

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

**CIVIL REVISION NO. 1331 OF 2024**

In the matter of:

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

AND

In the matter of:

Central Medical Stores Depot, represented by its Director (Stores and Supplies) 30, Shaheed Tajuddin Ahmed Sharani, Tejgaon, Dhaka-1208.

.... Petitioner

-Versus-

OMC Ltd (Changed from Overseas Marketing Corporation (Pvt Ltd) represented by its Managing Director, Unique Trading Centre(UCT), Level-15,8 Panghapath, Dhaka 1215.

....Opposite-party

Mr.Syfuzzaman, Advocate

... For the petitioner

Mr.Ahsanul Karim, senior Advocate with

Mr. Anam Hossain, Advocate

....For the opposite party no. 1

**Heard on 27.05.2024 28.05.2024 02.06.2024**

**03.06.2024**

**and Judgment on 03.06.2024**

**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 namely, Central Medical Stores Depot (CMSD), to the Miscellaneous Case No. 341 of 2023 this rule was issued calling upon the opposite-party (the petitioner to the Arbitration Miscellaneous Case No. 341 of 2023) to show cause as to why the order no.07 dated 30.11.2023 and that of the order no. 8 dated 17.01.2024 respectively passed by the learned District Judge, Dhaka in the said Arbitration Miscellaneous Case disposing of the said Case under section 12 of the Arbitration Act, 2001 and thereby appointing an Arbitrator without disposing of the application filed for rejecting of the Arbitration Miscellaneous case by the petitioner and then modifying the order dated 30.11.2023 vide order no. 8 dated 17.01.2024 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 order Nos. 7 and 8 dated 30.11.2023 and 17.01.2024 respectively passed by the learned District Judge, Dhaka in the said Arbitration Miscellaneous Case for a period of 3(three) months.

Mentionable, challenging that interim order the opposite party went to the Appellate Division by preferring a Civil Petition for Leave to Appeal No. 1310 of 2024 but the learned Chamber Judge on 24.04.2024 passed “no order” asking this court to get the rule heard within a period of 2(two) months and accordingly the rule was taken up for hearing by this court.

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

The present opposite party as petitioner initiated a proceedings under section 12 of the Arbitration Act, 2001 for appointing an Arbitrator for the petitioner under section 12 of the Arbitration Act which gave rise to

Arbitration Miscellaneous Case No. 341 of 2023. In the said Miscellaneous case, the present petitioner as opposite party entered appearance and filed an application for rejection of the said Arbitration Case asserting that, no contract was signed between the petitioner and the opposite party let alone any notification of award was issued to the opposite party and since there remains no legal contract or agreement among the parties so, the Arbitration clause so have been mentioned in the invitation of priced offer as annexed as Annexure-‘E’ to the counter-affidavit cannot be applicable and thereby the Arbitration proceedings initiated by the opposite party cannot be entertained. The application so field by the present petitioner was entertained by the learned District Judge, Dhaka on 21.09.2023, heard the said application on 01.11.2023 (vide order No. 05) and then passed the following order:

অদ্য আপত্তির কপি জারী অস্তে শুনানীর জন্য দিন ধার্য আছে ।

উভয়পক্ষ হাজিরা দিয়াছে । দরখাস্তকারীপক্ষ প্রতিপ

মোকদ্দমা খারিজের দরখাস্তের বিরুদ্ধে লিখিত আপত্তি দাখিল করেছেন ।

দখি শুনানীর জন্য পেশ করা হ

উভয়পক্ষ

জন্য দিন ধার্য করা হ

আমার কথিত ম

But on the subsequent day as fixed dated 21.11.2023 the following order was passed:

