IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 482 OF 2024

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Kamrul Ashraf Khan, son of Ashraf Uddin Khan and Amena Begum, NID No. 2362481679, House No. 110, Road No. 8, Block: C, Banani, Dhaka-1213, Bangladesh, Proprietor of M/S Poton Traders having of BCIC Bhaban (16th Floor), 30-31, Dilkusha C/A, 1000, Dhaka, Bangladesh; represented by his constituted Attorney Md. Shahadat Hossain, son of Belayet Hossain and Mst. Saleha Begum, NID No. 5962813829 of present address at House No. 17, Flat No. 5/A, Road No. 02, Sector No. 09, Uttara, Dhaka-1230 and permanent address at House/Holding: Miahbari, Village/Road: Charshindur, Post Office: Charshindur-1612, Polash, Narshingdi.

.... Petitioner

-Versus-

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

....Opposite-party

Mr. Imtiaz Moinul Islam, Advocate

... For the petitioner

Mr. Md. Bodruddoza, Senior Advocate

...For the opposite-party

Heard on 25.11.2024.

Judgment on 26.11.2024.

Present:

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

Md. Mozibur Rahman Miah, J:

At the instance of the applicant in Arbitration Miscellaneous Case No. 367 of 2023 so initiated under section 12 of the Arbitration Act, 2001, this rule was issued calling upon the opposite-party to show cause as to why the order dated 30.11.2023 passed by the learned District Judge, Dhaka in the said Arbitration Case dismissing the case filed for appointment of arbitrator for the opposite-party should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

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

The present petitioner as applicant filed the aforesaid Miscellaneous Case before the learned District Judge, Dhaka under section 12 of the Arbitration Act, 2001 seeking following reliefs:

> *"**(A)** Admit this application and issue notice upon the opposite party calling upon to show cause as to why an arbitrator shall not be appointed by the learned Court to form the Arbitration Tribunal to adjudicate upon the dispute arisen between the applicant and the opposite party.*

(B) *After hearing the parties and cause shown, if any, pass an order appointing the arbitrator of the Arbitration Tribunal,*

(C) *Pass such other or further order or orders as this learned Court may deem fit and proper."*

The case so figured in the application is that the petitioner is a businessman and runs his business in the name and style "M/S Poton Traders" which is engaged in transportation of fertilizers to various government bodies including the opposite-party for a considerable period of time. It has further been stated that the petitioner is a local carrier and thus entered into 7(seven) different contracts with the opposite-party for transporting and stacking of bulk fertilizers imported by the opposite-party from various foreign sources and has been carrying imported fertilizers through multiple mother vessels to various godowns allocated by the present opposite-party, Bangladesh Chemical Industries Corporation (shortly, BCIC) and accordingly, 7(seven) different contracts were signed between the petitioner and the opposite-party ranging from 02.09.2021 to 05.04.2022 and accordingly, the petitioner furnished bank guarantee against those contracts with different banks which has also been described in paragraph nos. 4 and 5 to the application. But during the course of transporting the fertilizer, the petitioner failed to deliver the same in the designated godowns of the opposite-party due to shortage of space in the allocated godown earmarked by the BCIC, opposite-party. The godown in-charge issued certificate to that effect stating that the transport contractor, the petitioner duly delivered the fertilizer as

stipulated in the work order though such delivery could not be accepted by the opposite-party for want of capacity in the concerned godowns. But all of a sudden, the opposite-party by breach of contract and without giving any reasonable opportunity to resolve the dispute vide several letters all dated 30.11.2022 and letter of reminder dated 02.1.2023 informed the petitioner that the bank guarantee so furnished by the petitioner would be encashed if the tenure of the same is not extended. Upon receiving the information, the petitioner then filed an application under section 7A of the Arbitration Act, 2001 for restraining the opposite-party from encashing bank guarantee. However, since the opposite-party did not come forward to settle the dispute amicably rather went on to encash the bank guarantee, the petitioner then compelled to issue a notice under section 27 of the Arbitration Act on 11.05.2023 asking the opposite-party to appoint its arbitrator to resolve the dispute by appointing his (petitioner) arbitrator namely, Ms. Anita Gazi Rahman, Barrister-at-Law, Advocate, Supreme Court of Bangladesh as per the condition so provided in clause 6 to the Contracts. As the opposite-party failed to appoint its arbitrator within the statutory period of 30 days from the date of receipt of the copy of the notice of arbitration, the petitioner as applicant then filed the Miscellaneous Case on 05.07.2023.

