existence of an arbitration agreement. This issue has been dealt with in greater detail by this Court in the case of Corona Fashion Vs Milestone Clothing LLC reported in 71 DLR 106. More importantly, given that the very meaning of the terminology 'arbitration agreement' is the voluntary consent of the parties concerned for making an arrangement of resolution of their present or future dispute outside the Court, there must be the existence of written agreement inked previously or at any time after arising of any dispute between the parties. To this end, I find it pertinent to look at the definition of 'arbitration agreement' enshrined in Section 2(n) of the Arbitration Act, which runs as follows:

> 2(n) "Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (underlined by me)

21. After perusal of the statutory definition of the terms 'arbitration agreement', there remains hardly any scope for anyone to say that without having an arbitration agreement any provision of the Arbitration Act can be invoked or enforced inasmuch as it states without any ambiguity that *'............an agreement by the parties..................'.*

22. Lastly, I am required to deal with the case-laws referred to and relied upon by the learned Advocate for the petitioner. I have minutely perused all the case-laws, which are of Indian jurisdiction, referred to this Court by the learned Advocate for the petitioner. But the facts of the cited case being different from that of the case in hand, the *ratio* laid down therein are not applicable to the instant case. More so, some of the provisions of Indian Arbitration Act being dissimilar to the provisions of ours, the principles set out by the Indian Court are not applicable unless the provisions of Arbitration Act of the two jurisdictions are discussed upon narrating the context of the cited case and the case in hand, as has been observed by this Court in the case of Corona Fashion –Vs- Milestone Clothing reported in 2019(1) 15 ALR 38.

23. The above discussions lead me to hold that, in the case of international arbitration, this Court and, in the case of domestic arbitration, the District Judge Court is obligated to examine the issue as to whether there is an existence of an agreement between the parties for holding arbitration before entertaining an application under any provision/Section of the Arbitration Act. However, in absence of the arbitration agreement, if the parties decide to go for arbitration during pendency of an application under any Section of the Arbitration Act, they would be competent to proceed with arbitration in that the scheme of arbitration is founded on the mutual consent of the parties and there is no provision within the four corners of the Arbitration Act prohibiting initiation of arbitration proceeding during pendency of an arbitration application before this Court/the District Judge Court.

24. With the above findings on the legal issue, now, I am required to carry out a scrutiny of the facts of the case with an aim to see whether there is existence of any agreement between the petitioner and the Vinafood1 to arbitrate the dispute alleged by the petitioner. It is an admitted fact that the petitioner, having participated in the tender floated by the GoB, eventually, entered into contract with the GoB to supply 50,000 MT of white rice (ATAP) and, evidently, Vinafood1 being not the party to the aforesaid contract, the GoB has not raised any issue with the Vinafood1. It is the case of the petitioner that it participated in the tender of the GoB depending on the contract entered into with the Vinafood1 to supply the requisite white rice and the Vinafood1 having failed to carry out its contractual obligation, it is bound to compensate the petitioner either mutually or by holding arbitration. Now, I need to find out whether any contract for supplying 50,000 MT white rice was inked by the petitioner with the Vinafood1 or, at least, an arbitration agreement was made by the parties. For the said purpose, I went through all the annexures appended to the application and affidavit-in-opposition. And, from a meticulous scrutiny of the annexures, I find that the petitioner was communicating with one Mr. Vandra Din of Geneva, Switzerland who had assured the petitioner to procure the white rice from the Vinafood1. From all the e-Mail communications, it transpires that the petitioner has never made any direct communication with the Vinafood1; all the e-Mail communications were sent by the petitioner to Mr. Vandra Din who was making queries with Vinafood1 regarding quality, quantity, time, shipment and payment of the rice. It further transpires from the correspondences that Mr. Vandra Din was engaged by the petitioner as its agent and it was his deal with the Vinafood1 that if the Vinafood1 enters into contract with the petitioner, Mr. Vandra Din, as the petitioner's agent, will get a certain commission out of the said deal. However from the annexed correspondences, it transpires that the Vinafood1 ultimately did/could not enter into any agreement regarding supply of the white rice to the GoB due to disagreement with Mr. Vandra Din on the issue of quality of rice, shipment and payment. It is the settled principle of the law of contract in all jurisdictions of the world that in order to treat a document or any correspondence between the parties to be a contract/agreement, the Courts must be satisfied as to the existence of consensus ad idem between the parties on the important term/s of the contract, such as the terms of quality, price, arbitration etc, not only from the mere wordings of the document or correspondence but also from the facts on record.