অদ্য রায় প্রচা

আদালত ফৌজদারী ও দেওয়ানী মোকদ্দমার শুনানীতে ব্যস্ত থাকায়

এবং অন্যান্য মোকদ্দমায় রায় ও আদেশ প্রস্তুতে ব্যস্ত থাকায় এ মোকদ্দমার

রায় প্রস্তুত না হওয়ায় আগামী ৩০.১১.২০২৩ তারিখ রায় প্রচা

ধার্য্য হয়।

আমার কথিত ম

Eventually, on 30.11.2023 the first impugned judgment was passed appointing Mr. Justice Syed Mahmud Hossain, former Chief Justice of Bangladesh as Arbitrator, for the petitioner and that of Mr. Md. Manjurul Basit, retired District Judge for the opposite party to the said Miscellaneous case. After that, the opposite party (petitioner in the Miscellaneous case) filed an application for rectification of the judgment and order dated 30.11.2023 and the learned District Judge, Dhaka vide an elaborate order dated 17.01.2024 allowed the said application appointing Mr. Moyeenul Islam Chowdhury, former Justice, High Court Division, Supreme Court of Bangladesh in place of Mr. Justice Syed Mahmud Hossain, the former Chief Justice of Bangladesh as Arbitrator for the petitioner (herein opposite party).

It is at that stage, the opposite party to the Miscellaneous Case as petitioner then filed this revision and obtained rule and the interim order as stated above.

Mr. Syfuzzaman, the learned counsel appearing for the petitioner upon taking us to the revisional application and all the documents appended therewith at the very outset submits that, moment the Miscellaneous case initiated under section 12 is disposed of, the learned District Judge reserves no authority to entertain any application in any manner let alone for rectification of its own order as section 12(12) put a clear bar on that as sub section 12 has clearly denotes, order passed under sub section 3,4 and 7 of section 12 by the District Judge will be final (জেলা

জজ কর্তৃক প্রদত্ত কিন্তু চূড়ান্ত হইবে) having no occasion to pass any rectification order when the learned District Judge became *functous officio* after disposing of the case on 30.11.2023

The learned counsel in his second leg of submission also contends that, even though after passing the impugned judgment dated 30.11.2023 the petitioner of the Miscellaneous case had filed the application for rectification but no copy of the same had ever been served upon the present petitioner and the learned District Judge has clearly sidetracked that vital aspect and most illegally entertained subsequent application and therefore the order dated 17.01.2024 cannot be sustained in law. By refuting the contention taken by the learned senior counsel for the opposite party that, under section 16 of the Arbitration Act, 2001 the court has passed the order of rectification, the learned counsel then by referring to section 15 of the said Act contends that, in that very section certain circumstances have been set forth as to when the authority of an Arbitrator will be dissolved (অবসান) but nothing sort of any of those circumstances has ever been occurred in the instant case nor it has been asserted in the application for rectification even though the said circumstances are not there in the instant case yet the learned District Judge under misconception of law and facts has allowed the said application who assumed no authority to entertain the application and therefore the subsequent order dated 17.01.2024 is also a nullity. When the learned counsel is confronted with the submission advanced by the learned counsel for the opposite party that following the appointment of the Arbitrators, since an Arbitral Tribunal has been constituted by appointing Mr. Syed Mahmud Hossain, the former Chief Justice of Bangladesh as its chairman and they (both the petitioner

and the opposite party) have participated in the proceedings of the Arbitral Tribunal, then the petitioner will be precluded from raising any objection with regard to the validity of the two orders impugned in this revisional application, the learned counsel then retorted that, as per the information he gathered from the petitioner, the said Arbitral Tribunal has been formed online and in the deliberation held therein the petitioner had expressed that, it will challenge the impugned orders in the High Court Division so there remains no legal bar for the petitioner to challenge the said two orders before this Hon'ble court as there occurred patent illegality in both orders.

The learned counsel further adds that, even there has been no legal bar to challenge the impugned orders in spite of proceedings with the Arbitral Tribunal merely for appointing alleged Arbitrators which has been done illegally. Insofar as regards to the reliance of the provision of section 20 of the Arbitration Act by the opposite party, the learned counsel then contends that, that very provision is totally inapplicable in adjudicating this rule because none of the party to the rule has ever challenged the authority of the Arbitral Tribunal before this Hon'ble court so the submission advanced by the opposite party to that effect is totally misconceived one. As regards to the submission for the opposite party that changes of Arbitrator made under section 12(3)(kha) of the Act by rectification order dated 17.01.2024 passed by the learned District Judge is a nullity still the petitioner of the Miscellaneous case by invoking section 12(3)(kha) can re-appoint their Arbitrator on its own volition as it had proposed 3 (three) names for appointing Arbitrators in the notice of Arbitration as well as in the application of Miscellaneous case filed under section 12 of the Arbitration Act and out of three names, the petitioner of the Miscellaneous

