

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Miscellaneous Appeal No. 221 of 2018

In the matter of:

M/s. NEETI Construction represented by its Proprietor Ahmed Faruq Khokon, House No. 27, Road No. 9, Block-Kha (Ground Floor), Pisciculture Housing Society, Mohammadpur Dhaka and House No. B-107, Road No. 8, Mohakhali DOHS, Dhaka.

... Appellant

-Versus-

Bangladesh Chemical Industries Corporation (BCIC) represented by its Chairman BCIC Bhaban (4th Floor), 30-31 Dilkusha C/A, Dhaka-1000 and another.

... Respondents.

Mr. Md. Kamruzzaman with
Ms. Keya Sen, Advocates

...For the appellant

Mr. Habibur Rahman with
Ms. Banarupa Roy, Advocates

...For the respondent no. 1

**Heard on 29.05.2024, 04.06.2024 and
05.06.2024.**
Judgment on 05.06.2024.

Present:

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

Md. Mozibur Rahman Miah, J.

At the instance of petitioner of Arbitration Miscellaneous Case No. 190 of 2018, this appeal is directed against the judgment and order dated 03.04.2018 passed by the learned District Judge, Dhaka in the said Arbitration Miscellaneous Case dismissing the case finding it barred by limitation so initiated under section 42 of the Arbitration Act, 2001 for setting aside the award dated 23.02.2016 passed by the majority of the arbitrators in regard to forfeiting the bank guarantee (performance guarantee) bearing no. 137/2010 dated 18.10.2010 in Arbitration Case (proceeding) No. 02 of 2012.

The short facts leading to preferring this appeal are:

The present respondent no. 1, Bangladesh Chemical Industries Corporation (shortly, BCIC) entered into a purchased agreement with the present appellant, namely, M/s. NEETI Construction for supplying 12,500 MT of Prilled Urea fertilizer but since dispute arose in sourcing the fertilizer from country of origin, the opposite-party then invoked clause 24.00 of the purchased order dated 20.10.2010 and then encash the bank guarantee given by the petitioner. Accordingly, an arbitral tribunal was formed consisting two arbitrators namely, Mr. Mohd. Akhtaruzzaman, former Member of Parliament as the arbitrator of the appellant and Mr. Tofailur Rahman, Barrister-at-law, Senior Advocate, Supreme Court of Bangladesh as the arbitrator of the respondents who upon concurrence then appointed one, Mr. Justice Syed Amirul Islam as a Chairman of the arbitral tribunal. Since there has been no provision to pass any interim order by the constituted arbitral tribunal, the appellant as petitioner then filed a Miscellaneous Case being Arbitration Miscellaneous Case No. 97 of 2011

under section 7ka of the Arbitration Act before the learned District Judge, Dhaka praying for injunction restraining the opposite-party no. 1 herein respondent, from encashing the performance guarantee no. 137/2010 dated 18.10.2010 issued by the opposite-party no. 2, National Bank Limited, Dilkusha Branch, Dhaka. The learned District Judge after hearing the parties initially issued a show cause notice and passed an order of status quo in respect of encashing performance guarantee and the said order of status quo subsequently extended from time to time though ultimately on 13.04.2016, the said Miscellaneous Case was dismissed. Challenging the said judgment and order dated 13.04.2016, the appellant then filed a civil revision being Civil Revision No. 1137 of 2016 before this court and at the time of issuance of the rule, this court also passed an order of status quo in respect of said performance guarantee. The said order of status quo was extended from time to time and ultimately, on 29.03.2018, the rule was also discharged for non-prosecution. But during the pendency of the said legal proceeding, the arbitral tribunal (in Arbitration Case No. 02 of 2012) passed an award on 23.02.2016 though in the said award, the arbitrator representing the appellant passed dissenting view. Subsequently, the appellant as petitioner on 02.04.2018 filed an application under section 42 of the Arbitration Act before the learned District Judge, Dhaka for setting aside the award dated 23.02.2016. On the date of filing that application under section 42 of the Arbitration Act, the appellant also filed an application for condonation of delay of 767 days in filing the said case under section 5 of the Limitation Act basing on the provision of section 55 of the Arbitration Act. In the said application, it has been stated that, the

appellant only on 27.03.2018 came to learn about passing of the award and upon obtaining the certified copy of the award on 29.03.2018 filed the Miscellaneous Case No. 190 of 2018 on 02.04.2018 and hence, the said delay has been caused.

It has further been averred that, the said delay is totally unintentional and beyond the capacity of the petitioner having no fault of the appellant and there has been sufficient reason for not filing the Miscellaneous Case under section 42 of the Arbitration Act in time and thus the said delay may kindly be condoned. However, the case filed under section 42 of the Act being Arbitration Miscellaneous Case No. 190 of 2018 was taken up for admission hearing and vide impugned order, the learned District Judge dismissed the Miscellaneous Case finding the delay is unusually long and there has been no satisfactory explanation with regard to delay.

It is at that stage, the petitioner of the said Miscellaneous Case as appellant preferred this appeal.

Mr. Md. Kamruzzaman along with Ms. Keya Sen, the learned counsels appearing for the appellant upon taking us to the application so filed under section 5 of the Limitation Act along with the petition of Miscellaneous Case being No. 190 of 2018 at the very outset submits that, the learned Judge while dismissing the case has not taken into consideration of the explanation so offered in the application for condonation of delay where it has categorically been explained how the delay has been caused.