25. In the case in hand, I find from the correspondences as well as from the facts on record that there was no consensus ad idem between the parties neither with regard to the main subject of the contract nor on the issue of arbitration. So, there being no meeting of minds of Mr. Vandra Din and the Vinafood1, there was no contract between Mr. Vandra Din and the Vinafood1. Had there been a written contract between Mr. Vandra Din and

Vinafood1, then, a question might have arisen as to whether the said agreement could be indirectly treated as an agreement between the petitioner and the Vinafood1.

26. The learned Advocate for the petitioner has sought to invoke the Terms and Conditions (T & C) No. 16 of the Tender Document (International Quotation for Import of White Rice) of the GoB against the Vinafood1. The aforesaid T & C is the arbitration clause, which is couched in the following language;

> *16. Arbitration:*
> *Any dispute relating to the Contract or breach thereof shall be settled amicably by negotiation between the Buyer and the Seller. In case, no settlement can be reached the dispute shall be referred to Arbitration. In the matter of Arbitration the provision of the Arbitration Act, 2001 (Act 1 of 2001) of Bangladesh shall be followed and the venue of the arbitration shall be in Dhaka, Bangladesh.*

27. The above arbitration clause would be enforceable by the GoB against the petitioner or vice-versa, in the event of arising any dispute between them, as the petitioner and the GoB entered into the contract. The Vinafood1 neither entered into any contract with the GoB nor with the petitioner and, therefore, there is no way to entangle the Vinafood1 with the T & C of the Tender Documents of the GoB.

28. Thus, I find that the petitioner's e-Mail communications with Mr. Vandra Din are not capable of creating or generating a contract between the petitioner and the Vinafood1 inasmuch as the e-Mail correspondences of Mr. Vandra Din with Vinafood1 did not acquire the status of a contract at any stage. Also, there was no arbitration agreement between the parties. And even, as of now, there has not been any consensus among the parties to arrange a private forum for resolution of the dispute alleged by the petitioner. If there is really any claim against the Vinafood1, the petitioner is always at liberty to sue/prosecute the Vinafood1 in a competent Court of law.

29. After conclusion of the hearing of this two-year-old Rule, the view of this Court was expressed announcing that the Rule is liable to be discharged, and the learned Advocate for the petitioner was given the opportunity to non-prosecute the Rule upon taking necessary instructions from the petitioner. But the learned Advocate for the petitioner opted to receive a full-fledged Judgment. Therefore, as per the *ratio* laid down in the case of ABB India Ltd Vs Power Grid Company Bangladesh Ltd, reported in 2020 ALR (HCD) Online 1-28, I find it appropriate to slap cost in this case. However, in the afore-cited case, at the time of issuance of the Rule it was specifically stipulated that after hearing the parties, despite this Court's verbal announcement as to discharging the Rule, if the petitioner wants to have a detailed Judgment, instead of nonprosecuting the same, in that event, an amount of cost of Taka 10,00000/- (ten lacs) shall be slapped and, in the present case, there being no such condition in the Rule-issuing Order, it would be rational, in my considered view, to slap only a token amount of cost.

30. Accordingly, the Rule is discharged with cost of Taka 2 (two) lacs, out of which Taka 1 (one) lac shall be deposited in the National Exchequer by way of submitting a Treasury Challan and the remaining Taka 1 (one) lac shall be paid to the respondent (Vinafood1).