

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

**Present:**

**Mr. Justice Zafar Ahmed**

**Civil Revision No. 1525 of 2019**

**In the matter of:**

Bangladesh Bridge Authority

Petitioner

-Versus-

Jamuna Resort Limited

Opposite Party

Mr. Zafar Sadeque, Advocate

...For the petitioner

Mr. Margub Kabir, with

Mr. Taisir Mahmud, Advocates

.....For the opposite party

Heard on: 25.11.2024 and 03.12.2024

Judgment on: 08.12.2024

The instant Rule issued on 18.06.2019 is directed against judgment and order dated 20.01.2019 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 340 of 2015 appointing two arbitrators under Section 12 of Arbitration Act, 2001.

The present petitioner, namely Bangladesh Bridge Authority (hereinafter referred to as ‘Authority’) and opposite party, namely Jamuna Resort Limited (in short, the ‘Company’) entered into a concession agreement on 21.11.1999 to develop, manage, operate and

maintain specific areas for 30 years. The agreement contained an arbitration clause in Clause No. 35. It is stated in the said arbitration clause that in the event of any dispute or difference of opinion between the parties upon or in relation to or in connection with the agreement with regard to the performance of any obligations under the agreement by the parties shall be settled in accordance with the provisions of the Arbitration Act, 1940. Be it mentioned that the Arbitration Act, 1940 was repealed by the Arbitration Act, 2001 which came into force on 10.04.2001.

During subsistence of the agreement, dispute arose between the parties regarding terms and conditions as well as performance of the agreement. The Company gave a notice to the Authority on 27.04.2014 to resolve the dispute by invoking by Arbitration Clause No. 35. However, the Authority did not respond. The Company gave two more reminders to the Authority regarding the matter *i.e.* resolving the dispute through arbitration but again received no response. Eventually, the Authority terminated the agreement on 01.04.2015 on the grounds stated in the termination letter. Thereafter, on 11.05.2015 the Company filed an application under Section 12 of the Arbitration Act, 2001 before the learned District Judge, Dhaka to appoint arbitrator to resolve the dispute through arbitration. Accordingly, Arbitration Miscellaneous Case No. 340 of 2015 was registered. The Authority being the opposite party in the said

miscellaneous case entered appearance on 02.11.2015 by filing a written objection taking the grounds that the arbitration miscellaneous case is not maintainable for the reason, *inter alia*, the agreement in question had already been terminated and thus, there is no scope and necessity for arbitration. 20.01.2019 was fixed for hearing the miscellaneous case. Both the parties filed petitions for adjournment of the hearing. The learned District Judge rejected both the petitions and directed the parties to conduct the hearing. The Company then filed hazira. The Authority did not file any hazira. The learned District Judge proceeded with the hearing *ex parte* and appointed Mr. Md. Azizul Haque, former Judge of the High Court Division of the Supreme Court of Bangladesh as arbitrator for the Company and Mr. Md. Fazlul Karim, retired District and Sessions Judge and former Registrar of the Bangladesh Supreme Court as arbitrator for the Authority with direction upon them to appoint 3<sup>rd</sup> arbitrator to act as Chairman of the Arbitral Tribunal. Accordingly, the arbitration miscellaneous case was disposed of on 20.01.2019. The Authority has challenged the said order in the instant civil revision, obtained Rule and order of stay on 18.06.2019.

The affidavit of the instant revisional application was sworn on 03.06.2019 and the Rule was issued and order of stay was passed on 18.06.2019. It appears from the counter affidavit filed by the Company that meanwhile on 26.01.2019 two arbitrators appointed

Mr. Kazi Habibul Awal, former Senior Secretary, who later on was appointed as Chief Election Commissioner, as Chairman of the Arbitral Tribunal. The Tribunal sent notice to the Authority by registered post, vide orders dated 16.02.2019 and 07.04.2019 respectively. It is noted in the order dated 24.06.2019 that the service returned with A/D. The Authority did not appear before the Arbitral Tribunal. Meanwhile, on 18.06.2019 this Court issued a Rule and passed an order of stay. On 25.06.2019, the Authority for the first time appeared before the Arbitral Tribunal and submitted the lawyer certificate regarding the Rule and order of stay.

The matter does not end here. Earlier, the Company filed Arbitration Miscellaneous Case No. 239 of 2015 under Section 7(ka) of the Arbitration Act, 2001 before the learned District Judge, Dhaka praying for stay operation of the notice of termination of the agreement and restraining the Authority from taking over the possession of the schedule land. The learned District Judge on 02.04.2015 passed an order of *status quo*. The Authority entered appearance in the said miscellaneous case which was eventually dismissed on 22.04.2015. The said dismissal order was challenged by the Company in Civil Revision No. 984 of 2015. This Division, vide judgment and order dated 28.04.2016 made the Rule absolute. The Authority filed Civil Revision For Leave to Appeal (CPLA) No. 3302 of 2016 and leave was granted on 16.02.2020. Thereafter, Civil

Appeal being No. 73 of 2020 was filed and the same is now pending for disposal. It appears from the judgment and order dated 16.02.2020 passed in the CPLA that leave was granted to consider four (04) grounds. The ground No. III is quoted below:

“III. Because the agreement in question having been cancelled and possession of the case property having been taken over by Bangladesh Bridge Authority, the Jamuna Resort Limited at best can claim compensation, if any, in the arbitration proceeding but order of status quo in respect of the case property under Section 7(ka) of the Arbitration Act is not tenable and as such, the judgment passed by the High Court Division is liable to be set aside.”