case has subsequently replaced Mr. Justice Moyeenul Islam Chowdhury, former judge of the High Court Division for Mr. Justice Syed Mahmud Hossain, former Chief Justice of Bangladesh and therefore it is justified. In response to that, the learned counsel for the petitioner submits that, once a party to any dispute invokes the jurisdiction of the District Judge for appointing Arbitrator under section 12 of the Arbitration Act, there has been no scope for it to change the Arbitrator on its own accord and therefore the said submission is also devoid any legal basis. With those submission the learned counsel finally prays for making the rule absolute on setting aside the impugned orders.

*Per contra*, Mr.Ahsanul Karim, the learned senior counsel along with Mr. Anam Hossain, the learned counsel appearing for the opposite party by filing a counter-affidavit and annexing voluminous of document therewith at the very outset submits that, the learned District Judge occurred no illegality in passing the impugned orders and therefore the orders are liable to be sustained.

The learned counsel however frankly submit that, the order dated 17.01.2024 through which the learned District Judge rectified its earlier order dated 30.11.2023 is a nullity and misconceived one which bears no legal basis yet under section 12(3)(kha) of the Act subsequent appointment replacing the Arbitrator of the opposite party has been done legally.

The learned counsel then by taking us to the counter-affidavit and various clauses of annexure-E mainly contends that, since as per that very contract, the opposite party supplied the equipments to the petitioner and the said contract has been signed by both the parties and even upon supplying the equipments to different hospitals, the petitioner has failed to

pay the amount so the opposite party had no other option but to invoke the provision of Arbitration which has clearly been stipulated in clause 47.3 of the said contract (Annexure-‘E’ to the counter affidavit.) having no illegality in it.

The learned counsel goes on to submit that, from Annexure-F-1 to the counter-affidavit it is evident that, the petitioner itself has signed several documents under different packages in supplying PCR machine sets and it has also been shown from annexure-F-3 that negotiation was going on among the parties and several laboratory machineries and other materials were also supplied as found in Annexure-J so all those documents exemplifies that the contract among the parties has been carried out under which the opposite party supplied the equipments to the petitioner having no scope to say that, no contract has been signed with the opposite party rather in order to escape payment to the opposite party, the petitioner has resorted to different tactic which cannot be sustained.

The learned counsel further contends that, since the petitioner remained present in the proceedings of Miscellaneous Case initiated under section 12 of the Arbitration Act as well as it has also participated in the Arbitral Tribunal formed following the appointment of Arbitrator raising no objection with regard to the appointment of its own Arbitrator namely, Mr. Monjurul Basit, a retired District Judge and the proceeding of the Arbitral Tribunal has already been initiated so the petitioner has alternatively admitted the orders impugned in this revision application and then there has been no scope for it to revert back from its position by challenging the impugn orders.



The learned counsel by taking us through section 7 of the Arbitration Act also contends that, since it is admitted position that there has been an Arbitration clause being no. 47.3 in Annexure-‘E’ to the counter-affidavit so there has been no scope for any of the parties to the Miscellaneous case not to proceed with the Arbitral Tribunal. Insofar as regards to not disposing of the application filed by the petitioner for rejection of the Arbitration Miscellaneous case though entertained by the learned District Judge, the learned senior counsel then contends that, by not passing any order on that application, it has not occasioned any failure of justice adding that, if the District Judge had entertained the application, that result would have been the same, so mere not disposing of the application for rejection of the Miscellaneous case will not render the judgment passed on 30.11.2023 illegal. At this, the learned counsel has relied upon a decision so reported in 18 BLD (AD) 121. The learned counsel then by referring to section 20 to the Arbitration Act also submits that, if any illegality is committed in the proceeding of the Arbitration Miscellaneous case, this Hon’ble court is authorized to pass any appropriate order even though the orders impugned in this revisional application has not been passed illegally. When we pose a question to the learned senior counsel about the reason of filing subsequent application for rectification of the order dated 30.11.2023, the learned counsel then readily submits that, since the former Hon’ble Chief Justice of Bangladesh, Syed Mahmud Hossain has resigned from the post of Arbitrator appointed for the petitioner (herein the opposite party) for that obvious reason, the opposite party then by giving notice to Mr. Justice Moyeenul Islam Chowdhury, former judge of the High Court Division requested him to be its Arbitrator and since he readily accepted

