

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Murad-A-Mowla Sohel

Civil Revision No. 1042 of 2025

M/S Pubali Traders ..... petitioner

-Versus-

Ministry of Food and Disaster Management  
(collection department) and another

..... opposite parties

Mr. Probir Neogi, Senior Advocate with

Mr. A.S.M. Shahriar Kabir and

Mr. Md. Saifullah Sarker, Advocates

..... for the petitioner

Mr. Md. Kabir Iqbal Hossain, Advocate

..... for opposite party 1

Judgment on 09.12.2025

Bhishmadev Chakrabortty, J:

At the instance of the debtor in an arbitral award this Rule was issued calling upon the opposite party to show cause at why the judgment and order dated 23.03.2025 passed by the District Judge, Dhaka in Arbitration Miscellaneous Case 105 of 2025 rejecting the miscellaneous case summarily filed under section 7A of the Arbitration Act, 2001 (Act, 2001) for restraining the opposite parties from encashing the performance guarantee bearing No. 77/2010 dated 20.06.2010 amounting to US dollar 1, 196, 107.50 issued by opposite party 2 till execution of the award under section 44 of the Act, 2001 should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

At the time of issuing the Rule, the parties were directed to maintain *status quo* in respect of encashment of the aforesaid

performance guarantee for a period of two weeks which was subsequently extended and still subsists.

Facts relevant for disposal of this Rule, in brief, are that the petitioner participated in the bid of an international tender dated 30.03.2010 to import of 1,00,000/- metric tons (MT) of wheat and became the lowest bidder. The tender notice was accepted on the same day. Opposite party 1, Ministry of Food and Disaster Management Government of Peoples Republic of Bangladesh requested the petitioner to submit 5% performance guarantee of the term value. The petitioner submitted a performance guarantee for the aforesaid amount on 20.06.2010 issued by opposite party 2 bank. The petitioner then entered into a contract with opposite party 1 on 27.06.2010 to import the goods but failed. The reason of failing to import goods has been assigned that he failed to open back to back LC in favour of the seller. The petitioner thus suffered huge loss for breach of contract by opposite party 1. On repeated request and representation opposite party 1 failed to mitigate the loss. The petitioner tried its level best but due to force majeure events he failed to import goods from Russia and supply those to opposite party 1 and consequently the contract became frustrated. The petitioner then sought arbitration and filed a case under section 7A of the Act, 2001 before the District Judge, Dhaka but no interim order was passed. It then moved in this Court in Civil Revision 3304 of 2010 upon which the Rule was issued and finally it was made absolute and encashment of performance guarantee was

restrained till disposal of appointment arbitrator. Subsequently, on filing a case under section 12 of the Act, 2001 a tribunal was formed and the arbitral tribunal upon hearing the parties rejected the claim of both the parties by the judgment passed on 16.02.2025 but ordered to encash the performance guarantee of the petitioner. Opposite party 1 wrote a letter to opposite party 2 on 26.02.2025 to encash the performance guarantee in pursuance of the award. In the above situation the petitioner on 06.03.2025 filed an application under section 7A of the Act, 2001 being Miscellaneous Case No. 105 of 2025 before the District Judge and prayed for restraining the opposite parties from encashing the performance guarantee till execution of the award under section 44 of the Act, 2001 or till disposal of the application filed under section 42 of the same Act for setting aside the award. In the miscellaneous case the petitioner prayed for an interim order of restraintment but the District Judge rejected the miscellaneous case summarily which prompted the petitioner to approach this Court with this application under section 115(1) of the Code upon which this Rule was issued and an interim order was passed.

Mr. Probir Neogi, learned Senior Advocate for the petitioner taking us through the impugned order and the provisions of section 7A and sections 42-45 of the Act, 2001 submits that under 7A (1) (uma) of the Act, 2001 the Court may pass any interim order of restraintment from encashing of bank guarantee. Since award has been passed by the arbitrators, this petitioner has the right to file

miscellaneous case under section 42 of the Act, 2001 for cancelation of the award and the Court can cancel it on the reason stipulated in section 43 of the same Act. Furthermore, the awardee cannot encash the performance guarantee of the petitioner without complying with the provisions of section 44 of the Act. Mr. Neogi refers to the cases of Reliant Commodities & Technologies Pvt. Ltd. vs. Bangladesh Chemical Industries Corporation, 7 LG (HCD) 64; Desktop Computer Connection Ltd vs. ST Electronics (Info-Software) Ltd and others, 15 BLC 644; Summit Bibiyana Power Company Ltd. vs. Bangladesh, representative by Secretary, Ministry of Power, Energy & Mineral Resources Dhaka and others, 5 CLR (HCD) 355; Drilltee-Maxwell Joint Venture vs. Gas Transmission Company Limited (GTCL) and others, 21 BLC 122 and the case of Gangatri and Textile Limited Vs. Union of India and others, AIR 2016 (SC) 2199 and relied on the *ratio* laid therein that under section 7A of the Act, 2001 a Court is empowered to grant interim relief before arbitration proceeding starts or even at the stage of execution of the award. He finally submits that till finalization of the award passed in an arbitration proceeding, the procedure is to be guided by the Act, 2001. The aforesaid law is a special law and shall prevail over the general laws of the country. The District Judge in a different way traveled into the matter and referring some irrelevant case laws rejected the case under section 7A of the Act, 2001 summarily which is required to be interfered with by this Court in this revision. The Rule, therefore, would be made absolute.