The learned counsel further contends that, in the impugned order, the learned Judge just in one line has found the delay unusually long and not

satisfactory without assigning any reason whatsoever even he has not taken into consideration of the pendency of Miscellaneous Case filed by the appellant under section 7ka before the same court and that of the civil revision filed before this Hon'ble court where in fact most of the time had been consumed resulting in causing delay in filing the Miscellaneous Case under section 42 and thus the explanation for causing the delay is well-founded and the learned Judge ought to have considered the said explanation but without considering the same, the Miscellaneous Case was dismissed which has occasioned failure of justice.

The learned counsel wrapped up his submission contending that, since the Miscellaneous Case filed under section 42 of the Arbitration Act has not been disposed of on contest and on merit despite of the fact that, the arbitrator representing the appellant had given dissenting view to the alleged award and so for that obvious reason, the learned District Judge ought to have condoned the delay enabling the parties to contest the Miscellaneous Case and finally submits to allow the appeal and set aside the impugned judgment.

By contrast, Mr. Habibur Rahman along with Ms. Banarupa Roy, the learned counsels appearing for the respondent no. 1 by filing a counter-affidavit opposes the contention taken by the learned counsel for the appellant and submits that, the learned District Judge has perfectly rejected the Miscellaneous Case finding it barred by limitation as the delay for filing the Miscellaneous Case has not been well-explained.

To supplement the said assertion, the learned counsel further submits that, since the appellant appeared in the arbitral tribunal so it had every

knowledge about the proceedings of the arbitral tribunal so it is not true that it has got no knowledge about passing of the award since its arbitrator has given dissenting views in the award.

The learned counsel by referring a decision so have been reported in 68 DLR (AD) 4 also contends that, since the Arbitration Act, 2001 is a special law so the special law will prevail over any other ordinary law and therefore, the delay caused in filing the case cannot be taken in ordinary manner and the learned District Judge has perfectly passed the impugned order.

The learned counsel has also pointed out several irregularities adopted by the appellant while supplying the fertilizer to it and finally prays for dismissing the appeal.

We have considered the submission so advanced by the learned counsel for the appellant and that of the respondent no. 1 and perused the memorandum of appeal, the counter-affidavit as well as other documents appended therewith.

There has been no gainsaying the facts that, during the proceeding of the Arbitration Case No. 02 of 2012 before arbitral tribunal, the appellant as petitioner filed an Arbitration Miscellaneous Case No. 97 of 2011 under section 7ka of the Arbitration Act for obtaining a restrain order so that, the bank guarantee cannot be encashed by the respondent-opposite-party no. 1 given by the opposite-party no. 2 in favour of the appellant and ultimately, got an interim order of status quo from the learned District Judge, Dhaka and that very status quo remained in place till the said Miscellaneous Case was dismissed on 13.04.2016. So it is clear that, during the subsistence of

the interim order of status quo, the arbitral tribunal kept on proceeding with the said arbitral proceeding as the award was passed on 23.02.2016 when the Miscellaneous Case No. 97 of 2011 was *inseisin*. Even after disposal of the said Miscellaneous Case dated 13.04.2016, the present appellant challenged that very order by filing a civil revision before this court being Civil Revision No. 1137 of 2016 and also got an order of status quo in that civil revision which was ultimately discharged for non-prosecution on 29.03.2018. So during the time when the arbitral tribunal was proceeding with the case, there had been an order of status quo where the present respondent was being represented by its arbitrator so both the arbitrators representing the appellant as well as the respondent could have informed the tribunal about the pendency of a Miscellaneous Case where an order of status quo was in place on the encashment of the bank guarantee but none of the arbitrator representing the parties to the arbitral tribunal ever informed the said fact to it (arbitral tribunal) so it is not only the appellant rather the respondent had the duty to let the tribunal know about the proceedings initiated before the District Judge as well as the High Court Division.

Having said that, since before disposal of the said civil revision, the petitioner came to learn about the award dated 23.02.2016 on 27.03.2018 and since the very date of knowledge has not been controverted by any cogent reason by the respondent so we find that, the explanation so have been given by the appellant in its application under section 5 of the Limitation Act has got every substance and moment they came to learn about the said award on 27.03.2018 then within two days they obtained

certified copy of the impugned award and filed the Miscellaneous Case under section 42 of the Arbitration Act on 02.04.2018. So from the date of knowledge and to file the Miscellaneous Case, the appellant took only five days and since the respondent by filing counter-affidavit could not shake or make any deviation with regard to the date of knowledge so we find the explanation so have been given by the appellant in the application for condonation of delay is well-founded and reasonable one but the learned District Judge while dismissing the said Miscellaneous Case has not taken into account of the explanation rather only in a single line, the learned Judge found that, the delay is not satisfactorily explained which does not conform with the explanation offered in the application. Though the learned counsel for the respondent placed his reliance in the decision reported in 68 DLR (AD) 4 but on going through the *ratio* so have been settled in that decision as well as the facts stated therein is totally distinguishable with the facts and point-in-law involved in the instant case. Accordingly, the said decision is totally inapplicable in the instant case.

Regard being had to the above facts and circumstances, we don't find any substance in the impugned order which is liable to be set aside.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and order dated 03.04.2018 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 190 of 2018 is hereby set aside resulting in the said Arbitration Miscellaneous Case is restored to its original file and number.

The learned District Judge, Dhaka is hereby directed to take up the said Arbitration Miscellaneous Case for hearing by intimating the respective learned Advocates of the parties and dispose of the same as expeditiously as possible preferably within a period of 6(six) months from the date of receipt of the copy of this judgment.

The order of injunction passed by this court on 12.04.2018 will remain in place till disposal of the said Arbitration Miscellaneous Case.

Let a copy of this judgment be transmitted to the learned District Judge, Dhaka forthwith.

Md. Bashir Ullah, J.

I agree.