The present opposite-party, BCIC filed written objection against the application so filed under section 12 of the Arbitration Act stating *inter alia* that, the petitioner has delivered 143576.258 metric tons fertilizer out of 215377.566 metric tons and therefore, he did not deliver a total amount of 71801.31 metric tons and for that obvious reason, claiming the amount

of that non-delivered fertilizer, the opposite-party already filed a suit against the petitioner being Money Suit No. 13 of 2023 for an amount of taka 11,63,16,18,128/-. It has further been stated that the bank guarantee so furnished by the petitioner are all subject to condition that if the applicant ever fails to deliver the fertilizer within the stipulated time, the opposite-party holds every right to encash the bank guarantees and thus in the above circumstances, the case so filed under section 12 of the Arbitration Act cannot be maintained and finally prayed for dismissing the case.

However, the learned District Judge took up the case for hearing and vide impugned judgment and order dated 30.11.2023 dismissed the same holding that as per the agreement dated 15.09.2021 there has been provision in particular in the GCC clause nos. 59.1 and 59.5 to settle the dispute by the President of the Institute of Engineers, Bangladesh and without resorting to that option, the Arbitration Miscellaneous Case was filed when the opposite-party has already filed a suit being Money Suit No. 13 of 2023 against the petitioner and in order to escape in paying the amount in that suit, the instant Miscellaneous Case has been filed.

It is at that stage, the applicant of the Miscellaneous Case as petitioner came before this court and obtained the instant rule.

Mr. Imtiaz Moinul Islam, the learned counsel appearing for the petitioner upon taking us to the impugned judgment and order at the very outset submits that, the learned District Judge without considering the materials on record placed before him and very unfairly passed the impugned judgment and order which cannot be sustained in law.

The learned counsel by referring to the contract furnished between the parties (between respondent and appellant) ranging from 02.11.2021 till 24.04.2022 submits that, there has been no existence of any contract ever furnished between the parties on 15.09.2021 let alone having any clause as mentioned in the impugned judgment as GCC clause nos. 59.1 and 59.5 and therefore, it proves sheer unmindfullness of the learned Judge while disposing of the Miscellaneous Case and hence the said judgment and order should stand set aside.

The learned counsel by referring to another reason assigned by the learned District Judge in dismissing the case that is, for pendency of Money Suit No. 13 of 2023 and then contends that, under the provision of section 12 of the Arbitration Act, there has been no option open to the learned District Judge to take into account of any other suit while adjudicating a Miscellaneous Case meant for appointing arbitrator to resolve any dispute among the parties provided an arbitration clause is there in any contract/agreement between the parties authorizing any of the parties to resolve the dispute.

The learned counsel further contends that, since it has already been decided in a raft of decisions of this Division and the Appellate Division settling that if there has been any clause of arbitration in a contract for resolving any dispute, the limitation will run from the denial of appointing arbitrator by any of the parties to the contract upon receiving notice of arbitration from its adversary and since the Arbitration Act, 2001 does not stipulate any time limit for initiation of an arbitration proceeding then the

time limit provided in Article 181 of the Limitation Act will come into play here.

The learned counsel next contends that, since the opposite-party in compliance with the provision of section 12 (4) (ka) failed to appoint its arbitrator within 30 days of receiving the notice of arbitration issued by the petitioner on 11.05.2023 under section 27 of the Act, the Arbitration Case was rightly filed having no scope to dismiss the same.

In response to the submission so placed by the learned senior counsel for the opposite-party to the effect that moment the tenure of the contract expires, there remains no scope to initiate any arbitration, the learned counsel then contends that, the provision of section 9 of the Arbitration Act clearly stipulates that an arbitration clause inserted in any agreement form a separate agreement having no nexus with the tenure of the contract.