Mr. Kabir Iqbal Hossain, learned Advocate for opposite party 1 on the other hand opposes the Rule and supports the Judgment and order passed by the District Judge. He then submits that before starting of arbitration proceeding by the arbitrator this petitioner invoked the same jurisdiction in 2010 under section 7A of the Ain, 2001. This division passed an order of injunction in the revision and this petitioner enjoyed it till conclusion of the arbitration proceeding. But since in the meantime the arbitrators passed award in favour of opposite party 1, now he cannot approach this Court again invoking same jurisdiction with same prayer. He then refers to the cases of Uttara Bank vs. Macneill and Kilurn Ltd. and others, 33 DLR (AD) 298; Gooryonly (BD) Textile Ltd. vs. Chatkar Information Holding. Ltd and others, 54 DLR (AD) 70 and Smart Appeals (Pvt) Ltd. vs. Hanvit Bank Kuni Bong Branch and others, 57 DLR (AD) 194 and submits that in the aforesaid cases it has been held that no Court can pass any restraintment order on any issuing bank from performing or discharging the contractual obligation by eacashing the bank guarantee or any payment under letter of credit. He then refers to the cases of Southern Solar Power Ltd and another vs. Bangladesh Power Development Board and others, 16 ALR 2019(2) HCD 91 and the case of ABP India Limited vs. Power Grid Company of Bangladesh Ltd. and others, 73 DLR 362 and submits that this division in the aforesaid two cases related on section 7A of the Act, 2001 held that a bank guarantee is an independent deed of contract between the bank

and the beneficiary *albeit* the bank enters into a contract at the instance of third party. By entering into the contract, the bank guarantee to the beneficiary that if the third party does not pay the debt or does not pay the bid money required for participation in the tender, or does not return the money taken as advance, or does not pay the rent, or does not perform the contract as per the terms, then the bank shall pay the amount guaranteed on demand by the beneficiary. Since the arbitral tribunal passed order that respondent may encash the performance grantee in usual course, there is no obstruction in encashing it by this opposite party. The District Judge on correct appreciation of fact and law rejected miscellaneous case of the petitioner summarily filed under section 7A of the Ain, 2001 which may not be interfered with by this Court in this revision. The Rule, therefore, would be discharged and the interim order be vacated.

We have considered the submissions of both the sides, gone through the materials on record, the provisions of law as referred to and *ratio* of the cases cited by the parties.

It is admitted fact that this petitioner participated in an international tender to import 1,00,000/- MT of wheat and became the lowest bidder. It is also admitted that he entered into a contract with opposite party 1 to import the aforesaid goods from Russia. It is also admitted by the parties that this petitioner failed to import those goods from Russia. We do not want to discuss here what prevented the petitioner to import the goods or who is responsible for not

performing the contract because it is the subject matter of arbitration. It is admitted that this petitioner had sent the matter for arbitration according to clause 16 of the agreement and the arbitrators were appointed to resolve the dispute. Both the parties furnish their claim before the arbitrators. But the arbitral Tribunal passed the award in the following manner:

*Award*

*45. Accordingly, we make and published this award and direct as follows;*

*A. The reliefs prayed by the claimant are rejected;*

*B. The Counterclaims by the respondent are also rejected;*

*C. Hence it is ordered that the Respondent may encash the Performance Guarantee in usual course;*

*D. The parties shall bear own expenses related to the Arbitration Proceeding.*

The aforesaid award shows that the arbitral tribunal rejected claims of both the parties but ordered to encash the performance guarantee in usual course. It appears that after getting the award opposite party 1 without moving to the District Judge to comply with the provisions of section 44 of the Ain, 2001 for enforcement of the award, wrote a letter to opposite party 2 bank on 26.02.2025 for encashment of the performance guarantee. The petitioner being aggrieved filed a miscellaneous case under section 7A of the Ain, 2001 before the District Judge praying for temporary injunction

restraining the opposite parties from encashing the bank guarantee till conclusion of the proceeding, if any, under sections 42 and 44 of the Act, 2001. The District Judge rejected the aforesaid miscellaneous case mainly on the ground that performance guarantee is an independent and autonomous contractual obligation and no order of restraint of its encashment can be passed.

