

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

CIVIL REVISION NO. 4240 OF 2022

In the matter of:

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

AND

In the matter of:

CEAT Bangladesh Limited

.... Petitioner

-Versus-

Magnum Engineering & Construction Limited

....Opposite-party

Mr. T.M. Shakil Hasan, Advocate

... For the petitioner

Mr. Shamsun Nahar Mahmood, Advocate

....For the opposite party no. 1

Heard and Judgment on 25.02.2025

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

At the instance of the opposite party to the Arbitration Miscellaneous Case No. 105 of 2020 namely, CEAT Bangladesh Limited, this rule was issued calling upon the opposite-party to show cause as to why the judgment and order dated 19.06.2022 passed by the learned District Judge, Dhaka in the said Arbitration Miscellaneous Case disposing the same by appointing Arbitrator each for the parties to the case should not be set

aside set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, the operation of the impugned judgment and order dated 19.06.2022 passed in the said Miscellaneous Case was stayed for a period of 06 (six) months which was subsequently extended from time to time and it was lastly extended on 02.09.2024 for another 06(six) months.

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

The present opposite party, “Magnum Engineering and Construction Limited” filed the aforesaid Miscellaneous Case under section 12 of the Arbitration Act, 2001 seeking following reliefs:

- (A) *Issue notice on the opposite party to show cause as to why an arbitrator shall not be appointed in accordance with the provisions of Section 12 of the Arbitration Act, 2001 for the purpose of constituting Arbitral Tribunal for resolution of dispute between the parties mentioned in the notice of Arbitration.*
- (B) *After hearing the parties and perusing the causes shown (if any), appoint an arbitrator for the purpose of constituting Arbitral Tribunal.*
- (C) *To award cost of the case in favour of the petitioner and to direct the opposite party to bear the fees of the Arbitrator;*
- (D) *AND/OR Pass such other or further order or orders as this Your Honour may deem fit and*

proper. And for this act of kindness, your petitioner as in duty bound shall ever pray.

The case of the opposite party so have been described in the said Miscellaneous Case is that the present petitioner entered into two separate agreements both dated 31st March, 2024 with it for completing construction of a project at a cost of taka 41,16,63,404.40. During the course of construction of that project by the opposite party, the petitioner since took initiative to encash the bank guarantee so furnished by the opposite party as a security to complete the construction work and as the present petitioner did no pay taka 14,35,64,149/- incurred by the opposite party no. 1, it then on 25.11.2019 issued a notice of arbitration asking the present petitioner (opposite party to the said Miscellaneous Case) to appoint its arbitrator to resolve the dispute. Since the opposite party did not come forward either to respond the said notice of arbitration or appoint its own arbitrator, that compelled the opposite party to file the said Arbitration Miscellaneous Case as petitioner.

The present petitioner as opposite party no. 1 to the said Miscellaneous Case entered appearance in the case and filed written objection denying all the material statements made in the petition contending, *inter alia*, that, the case was premature as no discussion took place between the petitioner and the opposite party before filing of the case. It has further been asserted that, though the Miscellaneous Case was filed for appointing arbitrator but no 'notice of arbitration' had been served upon the present petitioner. It has also been asserted that, in the service agreement there has been a clause of "dispute resolution" where it has been

stipulated that prior to refer the dispute to Arbitration, the parties would mutually resolve the dispute through mutual negotiation but without taking resort to that condition, the Miscellaneous Case was filed and as such the same cannot be maintained.

However, the learned District Judge after considering the assertion and counter-assertion so made by the petitioner (herein opposite party no. 1) made in the Miscellaneous Case and that of the opposite party (herein petitioner) made in the written objection, vide impugned judgment and order allowed the Miscellaneous Case and appointed the arbitrator for both the parties.

It is at that stage, the opposite party to the said Miscellaneous Case as petitioner came before this court and obtained instant rule and order of stay.

Mr. T.M. Shakil Hasan, the learned counsel by supplying us the photocopies of two agreement that is “Mutual purchase Agreement” and “Service Agreement” both dated 31st March, 2014 at the very outset submits that, in clause 21 as well as clause 25 respectively of those two agreements it clearly denote how to resolve the dispute amicably first before invoking the Arbitration Act, 2001 and even in clause 25(1) of Service agreement it has been provided to resolve the dispute through a ‘sole arbitrator’ as of last resort before referring the dispute to the Arbitration in accordance with Arbitration Act, 2001.

The learned counsel further contends that, no “notice of arbitration” as alleged to have issued on 25.11.2019 has ever been served upon the petitioner and since it has not been served, so the Arbitration Miscellaneous

Case itself cannot be entertained even there has been no assertion either in the petition of Miscellaneous Case or in the impugned judgment to that effect, in absence of which the Arbitration Miscellaneous Case should not have entertained.

The learned counsel lastly contends that, in paragraph no. 6 to the 'notice of arbitration' itself it has been admitted that, out of the total work, only 2.2% work has been done by the present opposite party having no reason to believe that for that work taka 14,35,64,149/- has been defrayed by it even though that very factual aspect is not any point-in-issue in the Miscellaneous Case yet since the precondition to invoke arbitration has not been complied with by the opposite party, so the learned District Judge has committed a grave illegality in appointing arbitrator for of both the parties which cannot be sustained in law and finally prays for making the rule absolute by setting aside the impugned judgment and order.