Mr. Zafar Sadeque, the learned Advocate appearing for the petitioner *i.e.* the Authority submits that the instant Rule should not be disposed of at this stage, rather it should be decided after disposal of the Civil Appeal No. 73 of 2020. The learned Advocate next submits that the impugned order appointing two arbitrators was passed *ex parte* without hearing the Authority. The learned Advocate finally submits that since the agreement has been terminated, there is no scope to settle the matter by invoking Arbitration Clause No. 35 contained in the agreement.

Mr. Margub Kabir, appearing with Mr. Taisir Mahmud, the learned Advocates for the opposite party *i.e.* the Company, on the other hand, submits that the subject matter of the Civil Appeal No. 73

of 2020 and that of the instant Rule is completely different and the cause of action is distinct under different provisions of the Act, 2001 and as such, the outcome of the Civil Appeal No. 73 of 2020 shall have no bearing upon the merit of the instant Rule. Mr. Kabir next submits that the Authority had ample opportunity to contest the Arbitration Miscellaneous Case No. 340 of 2015 but it adopted a dilatory tactics and therefore, the learned District Judge rightly proceeded with the matter *ex parte*. In respect of the argument that once the agreement is terminated arbitration clause becomes inoperative, Mr. Kabir refers to the cases reported in 21 BLC 122 and AIR 2007 SC 2327.

Civil Appeal No. 73 of 2020 arose out of a proceeding under Section 7(ka) of the Arbitration Act, 2001 in respect of interim order with regard to preservation of the subject matter by maintaining *status quo*. The instant proceeding arose out of an application under Section 12 of the Act, 2001 to appoint arbitrators. Therefore, cause of action of the two proceedings is completely different. The outcome of the civil appeal shall have no bearing, whatsoever, upon the outcome of the instant Rule. We have already noted that leave was granted in Civil Appeal in favour of the Authority considering its submission that the dispute can be resolved through arbitration. Therefore, the submission advanced on behalf of the Authority on this ground falls apart.

It is true that the order which has been impugned in the instant Rule was passed *ex parte*. We have already discussed the relevant chronology of events. The instant application under Section 12 of the Act, 2001 was filed on 11.05.2015. The Authority filed written objection on 02.11.2015. No explanation has been given by the Authority for dragging the matter till 2019 by way of seeking continuous adjournment. Therefore, the learned District Judge rightly proceeded with the matter *ex parte* otherwise the purpose of settling the dispute through arbitration would be frustrated. In fact, the learned District Judge ought to have disposed of the arbitration miscellaneous case earlier.

In *Drilltee-Maxwell Joint Venture vs. Gas Transmission Company Limited (GTCL) and ors.*, 21 BLC 122, it is held:

“In the present case, clause 45.5 of the GCC that provides for arbitration has been couched in widest possible terms as can be well imagined. It includes any disputes, differences, claims and questions between the parties arising out of the said contract or in any way relating thereto. The contract agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, I am accordingly of opinion that the arbitration clause 45.5 survives for determining the mode of their settlement although the contract has come to an end on account of termination or reputation.

In this connection reliance may be placed on a decision referred by the learned Advocate for the petitioner reported in AIR 2010 SC 488 wherein it has been held that when the

contract is terminated by one party on account of the breach committed by the other particularly in it case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising “in respect of” or “with regard to” or “under the contract.” This is the line with the earlier decisions of the Indian Supreme Court, particularly as laid down in *Union of India vs. Kishori Lal Gupta*, AIR 1959 SC 1362.”

In *National Agricultural Co-op. Marketing Federation India Ltd. vs. Gains Trading Ltd.*, AIR 2007 SC 2327 one of the issues were whether an arbitration clause comes to an end, if the contract containing such arbitration agreement, was abrogated. It was held:

“Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide: *Heymen v. Darwins Ltd.* 1942 (1) All ER 337, *Union of India vs. Kishori Lal Gupta and Bros.* MANU/SC/0180/1959: [1960]1 SCR4 93 and *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath* MANU/SC/0348/1967: [1968]1 SCR 821].”



In view of the decided cases, I have no hesitation to hold that the Arbitration Clause No. 35 contained in the agreement is alive in spite of termination of the agreement by the Authority.

In view of the above discussions, the submissions advanced on behalf of the petitioner Authority have no legs to stand on. Accordingly, this Court does not find any illegality in the order dated 20.01.2019 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 340 of 2015 appointing two arbitrators.

It is already noted that the two arbitrators on 26.01.2019 appointed Mr. Kazi Habibul Awal as Chairman of the Arbitral Tribunal. The learned Advocates of both sides submit that later on Mr. Kazi Habibul Awal became the Chief Election Commissioner and resigned from the office of the Chairman of the Arbitral Tribunal. In that view of the matter, the arbitrators shall appoint a new Chairman for the Arbitral Tribunal and shall proceed with the matter.

With the above observations and directions, the Rule is disposed of.