IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(STATUTORY ORIGINAL JURISDICTION)

Present

Mr. Justice Sikder Mahmudur Razi

Arbitration Application No. 27 of 2024

With

Arbitration Application No. 28 of 2024

In the matter of:

An application under section 12(4) and under section 7A of the Arbitration Act, 2001.

And

In the matter of:

Thianis Apparels Limited.

…Petitioner.

Versus

Bangladesh Export Processing Zone Authority (BEPZA) and others.

…Respondents.

Mr. Shamsuddin Babul, Senior Advocate
…For the petitioner.
Ms. Qumrun Nahar Mahmud, Advocate
…For the respondent.

Heard on: 31.08.2025 & 03.09.2025

And

Judgment on: The 23rd October, 2025

Thianis Apparels Limited as petitioner filed two applications before this court, one being Arbitration Application No. 27 of 2024 under section 12(4) and the other being Arbitration Application No. 28 of 2024 under section 7Ka of the Arbitration Act, 2001. At the time of admission of Arbitration Application No. 28 of 2024 it was ordered by this court that the same will be heard and disposed of analogously with Arbitration Application

No. 27 of 2024. Accordingly, both the two applications are taken up together for hearing and now disposed of by a single judgment.

The facts narrated by the petitioner in both these two applications are identical. It is the case of the petitioner that the petitioner company was incorporated in February, 2006 pursuant to a Joint Venture Agreement mainly to establish and run garment industry. The petitioner established its factory at Chattogram Export Processing Zone (CEPZ) at building No. SS-05(east and west wing). After the Rana Plaza incidents all the foreign buyers committed to give LC in Bangladesh only to the factories who made the compliance standard set by Accord and Alliance. The petitioner company spent a total of US$5,50,000 which includes the cost incurred for retrofitting and workers payment to retain trained workers to meet compliance standard as set by Accord and Alliance. On 15th February, 2017 a sudden fire broke out at the company's factory which rendered the company's factory unusable and unsuitable for industrial use. Following the incidents the respondent No. 2 arranged an alternative premise within CEPZ for the petitioner and the petitioner entered into a new agreement with the respondent No. 1 on 19th March, 2017 and the newly allocated premise was accordingly handed over to the petitioner. However, due to lack of gas connection the petitioner was unable to commence production. Moreover, for Accord/Alliance compliance the petitioner had to spend US$ 1,75,000 to repair the building. Subsequently, due to Covid-19 Pandemic the petitioner also suffered financial loss and significant shortage of liquid funds. Despite the challenges posed by Covid-19 Pandemic the respondent No. 1 did not waive rents during the Pandemic period. Instead, they allowed the petitioner

to make the payment in installments and subsequently imposed interest as surcharge. The petitioner paid the principal amount periodically however, respondent No. 1 failed to properly adjust these payments, partially applying them towards surcharges and the principal amount. Subsequently, the respondent No. 3 issued a letter on 30th April, 2023 demanding US$ 14,25,399.45 of which US$ 3,13,503.00 was charged as a surcharge. The respondent No. 3 also issued show cause notice to the petitioner on 03.07.2023. The petitioner replied on 9th July, 2023 and by another letter dated 13th August, 2023 proposed the respondent No. 1 to form a committee for calculating outstanding dues and to address the surcharge issue raised during Covid-19 Pandemic. However, the respondents ignored the proposal of the petitioner and issued another notice on 22.01.2024 claiming a total amount of US$ 18,10,841.37. In this backdrop the petitioner issued a notice on 12.02.2024 to respondent No. 3 under section 12 of the Arbitration Act, 2001 requesting the appointment of an Arbitrator. However, since no action was taken by the respondents in response to the said notice, therefore, the petitioner filed the instant Arbitration Application No. 27 of 2024 under section 12(4) of the Arbitration Act, 2001 for appointment of an arbitrator for the respondent as well as Arbitration Application No. 28 of 2024 under section 7A of the said Act, 2001 for an interim injunction as well as for restraining the respondents from creating any hindrance in issuing EP/IP and restrain the respondents from disturbing the peaceful possession and operation of the premise by the petitioner till disposal of the proposed arbitration proceeding. It further appears from the prayer portion of Arbitration Application No. 28 of 2024 that the petitioner prayed for interim

order subject to payment of US$ 55,000 for rent and utility charge and services within 15 of each month.