that offer so only for that reason, the name of the Arbitrator for the opposite party had been changed. When we asked the learned counsel to supply the copy of the said application for rectification he did so but on perusing the application we don't find that very fact of resignation of the former Chief Justice of Bangladesh to be true. The learned counsel then backed out from his such submission and contends that, since he is dealing with a junior's brief so he actually could not go through the application which we find to be totally unbecoming for a senior Advocate. However, the learned senior counsel instantly begs apology for such submission which we readily accepted. The learned counsel then reiterates that, since section 12(3)(kha) of the Act authorizes the opposite party to change the name of the Arbitrator out of the three names it proposed in the Arbitration Miscellaneous case, so basing on that provision the opposite party had subsequently changed its Arbitrator. With those submission the learned counsel finally prays for discharging the rule and to vacate the order of stay.

We have considered the submission so advanced by the learned counsel for the petitioner and that of the learned senior counsel for the opposite party no. 1. We have also very meticulously gone through the revisional application, counter-affidavit and all the documents appended therewith. Aside from that, we have also gone through the provision laid down in section 12, 15, 16, 20 and section 7 of the Arbitration Act 2001, There has been no denying that, during the pendency of the Arbitration Miscellaneous case so initiated by the opposite party under section 12 of the Arbitration Act, the present petitioner entered appearance and filed an application for rejection of the application filed for appointing its Arbitrator

asserting that, since there has been no legal contract ever penned with the opposite party then the filing of the Arbitration Miscellaneous case cannot be sustained although in the said application, the petitioner has also taken other legal grounds. However, the said application was entertained by the learned District Judge and even he heard the said application of the petitioner on contest and fixed on 21.11.2023 for passing order on that very application before disposing of the Miscellaneous case on 30.11.2023. Curiously enough, without passing any order on that application filed for rejecting the Miscellaneous case, the learned District Judge has passed the impugned judgment on 30.11.2023 disposing of the Miscellaneous case without bothering to pass any order of the petitioner's application and appointed Arbitrator for both the parties. Soon enough, the learned District Judge even entertained the application for rectification of his earlier order filed by the present opposite party though that very application has not been annexed with the counter- affidavit though a host of documents have been annexed with the counter- affidavit save for that very application for which we repeatedly asked for that application to the learned counsel for the opposite party to examine for ourselves the reason to change the name of the former Chief Justice of Bangladesh for the opposite party reappointing Mr. Justice Moyeenul Islam Chowdhury former judge of the High Court Division in his place. Today, at the fag end of hearing, the learned counsel for the opposite party supplied the photocopy of the application for rectification and we find from that application that, not a single word has been stated about the reason for changing the name of the former Chief Justice of Bangladesh as an Arbitrator for the opposite party but in spite of that very fact, the learned District Judge in a capricious manner allowed the

said application for rectification finding it to have been filed under section 16 of the Act initiated the order stating inter alia that, “*Heard This is an application under section 16 of the Arbitration Act, 2001* which is nothing but simply a mechanical order through which he replaced a former Chief Justice of Bangladesh with a former judge of the High Court Division that, in fact, exemplifies the ineptness of the learned District Judge in adjudicating the matter when he reserves no authority to entertain such application. Though the learned counsel for the opposite party in that regard submits that, the said order is misconceived one and a nullity but in the next breath he justifies the rectification order dated 17.01.2024 relying upon the provision of section 12(3)(kha) of the Arbitration Act which is totally contradictory stance because on the one hand, the opposite party placed its reliance on the order of the court while appointing Arbitrator under section 12 of the Act but when he confronted with the rectification order, then it reverted back to section 12(3)(kha) for its justification submitting that, it is the party who is authorized to change the name of its Arbitrator which sounds frivolous and is devoid of any legal substance on the face of the Arbitration Act, 2001. Further, section 15 of the Arbitration Act clearly outlines some circumstances under which the authority of an Arbitrator can be dissolved/ relinquished (অবসান). Though in the application for rectification section 16 of the Act has not been quoted but in the entire submission, the learned counsel for the opposite party kept on asserting that, very application was submitted under that section even though section 16 of the Act has no application in rectifying the appointment of any Arbitrator because the circumstances which has been set out therein how once an Arbitrator is appointed, he /she can be removed or his authority can

