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

CIVIL REVISION NO. 2403 OF 2020

In the matter of:
An application under Section 115(1) of the Code of Civil Procedure.

AND

In the matter of:

M/s. Haji Traders represented by its Proprietor Alhaz Md. Al-Amin Ahmed, son of Alhaz Haez Md. Omar Faruque and another.

.... Petitioners

-Versus-

Aman Cement Mills Unit-2 Ltd. represented by its Managing Director and others.

....Opposite-parties

Mr. Amit Das Gupta, Advocate
... For the petitioners

Mr. Meah Mohammed Kausar Alam, Advocate
...For the opposite-party nos. 1 and 2

Mr. Tirtha Salil Pal, Advocate
...For the opposite-party no. 3

Heard on 10.01.2024 and 17.01.2024.

Judgment on 21.01.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J:

At the instance of the applicants in Arbitration Miscellaneous Case No. 03 of 2020 so filed under section 7ka of the Arbitration Act, 2001, this rule was issued calling upon the opposite-parties to show cause as to why the judgment and order dated 01.12.2020 passed by the learned District Judge, Mymensingh in the said case rejecting the same and thereby vacating the order of ad-interim temporary injunction passed dated 20.01.2020 should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

At the time of issuance of the rule, all further proceedings of the judgment and order dated 01.12.2020 passed by the learned District Judge, Mymensingh in the said Arbitration Miscellaneous Case No. 03 of 2020 was stayed for a period of 3(three) months. That order of stay was subsequently extended from time to time and it was lastly extended on 02.03.2022 till disposal of the rule.

The present petitioners as applicants filed the aforesaid Miscellaneous Case seeking following reliefs:

> *"Wherefore, it is most humble prayed that your honour would graciously be pleased to pass an order of ad interim injunction restraining the opposite-party nos. 1 and 2 from encashing the Bank Guarantee No. MBL/MYM/BG/2017/02 dated 05.04.2017 for Taka 1,00,00,000/- (Taka One Crore) only lying with the opposite-party no. 3 (Schedule-A to the Application) and encashing 3(three) blank cheques bearing No. 1226347, 1226348 and 1226349 executed by the*

Applicant No. 2 of his Account No. 1157117093201 maintained with the opposite-party no. 3 i.e. the Bank (Schedule-B to the Application) thus oblige thereby."

The salient facts so figured in the said Arbitration Miscellaneous Case are:

On 11.06.2017, the applicant-petitioner no. 1 entered into sales and credit agreement for Distributor with Aman Cement Mills Unit-2 Limited represented by its Chief Marketing Officer and through the said agreement, the opposite-party no. 1 appointed the applicant no. 1 as distributor for sale of the cement so manufactured by the Aman Cement, opposite-party no. 1 for a period of 3(three) years from the execution of the said agreement starting from June, 2017 till May, 2020. After that, on 05.04.2017, the opposite-party no. 2 on behalf of the opposite-party no. 1 issued a confirmation letter in favour of the applicant no. 1 to the effect that the applicants would give them agreed security deposit upon furnishing bank guarantee of taka one crore. In order to confirm the said distributorship in favour of the applicants as per terms and conditions so provided in clause no. 9 to the agreement dated 11.06.2017, the opposite-party also kept three blank cheques executed by the applicant no. 2 of his account no. 1157117093201 maintained with the opposite-party no. 3, the Mercantile Bank Limited. Subsequently, on 05.04.2017, the applicant-petitioner no. 2 also executed bank guarantee for taka one crore with the opposite-party no. 3 issued in favour of the opposite-party no. 1. After completion of all those official formalities, the applicants have been engaged in the business of dealing in distributing and selling of cements promoting Aman Cement