The learned counsel then by referring to section 18 of the Arbitration Act further contends that an arbitration agreement to the contract should be deemed to constitute as separate agreement and therefore, in spite of having any tenure in the contract that will not *ipso facto* debar any party to the contract/agreement to initiate arbitration proceeding.

Insofar as regards to the maintainability of the instant revision, the learned counsel contends that, it has already been settled by a slew of decisions by this Division as well as the Appellate Division that in spite of the provision postulated in section 12(12) of the Arbitration Act, a civil

revision will lie before this court against the judgment passed by the District Judge under section 12 of the Arbitration Act.

In that connection, the learned counsel has relied upon a decision passed by this court reported in 18 BLC (HCD) 285 and another unreported judgment passed by this Division dated 11.03.2024 in Civil Revision No. 5327 of 2022.

The learned counsel has also placed his reliance in a decision passed by a Larger Bench reported in 18 SCOB HCD 257 where the judgment was passed on 11.08.2022 in Civil Revision No. 4042 of 2017 and then submits that, since section 48 of the Arbitration Act provides for an appeal against the judgment and order passed on an application under section 42 read with section 43 of the Act for setting aside an award, so invariably if any order is passed under section 12 of the Arbitration Act revision will lie.

The learned counsel by adverting to the submission so placed by the learned counsel for the opposite-party that section 10(2) and section 7 of the Arbitration Act also debar the petitioner to invoke arbitration proceeding, the learned counsel then contends that, section 10(2) is totally inapplicable here which denotes if any legal proceeding is pending among any parties where there exists any arbitration agreement then the further proceeding of such legal proceeding will stay and the court will then refer the dispute to the arbitration when section 7 of the Act has given preference to resolve the dispute following the provision of the Act of 2001 over any other judicial proceeding (অন্য কোন আইনগত কার্যধারার শুনানীর এখতিয়ার আদালতের থাকিবে না).

At the fag-end of his submission, the learned counsel submits that, since it is a long standing dispute among the parties, so this court by relying on the provision provided in section 12(6) and (7) of the Arbitration Act may appoint an arbitrator for the opposite-party vis-à-vis the Chairman of the tribunal by constituting it enabling to resolve the dispute expeditiously and finally prays for making the rule absolute.

On the flipside, Mr. Md. Bodruddoza, the learned senior counsel appearing for the opposite-party by filing a counter-affidavit very robustly opposes the contention taken by the learned counsel for the petitioner and contends that, in view of the clear provision provided in clause no. 2 of the contract, since the tenure of the same remained valid till 02.11.2022 so after expiry of its validity period, there has been no scope to invoke arbitration proceeding among the parties.

The learned counsel next contends that, though the learned District Judge has pointed out two different clauses stating date of agreement dated 15.09.2021 but it was a rider party to charter agreement and in that agreement, the present petitioner was not any party.

The learned counsel further contends that, since the petitioner has failed to supply a substantial quantity of Urea fertilizer to its different godowns earmarked by this opposite-party so the opposite-party suffers a huge loss compelling it to file a money suit which has now been pending and therefore, the arbitration proceeding cannot continue on the self-same dispute among the parties.

The learned counsel also contends that, for finding the petitioner involved in various corruption, a Suo Motu Rule was also issued by this

court and investigation is ongoing by the Anti-Corruption Commission against the petitioner, so taking into consideration of the conduct of the petitioner, the arbitration proceeding cannot be proceeded and the learned District Judge has thus rightly dismissed the Miscellaneous Case holding that the money suit is pending against the petitioner.

The learned counsel by referring to the provision of section 10(2) and section 7 of the Arbitration Act also contends that, since there has been clear bar in those two provisions to initiate any arbitration proceeding so the rule issued by this court is liable to be discharged.

Be that as it may, 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. We have also gone through the impugned judgment and order and all the relevant documents so appeared in the lower court record, counter-affidavit submitted by the opposite-party and the decisions cited by the learned counsel for the petitioner.