According to the provisions section 7A of the Act, 2001 a miscellaneous case under the aforesaid section for getting an *interim* order of restraint can be filed before or during continuation of the arbitration proceeding even upto enforcement of the award under sections 44 or 45 of the Act, 2001. The concerned Court may pass necessary order of restraint under section 7A(1) (Gha) and (Uma) of the Act, 2001. Therefore, we find that the law mandate the petitioner to file a miscellaneous case under section 7A of the Ain, 2001 for an interim order of injunction, although before starting of the arbitration proceeding, it filed a miscellaneous case for the same purpose. We find no bar in filing such application under section 7A of the Act, 2001 even before finalization of the award. We have gone through the *ratio* of the cases referred to by the parties. In the cases reported in 33 DLR (AD) 298; 54 DLR (AD) 70 and 57 DLR (AD) 194 as referred by opposite party 1, it is found that applications under Order 39 Rules 1 and 2 of the Code of Civil Procedure (the Code) filed for the same purpose were rejected. But since the Act, 2001 is a special law, the provisions prescribed therein shall prevail over the

other laws of the country. Therefore, we find that *ratio* of the aforesaid three cases as referred to by the learned Advocate for opposite party 1 shall not apply in this case. Admittedly, the parties entered into an agreement and there was an arbitration clause (clause 16) and in clause 19 of the agreement, the fact of performance grantee has been mentioned. Therefore, the performance grantee is a part of the contract and since the parties entered into the arbitration proceeding and the matter was referred to the arbitral tribunal and it has given an award only in respect of encashment of performance grantee, opposite party 1 has to proceed in accordance with law to enforce the award prescribed in section 44 of the Act, 2001. If the petitioner does not proceed under section 42 of the Act, 2001 for cancellation of the award, in that case opposite party 1 may proceed under section 44 for enforcement of the award on the grounds laid in section 43 of the Act, 2001. It is found that this petitioner has already challenged the award under section 42 of the Act, 2001 by filing Miscellaneous Case 149 of 2025 in Court of District Judge, Dhaka which is still pending. In that view of the matter, the encashment of bank grantee is required to be stayed till disposal of the aforesaid miscellaneous case. Mr. Hossain learned Advocate for opposite party 1 put reliance on the principle *laid* in the cases reported in 2019 (2) 16 ALR (HCD) 91 and 73 DLR 362 passed by a Signal Bench of this division that no restraint order can be passed even under section 7A of the Arbitration Act, 2001 on encashment of performance

guarantee or bank guarantee. We have gone through the aforesaid reported judgments. The view of same honb'le Single Judge in both the cases are same. But in the case of Summit Bibiyana Power Company Ltd. vs. Bangladesh, represented by the Secretary, Ministry of Power Energy and Mineral Resources, Bangladesh secretariat, 5 CLR (HCD) 354, a division bench of this Court comprising their lordship Mr. Justice Md. Nuruzzaman and Mr. Justice Md. Nurul Huda Jaigirdar held:-

*“We are not disagreeing with those settled principles as referred by the learned Advocate by the opposite party No. 3 however, in the fact and circumstances it appears to us that all the referred judgments were passed by the Civil Court on the applications tinder Order 39, rule 1 and 2 of the Code of Civil Procedure. But in the instant rule the order of ad-interim injunction was passed by this Division under section 7Ka (1)(uma) of the Arbitration Act, 2001 only to provide the petitioner to file an application under section 12(4) of the Arbitration Act, 2001 to invoke jurisdiction of Arbitration as stated in the agreement. Accordingly the learned District Judge has already appointed the Arbitrators. Therefore, our considered view is that the referred decisions would not be applicable in the instant Rule; rather, we find substance in the submissions advanced by the learned Advocate for the petitioner referring the Arbitration law as a special law and that law would prevail over the general law. Therefore, we are of the view that justice would be met if the order of*

*ad-interim injunction passed earlier by this Court be continued only until First sitting of the Arbitral Tribunal.”*

It has been further held that the petitioner is entitled to an order of injunction to restrain the respondents from encashing the bank grantee under section 7A (1) (Uma) of the Act, 2001 which is a special law compared to the Code and Special law prevails over the general law. The learned Advocates for both the sides failed to appraise us about any judgment of the appellate division on the similar point contrary to the present one. Therefore, the view taken by the division Bench of this Division shall prevail over the view of the single bench of this division. Since the parties sought arbitration, award has been passed therein and the petitioner filed Miscellaneous Case 149 of 2025 under section 42 act, 2001 challenging the award and enforcement or cancellation of the award is still *in seisin* of the learned District Judge, we hold that the encashment of the performance grantee is to be stayed till adjudication of the proceedings either under section 42 or under section 44 of the Act, 2001. The District Judge has gone wrong in fact and law in disposing the miscellaneous case filed under section 7A of the Ain, 2001 which is required to be interfered with by us.

Therefore, the Rule is made absolute. The judgment and order passed by the District Judge in the aforesaid miscellaneous case is hereby set aside. The opposite party 1 is hereby restrained from encashing the performance guarantee of the petitioner till disposal of

the Arbitration Miscellaneous Case 149 of 2025 now pending in the Court of District Judge, Dhaka for setting aside the award.

However, learned District Judge is directed to dispose of the aforesaid Miscellaneous Case 149 of 2025 within 06 (six) months from the date of receipt of this judgment and order.

Communicate this judgment and order to the concerned Court.

Murad-A-Mowla Sohel, J:

I agree.

*Rajib*