through own advertising and other marketing methods so approved by the opposite-party no. 1. It has further been stated that, in the month of November, 2018, the applicant achieved 105% target in selling the cement. The opposite-party no. 1 also made huge target which was actually difficult to achieve in the competitive market. But due to hike of the prices of constructions materials, the demand of cement started decreasing day by day and as such, running of the dealership became tough for the applicants-petitioners. However, the applicants with utmost sincerity and dignity kept on running the business with the opposite-party no. 1 and informed about the said adverse situation to it. Afterwards, the opposite-party no. 1 without assigning any reasons whatsoever on 18.12.2019 requested the opposite-party no. 3 to encash the bank guarantee dated 05.04.2017 amounting to taka one crore within 24.12.2019. The opposite-party no. 3-bank upon receiving the said letter dated 18.12.2019, it on 19.12.2019 issued a letter upon the applicants asking them to deposit taka one crore for encashment of bank guarantee. Then the applicants-petitioners on 20.12.2019 received the letter issued by the opposite-party no. 3 and immediately communicated with the opposite-party no. 1 who then made assurance that the dispute would be settled amicably. Subsequently, the applicants-petitioners on 02.01.2020 went to the office of the opposite-party no. 1 and talked with the officials thereon who also assured that the dispute would be resolved amicably. However, on 05.01.2020, the opposite-party no. 3 again sent a letter for taking appropriate steps for encashment of the aforesaid bank guarantee, the applicants-petitioners then in compliance with clause no. 14 to the agreement dated 11.06.2017 tried his level best to settle the

dispute amicably with the opposite-party no. 1 by way of made several verbal communications.

However, the opposite-party nos. 1 and 2 had not taken any steps in settling the matter amicably as per clause 14 of the agreement. The applicants then sent a letter on 09.01.2020 through registered post with acknowledgement due (AD) to the opposite-party by appointing its arbitrator, namely, Amit Das Gupta, Advocate, Supreme Court of Bangladesh so that the dispute and disagreement may be resolved and settled. The cause of action of filing the case arose firstly on 18.12.2019 when the opposite-party no. 1 sent a letter to the opposite-party no. 3 claiming encashment of bank guarantee given by the applicant no. 2 and again on 05.01.2020 while the opposite-party no. 3 claimed encashment of bank guarantee and then on 09.01.2020 when the petitioners gave a letter appointing an arbitrator for settling the dispute and hence, the case.

On the contrary, the present opposite-party nos. 1 and 2 contested the said Miscellaneous Case by filing a joint written objection denying all the material averments so made in the application contending *inter alia* that, as per the terms and conditions of appointing dealer in favour of the opposite-party nos. 1 and 2, the petitioners issued an unconditional bank guarantee in favour of the opposite-party no. 1 where it has been asserted that, after withdrawing the cement on credit from the opposite-party no. 1, they sell out in the retail market and after selling the said product, they would pay back the amount to the opposite-parties but it has been found that after withdrawing the cement and selling the same to the local market, the petitioners did not pay back the amount in favour of the opposite-parties for

which the opposite-party no. 1 compelled to ask the opposite-party no. 3 to encash the bank guarantee. It has further been stated that, there has been no scope to pass any restrain order against the bank guarantee and hence, the Miscellaneous Case is liable to be dismissed.

The learned District Judge after hearing the parties to the said Miscellaneous Case and considering the materials available before him by impugned judgment and order dated 01.12.2020 dismissed the Miscellaneous Case on contest against the opposite-party nos. 1 and 2 and thereby the interim order which was passed earlier on 20.01.2020 was vacated.

It is at that stage, the applicants of the Miscellaneous Case as petitioners came before this court and obtained the instant rule and order of stay as has been stated hereinabove.

Mr. Amit Das Gupta, the learned counsel appearing for the petitioners by filing a supplementary-affidavit and upon taking us to the revisional application and by referring to all the documents so appended therewith in the revisional application vis-a-vis the supplementary-affidavit at the very outset submits that, there had been strong *prima facie* case of the applicants-petitioners as they had initiated a process in settling the dispute arisen between the parties amicably and if the bank guarantee is encashed and the cheques are honoured, the applicants would suffer loss and face serious impediment in settling the dispute through arbitration.

The learned counsel next contends that, the applicants would suffer irreparable loss and injury if the bank guarantee and cheque are encashed when the applicants have invested a huge amount of money, time, skill,

labour to run the business and hence, an ad interim injunction is necessary restraining the opposite-party nos. 1 and 2 from encashing the bank guarantee.

The learned counsel further contends that, the bank guarantee is nothing but an integral part of the main agreement and the existence of the bank guarantee is based on the main agreement and the bank guarantee can only be encashed/activated on the issue of having any outstanding dues and the issue of outstanding dues is the subject matter of the arbitration between the parties which must be resolved through initiating an arbitration proceedings.

The learned counsel next contends that, invoking section 7ka of the Arbitration Act is to protect and preserve the subject matter of arbitral proceedings with a view to ensure that any future award can be executable when the opposite-party nos. 1 and 2 are not settling the dispute through arbitration proceedings hence the impugned order is liable to be set aside.