Since the point of maintainability has vehemently been raised by the learned senior counsel for the opposite-party to sustain the rule, so we feel it expedient to resolve the said issue first.

It is true, section 12(12) of the Arbitration Act has made the decision passed by the learned District Judge as conclusive one and for that obvious reason, the learned senior counsel for the opposite-party put his entire emphasis on that provision and submits that in such a clear provision the instant revision cannot lie rather the petitioner could invoke writ jurisdiction. However, that very assertion has vehemently been assailed by the learned counsel for the petitioner.

However, on this legal point, this court in three different decisions has taken a common view that revision can lie against any decision passed by the learned District Judge while disposing of the Miscellaneous Case filed under section 12 of the Act so obviously we hold the same view that, the submission so placed by the learned counsel for the opposite-party does not stand at all when the learned senior counsel could not take any adverse submission on those three decisions. Further, in section 48 of the Act since there has been a provision for appeal against any decision passed by the learned District Judge while disposing of a Miscellaneous Case filed under section 42 read with section 43 of the Act, so it can easily assume that against any decision passed under section 12 of the Act only revision will lie and in that regard, an elaborate judgment was passed by a Larger Bench of this Division only to decide on that legal issue which carries similar value as a judgment of our Appellate Division if it is not reversed by it and we gather no information ever brought to our notice by the opposite-party that the said decision of the Larger Bench has been reversed.

In regard to the application of section 10(2) of the Arbitration Act as contended by the learned counsel for the opposite-party, it is our considered view that, said provision is only applicable if any party to the dispute by avoiding arbitration proceedings ever goes for other legal proceedings and its adversary to the said dispute ever brings it to the notice of the court that there exists an arbitration agreement between the parties when the said court will stay the suits or the legal proceedings and

refer the dispute to the arbitration, so how that section 10(2) of the Act will be applicable here it is totally incomprehensible to us.

Furthermore, section 7 of the Arbitration Act is entirely an ouster provision which mandates the District Judge to proceed with the legal proceeding of the parties to the arbitration agreement and no judicial authority can hear any legal proceeding thereof so there appears no bar to proceed with the arbitration proceeding. Also, since the opposite-party admittedly did not come forward to resolve the dispute in spite of receiving arbitration notice, invariably the petitioner had no other option but to invoke the provision of section 12 of the Act by issuing arbitration notice to the opposite-party invoking clause (6) of the contract and then to file the Miscellaneous Case, so section 7 of the Act is totally inapplicable here as well.

Last but not the least, on going through the impugned judgment and order, we find the learned District Judge to be so indolent that he even did not bother to go through the contract to say the least its conditions which is the cornerstone to initiate a arbitration proceeding. Since there has been no clause like GCC nos. 59.1 or 59.5 as the learned Judge stated in the body of the judgment, so we clearly agree with the submission of the learned counsel for the petitioner that the learned District Judge has adopted the method of "**copy and paste**" in the impugned judgment as what he described in it while dismissing the case was none of the case of the opposite-party. Though on that very point, the learned senior counsel for the opposite-party did not support to what has been asserted by the learned District Judge going beyond the condition of the contract

furnished between the parties. However, it is totally unbecoming for a District Judge for pronouncing such a baseless judgment.

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

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

The impugned judgment and order dated 30.11.2023 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 367 of 2023 is thus set aside.

However, the learned District Judge, Dhaka is hereby directed to dispose of the Arbitration Miscellaneous Case No. 367 of 2023 afresh by appointing an arbitrator for the opposite-party within 15(fifteen) days from the date of receipt of the copy of this order by duly intimating the learned Advocates for the parties to the Miscellaneous Case No. 367 of 2023.

Let a copy of this order along with lower court records be communicated to the learned District Judge, Dhaka through **special messenger** with the cost to be borne by the petitioner and the petitioner is directed to deposit requisite cost to the office by 27.11.2024.

Md. Bashir Ullah, J:

I agree.

Abdul Kuddus/B.O