be dissolved (অবসান) but in the instant case nothing sort of any such circumstances happened even though the said provision is totally inapplicable here. So, the submission placed by the learned counsel for the petitioner is quite sustainable that the Arbitrator appointed by the learned District Judge cannot be changed/amended subsequently when he becomes *functous officio* under section 12(12) of the Arbitration Act. It is not justified that a District Judge can pass an order without issuing or serving notice to the opposite party to the Arbitration Miscellaneous case while changing the name of any Arbitrator regardless of the said change being made for the opposite party as the present petitioner reserves every authority to be informed about subsequent development of the case. It is the contention of the learned counsel for the opposite party that, once the petitioner consented to the appointment of the Arbitrator, vis-a-vis forming the Arbitral tribunal, there has been no occasion for the petitioner to challenge the earlier orders passed by the learned District Judge. But we don't find any shred of substance in the said submission because if any party to the proceedings ever finds the order is illegal it possesses every authority to challenge such order or orders to its higher authority which has been done in the instant case. So the said submission has got no leg to stand. Furthermore, section 20 of the Arbitration Act clearly speaks at what stage the High Court Division can interfere with the proceedings which is the propriety of the jurisdiction of an “**Arbitral tribunal**” but the case in hand the petitioner has challenged the validity of the orders passed by the learned District Judge in an Arbitration Miscellaneous Case appointing Arbitrators as well as rectification of such appointment not any proceeding of Arbitral tribunal so reliance on the provision of section 20 of the

Arbitration Act, 2001 by the learned counsel for the opposite party also bears no basis.

Last but definitely not the least, since the petitioner had filed an application for rejecting of the Miscellaneous Case on the point of maintainability and the learned District Judge entertained and heard the said application and ultimately no order has been passed therein, so he should have passed an appropriate order on that very application first before disposing of the Miscellaneous case vide order dated 30.11.2023 having no scope at all to rectify the order subsequently passed on 17.01.2024. In that respect though learned counsel for the opposite party submits that mere not passing order on that application occasioned no failure of justice and cited a decision to that aspect, but on going through the said decision we find that, the fact so have been described in the cited decision is totally distinguishable with the facts described in the present case, so that very decision is totally inapplicable in the instant case. Since we find from the record that, the application so filed by the present petitioner for rejection of the petition of the Miscellaneous case initiated under section 12 of the Arbitration Act has not been disposed of so justice would be best served if the learned District Judge is directed to dispose of the said application on merit first and then dispose of the Miscellaneous case filed under section 12 of the Arbitration Act by the present opposite party.

In view of the above discussion and observation we don't find any substance or merit in the impugned judgment and order Nos. 7 and 8 dated 30.11.2023 and 17.01.2024 respectively. Accordingly, the said orders cannot be sustained in law.

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

The order Nos. 7 and 8 dated 30.11.2023 and 17.01.2024 passed in Arbitration Miscellaneous Case No. 341 of 2023 by the learned District Judge, Dhaka stands set aside.

The learned District Judge, Dhaka is hereby directed to hear the application filed by the petitioner dated 21.09.2023 in the said Miscellaneous Case within a period of 30(thirty) days from the date of receipt of the copy of this order and then dispose of the Miscellaneous Case No. 341 of 2023 afresh within next 30(thirty) days.

The order of stay so granted at the time of issuance of the rule on the operation of the impugned orders dated 30.11.2023 and 17.01.2024 will continue till disposal of the Miscellaneous Case no. 341 of 2023.

Let a copy of this order be transmitted to the court concerned forthwith.

**Md. Bashir Ullah, J:**

I agree.