The learned counsel by taking us to the supplementary-affidavit also contends that, during the subsistence of the proceeding initiated under section 7ka of the Arbitration Act, the self-same applicants-petitioners also filed a Miscellaneous Case on 24.11.2020 under section 12 of the Arbitration Act asking the opposite-parties to appoint arbitrator to resolve the dispute yet for the last four years, the opposite-parties did not turn up to oppose or contest the said Miscellaneous Case through which the dispute should be resolved which also construe that the opposite-parties are delaying in disposal of the dispute among themselves.

The learned counsel by referring to clause nos. 9 and 14 of the Sales and Credit Agreement for Distributor further contends that, though in clause no. 9, these petitioners have given an undertaken to paid back any default payment by furnishing a bank guarantee as well as issuing blank cheques yet the dispute arose out of 'security deposit' can well be resolved through arbitration under clause 14 of the said agreement but without appreciating so, the learned Judge passed the impugned order rejecting the application for restraining the opposite-party no. 3 from encashing the bank guarantee which is liable to be set aside.

The learned counsel wrapped up his submission contending that, since the dues alleged to have shown stand against the petitioners is a disputed question of facts so that very dispute cannot be resolved until and unless, an arbitration proceedings is initiated but if the bank guarantee is encashed and the three blank cheques are honoured in that case, these petitioners would be highly prejudiced if ultimately it is found that, the said dues does not stand against the petitioners. With those submissions, the learned counsel finally prays for making the rule absolute by setting aside the impugned judgment and order.

In contrast, Mr. Meah Mohammed Kausar Alam, the learned counsel appearing for the opposite-party nos. 1 and 2 very robustly opposes the contention so taken by the learned counsel for the petitioners and contends that, the application so filed under section 7ka of the Arbitration Act itself is not maintainable since the opposite-party no. 3, Mercantile Bank Limited is not any party to the said dispute when section 7ka of the Act clearly denotes so there has been no reason to injunct the opposite-party no. 3 from

encashing bank guarantee in favour of the beneficiary that is, the opposite-party nos. 1-2.

The learned counsel further contends that, the sales agreement is not any sacrosanct document through which all the dispute should be resolved rather the terms and conditions so provided in clause 9 to the agreement has to be construed independently and in that very clause 9, it has been given absolute authority upon the opposite-party no. 3, Mercantile Bank Limited to encash bank guarantee even without giving any intimation to the present opposite-parties and therefore, the learned Judge of the trial court has rightly rejected the Miscellaneous Case so filed by the present opposite-parties.

Insofar as regards to the submission so placed by the learned counsel for the petitioners in reference to clause 14 of invoking arbitration of any dispute, the learned counsel further contends that, that the dispute among the parties does any monetary dispute to attract the condition so have been provided in clause no. 9 to the agreement when it has clearly been asserted that, *"The company has the right to encash/adjust against Distributor's outstanding at any time without assigning any reason whatsoever"* which has left the encashment of bank guarantee totally independent act to be exerted by the bank itself.

However, in support of his such submission, the learned counsel has placed his reliance firstly on article no. 5 of the ICC Uniform Rules for Demand Guarantees (URDG 758). The learned counsel has also placed his reliance in the decisions so have been reported in 17 BLD (AD) 49 and another decision published in the online portal styled "*Manupatra*" which

has also been reported in 1996 VIAD (SC) 290 when the learned counsel read out paragraph nos. 4 and 5 thereof and submits that, in terms of the bank guarantee, the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee and it does not depend upon the result of the decision in the dispute between the parties, in case of any breach and on that very assertion so made in those two decisions, the learned counsel finally prays for discharging the rule.

We have considered the submission so advanced by the learned counsel for the petitioners and that of the opposite-party nos. 1 and 2. We have also gone through the impugned judgment and order and all other documents so appended therewith in the revisional application as well as the supplementary-affidavit.

Aside from that, we have also examined the provision so have been provided in section 7ka of the Arbitration Act, 2001. Together, we have also examined the bank guarantee as well as “Sales and Credit Agreement for Distributor” and the letter issued by the opposite-party no. 1 in favour of the opposite-party no. 3 requesting it to encash the bank guarantee dated 18.12.2019 and the letter so issued by the opposite-party no. 3 in favour of the present petitioners dated 19.12.2019 and 05.01.2020 respectively. On going through clause no. 9 to the Agreement, we find amongst others the following assertion:

The company has the right to encash/adjust against Distributor’s outstanding at any time without assigning any reason whatsoever”.