Per contra, Ms. Shamsun Nahar Mahmood, the learned counsel appearing for the opposite party no. 1 very robustly opposes the contention taken by the learned counsel for the petitioner and contends that, on several occasions, the petitioner had been apprised about the process of construction in the project undertaken and the amount incurred for completion of such project, but since the petition did not come forward either to pay the outstanding amount or to resolve the dispute rather it went on to encashing the bank guarantee, so the opposite party has no other option but to issue a notice of arbitration and then to file the Arbitration Miscellaneous Case when there occurred no illegality to have committed by the opposite party. When we pose a question to the learned counsel with

regard to the application of clause 25 to the “Service agreement” dated 31.03.2014, the learned counsel then contends that, the opposite party issued several letters to the petitioner on different occasions asking it to resolve the dispute through negotiation and as the petitioner did not pay any heed to resolve the dispute through mutual or bilateral consultation or mutual agreement or amicable settlement so this opposite party had thus compelled to file the Miscellaneous Case under section 12 of the Arbitration Act having no illegality in it.

The learned counsel further contends that, the learned District Judge while allowing the Miscellaneous Case has rightly found the communications so made by this opposite party with the petitioner as part of negotiation and then came to a findings that, as the petitioner failed to resolve the dispute amicably it (the opposite party) has rightly invoked the jurisdiction of section 12 of the Arbitration Act.

The learned counsel by referring to the provision of section 12(7) of the Arbitration Act also contends that, that very provision also allows the opposite party to file a case under section 12 of the Arbitration Act to appoint arbitrator to resolve the dispute among the parties having no illegality in it and finally prays for discharging the rule.

Be that as it may, we have considered the submission so advanced by the learned counsel for the parties, perused the impugned judgment and order vis-à-vis the petition of Miscellaneous Case and the written objection filed there against. We have also gone through the relevant clauses meant for dispute resolution embodied in two agreements both dated 31st March, 2014 and that of the ‘notice of arbitration’ issued by the opposite party

upon the petitioner all supplied by the learned counsel for the petitioner. It is the *sina qua non*, before initiating an arbitration proceedings under section 12 of the Arbitration Act that, a notice of arbitration is to be given and if the adversary to that notice fails to appoint its arbitrator within 30 days of receiving the same, then the notice giver will be entitled to file a Miscellaneous Case under section 12 of the Arbitration Act. First of all, from the petition of Miscellaneous Case, and that of the impugned judgment we don't find that, there has been any assertion that the petitioner had ever received the said notice and therefore since provision of section 12(4)(ka) has not been complied with, the learned District Judge has thus committed illegality by appointing Arbitrator vide impugned judgment under section 12(4) (ga) of the Act, 2001.

On top of that, from the notice of Arbitration dated 25.11.2019, in particular, from paragraph 7, we find that the opposite party mentioned clause 25 to the agreement for taking resort to Arbitration though as per clause 25, the opposite party should have attempted mutual negotiation with the petitioner then to refer the dispute to "sole arbitrator" as part of resolve the dispute failing which to appoint arbitrator under the Arbitration Act as of last resort. In both the clauses, that is, in clause no. 21 and 25 to the Agreement dated 31.03.2014, it has clearly been stipulated that if any dispute arises it should be mutually resolved among themselves then by a sole Arbitrator and after exhausting all those two options, the aggrieved party can invoke the provision of section 12 of the Act for appointing arbitrator which has not been done in the case. It is the contention of the learned counsel for the opposite party that on several occasions by

supplying invoices as proof of defraying taka 14,35,46,149/-, it requested the petitioner to resolve the dispute but it did not do so. But nothing sort of such assertion has been made either in the “notice of Arbitration” or in the petition of Miscellaneous Case. So the submission so placed by the learned counsel for the petitioner that, the Arbitration Miscellaneous Case itself is premature one and asserted in its written objection filed against the application for appointing arbitrator, bears substance in view of clause 25 of the agreement. Furthermore, though section 12(4) of the Arbitration Act stipulates for appointing arbitrator for the adverse party to the dispute who fails to appoint its arbitrator in spite of receiving notice but interestingly, the learned District Judge has not only appointed arbitrator for the opposite party rather for the petitioner as well despite the fact that, in the notice of arbitration, the petitioner of the Miscellaneous Case appointed their own arbitrator. Even, how the further proceedings of the Arbitral Tribunal will be proceeded and what would be the process of Arbitration has also been outlined by the learned District Judge in the impugned judgment which is exaggeration and beyond the scheme of section 12 of the Arbitration Act.

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

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

The impugned judgment and order dated 19.06.2022 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 105 of 2020 stands set aside.

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

Let a copy of this order along with the lower court records be communicated to the court concerned forthwith.

Md. Bashir Ullah, J:

I agree.

Kawsar /A.B.O