At the time of admission of Arbitration Application No. 28 of 2024 as per prayer of the petitioner this court passed an order of injunction for a period of two months subject to payment of US$ 55,000 within 15 of each month as prayed by the petitioner itself.

From record it appears that, as the petitioner failed to comply the court's order dated 01.12.2024, thereafter as per their prayer the court by order dated 10.02.2025 extended the time to make the payment and to file affidavit in compliance by 1st March, 2025. Following the said order the petitioner filed affidavit-in-compliance on 04.03.2025 as evidence of partial payment. Subsequently, by filing an application for modification the petitioner sought additional time for ten days to comply fully the court's earlier order. The said prayer was allowed and the petitioner was directed to make the rest of the payment as per previous order within 25th March, 2025 positively and it was further ordered that in case of failure to make the payment the respondent may take appropriate steps.

Respondent No. 1 contested both the arbitration applications by filing separate affidavit-in-opposition. The respondent denied all the material allegations made in the substantive applications as well as presented detailed picture of each and every event in response to the petitioner's allegations. In the affidavit-in-opposition it has further been contended that the fire damage occurred to the petitioners' factory has been reimbursed by the authority. But these facts have not been disclosed in the substantive applications. The respondent further contended that there is no arbitral dispute between the

parties and the petitioner failed to mention a single word as to the existence of arbitral dispute between the parties and the differences which can constitute the dispute and moreover the petitioner failed to pay the outstanding dues of BEPZA as per their undertakings. Accordingly, the respondent prayed to dismiss both the arbitration applications.

The learned advocate of the respective parties made their submissions in line with their respective pleadings. Therefore, for brevity those are not repeated here.

I have heard the learned advocates of both the sides, perused the substantive petitions, the affidavit-in-oppositions as well as the documents annexed therewith.

Admittedly, the arbitration clause has been incorporated in clause 4(e) of the lease agreement entered into between the Bangladesh Export Processing Zones Authority and Thianis Apparels Ltd. In paragraph no. 13 of the substantive petition the petitioner quoted the following part of the said arbitration clause:

> *"Any dispute concerning this clause shall be determined by arbitration, according to whatever established practice in force in Bangladesh at the time"*

Thereafter, he advanced by stating that the petitioner and the respondents entered into an arbitration agreement under which they unequivocally agreed to resolve <u>any disputes</u> between them, in the event no agreement could be reached, through arbitration in Bangladesh. *(Underline supplied by me).*

Now, let us see the entire clause 4(e) and the same runs as follows:

> "*That if and so often as, the demised premises or any part thereof shall be destroyed or damaged by fire, explosion of any of the other causes mentioned in the Lessor's obligation to insure so as to become unfit for occupation or use for the purpose aforesaid, the said rents or a just and proportionate part thereof according to the nature and extent of the damage sustained shall abate and be allowed to the Lessee from the time of the destruction or damage until such time as the demised premises shall again be rendered fit for occupation and use for the purposes aforesaid. The Lessor shall repay to the Lessee the amount of such abatement in so far as the rent for the period of suspension shall have been paid in advance. Any dispute concerning this clause shall be determined, by arbitration, according to whatever established practice in force in Bangladesh at the time." (Underline supplied by me)*

Now let us see what are those "other causes" mentioned in the Lessor's obligation. The Lessor's obligations have been incorporated in clause 3 and the relevant clause is (e) which runs as follows:

> *"At all times throughout the tenancy to keep the demised premises insured against loss of damage by fire, explosion, storm, tempest (including lightening) or aircraft in some insurance company of repute in a sum sufficient to convert the cost of completely rebuilding and reinstating the demised premises and such insurance premium shall be reimbursed by the Lessee to the Lessor on submission of bill*

along with a photocopy of insurance policy and receipt for payment" (Underline supplied by me).