At the same time, we have also gone through the bank guarantee reproduced in the impugned order where certain portion of the bank

guarantee has been mentioned and we find from page no. 58 of the revisional application where it has been asserted that, *"in the event of default on the part of the Principal in making payment of the price of the cement supplied by you. The demand made by you (opposite-party nos. 1 and 2) shall be the conclusive proof of default. The payment under this guarantee shall be made without failure and within 3(three) calendar days of making the demand. We hereby acknowledge and declare that our obligation under this guarantee shall be* ***independent*** *from the obligation of the Principal and you are at liberty to have recourse against us at your discretion without taking any recourse against the Principal."*

The above recital so have been provided in the said bank guarantee and clause 9 to the agreement clearly demonstrates that, the bank guarantee is totally an independent condition having no nexus with condition so provided in clause 14 to the agreement that will be settled through arbitration for resolving the dispute.

Furthermore, at the fag-end of the impugned judgment, the court found taka 1,36,67,601/- stand dues against the petitioners which has not been refuted in the revisional application which also justifies the encashment of Bank guarantee undertaken by the petitioners who asserted to the effect that, *"in the event of default on the part of the Principal in making payment of the price of the cement supplied by you. The demand made by you shall be the conclusive proof of default on the part of the Principal in making payment of the price of the cement supplied by you"*. So with all the above circumstances clearly proves that, for having an outstanding dues against the petitioners, the opposite-party nos. 1 and 2

have compelled to ask the opposite-party no. 3 to encash the bank guarantee which clearly supports the assertion of the petitioners cited in the bank guarantee as well as the condition provided in clause no. 9 to the agreement.

Moreover, in the decision so have been cited by the learned counsel for the opposite-party nos. 1 and 2 reported in 17 BLD (AD) 49, we find the following *ratio:*

> *"It is fairly well settled that Courts are reluctant to interfere with commercial transactions entered into by the contending parties through performance of guarantee or letter of guarantee. The arbitration case in respect of the impugned termination of the agreement is not in respect of the Bank Guarantee and the raw materials in question. In case of success of the petitioner in the arbitration proceedings, his threatened loss may be adequately compensated by money and as such there is no case for injunction."*

Though the facts of the cited decision with that of the present one is bit different but the *ratio* so have been settled in that very decision is equally applicable here.

Furthermore, the decision so have been relied upon by the opposite-party nos. 1 and 2 published in the online portal *'Manupatra',* we have also found from the essence of the decisions is, under no circumstances, can any restrain order be given against a bank guarantee which is totally independent one. So the submission made by the learned counsel for the

petitioners that the bank guarantee is the integral part of the sales agreement has no leg to stand.

Further, we have also found from the impugned judgment that the petitioners have outstanding dues towards the opposite parties over taka one crore so there has been no reason not to ask the opposite-party no. 3 by the opposite-parties to encash the bank guarantee. However, if any dispute arises with regard to the said claim in future that claim may be resolved through arbitration but since a bank guarantee is absolutely independent instrument in its nature so under no circumstances can any injunction be granted by any court of law from encashing such bank guarantee. On top of that, we find ample substance to the submission so place by the learned counsel for the opposite-party nos. 1 and 2 that, there has been no scope on the part of the petitioners to invoke the jurisdiction of section 7ka of the Arbitration Act, 2001 for granting injunction against a third party herein the opposite party No. 3 because section 7ka of the Act clearly refers "পক্ষগণ" Since Mercantile Bank Limited, opposite-party no. 3 is not any party to the sales agreement so no relief can be sought against it. Then again, passing an interim order 'against bank guarantee' does not attract the 'subject matter' so provided in section 7ka of the Arbitration Act.

Given the above facts and circumstances, we don't find any iota of substance in the submission so placed by the learned counsel for the petitioners rather the submission so advanced by the learned counsel for the opposite-party nos. 1 and 2 is based on legal proposition and thus sustainable.

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

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this judgment along with the lower court records be sent to the learned District Judge, Mymensingh forthwith.

Mohi Uddin Shamim, J:

I agree.

Abdul Kuddus/B.O