Therefore, apart from 'fire' and 'explosion' the other causes as this court has found are 'storm', 'tempest (including lightening)' or 'aircraft'.

It is also admitted that on 15.02.2017 a sudden fire incident broke out at the company's factory. It appears from Annexure- 3 to the affidavit- in - opposition that the petitioner company by a letter dated 12.07.2018 requested the BEPZA authority to waive the old factory building's rent which amounts USD 110993.63 as well as the relevant surcharge against that amount. Thereafter, a committee comprising 04 members was formed to evaluate the entire issues and the terms were as follows:

"চট্টগ্রাম ইপিজেডস্থ শিল্প প্রতিষ্ঠান M/s. Thianis Apparels Ltd. এর অনুকূলে, বরাদ্দকৃত SS-05 এ বিগত ১৫-০২-২০১৭ তারিখে অগ্নিকান্ড সংগঠিত হয়। অগ্নিকান্ডে বেপজার কারখানা ভবনটি ভীষণভাবে ক্ষতিগ্রস্থ হয়। অগ্নিকান্ডের পর উক্ত ভবনে কোম্পানীর সামগ্রীক কার্যক্রম বন্ধ হয়ে যায়। উল্লেখ্য, পরবর্তী সময়ে কোম্পানী ভবনের একটি অংশে প্রয়োজনীয় সংস্কার কাজ সম্পন্ন করে উক্ত অংশে কোম্পানীর Ironing Section চালু রেখে সেখানে কার্যক্রম অব্যাহত রাখে। এমতাবস্থায় M/s. Thianis Apparels Ltd কর্তৃক অগ্নিকান্ড পরবর্তী সময়ে বেপজা ভবন দখলে রাখাসহ ফ্লোর ব্যবহার, অগ্নিকান্ডে ক্ষতিগ্রস্থ অংশটুকু বাদে ভবনের একটি অংশ ব্যবহার উপযোগী করে ব্যবহার করা এবং উক্ত সময়ের বিল ইস্যু ও ভাড়া আদায়ের বিষয়টি পরীক্ষান্তে সুপারিশসহ প্রতিবেদন দাখিলের লক্ষ্যে নিম্নলিখিত কর্মকর্তাগণের সমন্বয়ে একটি কমিটি গঠন করা হয়ঃ "

After inspection and evaluation, the committee made the following recommendation -

"গত ১৫/০২/২০১৭ তারিখে সংগঠিত অগ্নিকান্ডে M/s. Thianis Apparels Limited এর অনুকূলে বরাদ্দকৃত SS-05 ভবনটি ক্ষতিগ্রস্থ হওয়ার দরুন ব্যবহার উপযোগী না থাকায় (West wing)

১,৭৫৪.৮৪ বর্গ মিটার ভাড়া বাবদ অগ্নিকান্ড সংগঠিত হওয়ার পর থেকে জানুয়ারী, ২০১৮ পর্যন্ত ৫৫,৪৯৬.৮১ মার্কিন ডলার এবং East Wing এর ১,৭৫৪.৮৪ বর্গ মিটার এর ০১ (এক) মাসের ভাড়া বাবদ ৪,৮২৫.৮১ মার্কিন ডলার সর্বমোট=(৫৫,৪৯৬.৮১+৪,৮২৫.৮১) = ৬০,৩২২.৬২ (ষাট হাজার তিনশত বাইশ দশমিক বাষট্টি) মার্কিন ডলার মওকুফ করার বিষয়টি যথাযথ কর্তৃপক্ষের অনুমোদনের আলোকে বিবেচনা করা যেতে পারে মর্মে কমিটি সুপারিশ করেছে।"

Subsequently, the Executive Body of BEPZA in its meeting no. 224/2020(07) approved the said recommendation and their decision runs as follows:

" গত ১৫/০২/২০১৭ তারিখে সংগঠিত অগ্নিকান্ডে M/s. Thianis Apparels Limited এর অনুকূলে বরাদ্দকৃত SS-05 ভবনটি ক্ষতিগ্রস্থ হওয়ার দরুন ব্যবহার উপযোগী না থাকায় West wing ১,৭৫৪.৮৪ বর্গ মিটারের ভাড়া বাবদ অগ্নিকান্ড সংগঠিত হওয়ার পর থেকে জানুয়ারী, ২০১৮ পর্যন্ত ৫৫,৪৯৬.৮১ মার্কিন ডলার এবং East Wing এর ১,৭৫৪.৮৪ বর্গ মিটার এর ০১ (এক) মাসের ভাড়া বাবদ ৪,৮২৫.৮১ মার্কিন ডলার সর্বমোট=(৫৫,৪৯৬.৮১+৪,৮২৫.৮১) = ৬০,৩২২.৬২ (ষাট হাজার তিনশত বাইশ দশমিক বাষট্টি) মার্কিন ডলার এবং উক্ত ভাড়ার উপর আরপিত Sur-charge মওকুফের সিদ্ধান্ত গৃহীত হলো:" (সংযুক্ত)।"

It appears that the Petitioner did not object against the said decision rather from a memo dated 22.11.2022 (Annexure 7 to the affidavit-in-opposition) which is a minutes of the meeting held between BEPZA and the owner of Thianis Apparels Ltd., regarding non-payment of outstanding dues and non-compliance it appears that up to that date the outstanding dues of the petitioner was admitted and in spite of getting several opportunities to clear up those dues the petitioner failed to comply and repay.

Now, let us see the definition of "Arbitration Agreement" as incorporated in Section 2(n) of the Arbitration Act, 2001 which runs as follows:

> *"Arbitration Agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (Underline supplied by me)*

Therefore, it is evident from the said definition that it is up to the parties to the contract to decide whether they want to place "all" or "certain" disputes before the arbitration. Therefore, scope of reference to arbitration has to be construed in the light of the arbitration clause itself and the same cannot be extended beyond the terms as agreed between the parties.

Now, let us again examine the arbitration clause as incorporated in the lease agreement which is clause 4(e). The last part of clause 4(e) provides that any dispute concerning this clause shall be determined by arbitration and from the 1st part of the said clause reading with clause 3 (e) it appears that any dispute concerning this clause means destruction or damage of the demised premise by fire, explosion, storm, tempest (including lightening) or aircraft. The language is very clear and left no room for any ambiguity. Apart from the scope as mentioned in Clause 4(e) of the Lease Agreement there is no other scope provided in the agreement which can be referred to arbitration. As it appears, apart from the fire incident of February, 2017 the petitioner failed to point out any other loss, destruction or damage caused by fire explosion, storm, tempest (including lightening) or aircraft of the demised premise. Since, the fire incident which caused in 2017 has been

addressed and resolved without any objection, therefore, the arbitration, the petitioner is now asking for is beyond the scope of reference of the arbitration clause and as such, the instant applicant has got no merit.

Moreover, to mislead the court the petitioner-company has suppressed the events like application for waiver made by them, formation of committee, its recommendation and decisions of the Board, which has been brought to light by BEPZA and evident from Annexures 3 series of the affidavit-in-opposition.

Furthermore, admittedly the petitioner failed to repay their outstanding dues as per their commitments as well as the Court's order passed in Arbitration Application No. 28 of 2024.

Therefore, considering all these aspects, I am of the view that both the arbitration applications must fail. Accordingly, both the Arbitration Application being Nos. 27 of 2024 and 28 of 2024 are hereby dismissed.

However, there shall be no order as to cost.

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(Sikder Mahmudur Razi, J:)