

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

Present

Mr. Justice Sikder Mahmudur Razi

Arbitration Application No. 21 of 2025

In the matter of:

An application under section 20(1) of the Arbitration Act, 2001.

And

In the matter of:

Padma Oil PLC (former “Padma Oil Company Limited”).

...Petitioner.

Versus

Project Builders Limited and another.

...Respondents.

Mr. Mohammad Arshadur Rouf, Sr. Advocate with
Mr. Ashraful Hadi, Advocate with
Mr. Md. Fazla Hossain, Advocate
...For the petitioner.

Mr. Zainul Abedin, Sr. Advocate with
Mr. S.M. Mahbubul Islam, Advocate with
Ms. Taslima, Advocate with
Mr. Muntasir M. Rahman, Advocate
...For the respondent No. 1.

Heard on: 01.09.2025 & 03.09.2025

And

Judgment on: The 4th September, 2025

Sikder Mahmudur Razi, J:

Facts gathered from the substantive application, supplementary affidavit as well as from the affidavit-in-opposition are as follows:

The respondent no. 1 was awarded with Notification of Award on 13.01.2016 by the petitioner for construction of its Head Office in Chittagong. According to respondent no. 1 due to multiple breaches and defaults on the part of the petitioner it was not possible for the respondent no. 1 to complete the construction within time for which respondent no. 1

filed an application for extension of time. However, the petitioner without extending the time proceeded to encash the bank guarantee furnished by the respondent no. 1. This step of the petitioner prompted the respondent no. 1 to serve notice on 24.01.2021 under clause 20.3 of their contract requesting for forming Dispute Board within 24 hours. But as the petitioner failed to act as per the said notice, respondent no. 1 through their learned advocate served another notice on 27.01.2021 for appointment of arbitrator and constitution of Arbitral Tribunal. Again, as the petitioner failed to appoint arbitrator the respondent was compelled to file Arbitration Miscellaneous Case No. 54 of 2021 before the District Judge, Dhaka. At this stage on 12.12.2021 the high official of the petitioner company who were in charge of the project and respondent no. 1 entered into a draft revised contract for the completion of the remaining work but ultimately the Board of the petitioner did not finalize the contract. At this juncture, with an apprehension that the petitioner is going to engage third party contractors, the respondent no. 1 filed Arbitration Miscellaneous Case No. 302 of 2023 before the District Judge, Dhaka. But the District Judge, Dhaka returned the miscellaneous case on the ground of want of jurisdiction. Challenging the said order the respondent no. 1 filed Civil Revision No. 5024 of 2023 before the High Court Division. On 03.10.2023 the High Court Division passed an order directing the District Judge, Dhaka to return both the Arbitration Miscellaneous Cases to the court of District Judge, Chattogram as well as directing both the parties to maintain status quo in respect of Contract dated 15.02.2016 as well as Bank Guarantee. Against the said order the petitioner filed Civil Petition for Leave to Appeal no. 3441 of 2023. At the time of hearing of the said Civil Petition both the petitioner and the respondent no. 1 intimated the Hon'ble Appellate

Division about appointment of their respective arbitrators and the Hon'ble Appellate Division appointed the Chairman of the Arbitral Tribunal to complete the whole process of Arbitration in accordance with law.

Accordingly, the arbitration proceeding started and the Tribunal by its 2nd order dated 10.03.2024 fixed the next date on 07.04.2024 for filing statement of claim and for payment of fees. On 27.03.2024 the present respondent no. 1 by filing an application to the secretary of the Tribunal requested to adjourn the proceeding on the ground of resignation of their advocate and pendency of another Arbitration Miscellaneous Case being No. 151 of 2024 which was filed under Section 7Ka of the Arbitration Act, 2001. However, the said Arbitration Miscellaneous Case was dismissed on its very 1st date of admission hearing. On 08.06.2024 the respondent no. 1 filed two applications, one being for acceptance of partial payment and the other being for status quo on tender notice and appointment of contractor. But no application for extension of time for filing statement of claim was filed. On 06.07.2024 the Tribunal by its order fixed the next date on 27.07.2024 for order and in the meantime directed the respondent no. 1-claimant to comply fully with order no. 02 dated 10.03.2024. On 24.07.2024 the respondent no. 1-claimant filed an application seeking 02 weeks' time for payment of the remuneration of the Tribunal. But the respondent no.-1- claimant did not file any application for extension of time to submit statement of claim. It further appears from record that the respondent no. 1- claimant get the payment order ready on 30.07.2024. But as stated by the respondent no.1-claimant that after 5th of August, 2024 one of the members of the Tribunal as well as the Chairman was beyond reach and consequently, there was no sitting of

the Tribunal for a long period of time. Subsequently, after a long time the petitioner being respondent in the arbitration proceeding filed an application under section 35 of the Arbitration Act, 2001 for terminating the arbitration proceeding. Based on that application the secretary of the Tribunal issued a notice on 13.05.2025 to the learned advocate of the present petitioner i.e. the respondent of the arbitration proceeding. On the other hand, as per respondent no.1-claimant they came to know about the said sitting when the Secretary of the Arbitral Tribunal through his WhatsApp number on 27.05.2025 provided a zoom link for an online hearing and intimating the date of hearing. As per the respondent-claimant, on the suddenness of the event, they became perplexed and filed an application for adjournment on 28.05.2025 as well as filed written objection against the application of the petitioner i.e. the respondent of the arbitration proceeding. In the said application the respondent-claimant mentioned their difficulty in finalizing the statement of claim and committed to file the statement shortly. The Tribunal by their order dated 30.05.2025 fixed the next date on 04.06.2025 for passing necessary orders. On 03.06.2025 the present petitioner filed an application seeking 8 weeks adjournment for filing written objection against the application filed by the respondent no.1-claimant for status quo ante. On 04.06.2025 the Tribunal by its order No. 5 granted time to the present petitioner to submit their written objection as well as granted time to the respondent no.1-claimant to submit their statement of claim on or before 19.07.2025. On 17.07.2025 the respondent no.1-claimant prayed for 3 days adjournment to submit their statement of claim on the ground of illness of their learned advocate. The secretary of the tribunal on 19.07.2025 by WhatsApp SMS confirmed the adjournment fixing the next date on

23.07.2025. On 17.07.2025 the petitioner filed the present Arbitration Application No. 21 of 2025 and obtained Rule and an order of stay on 21.07.2025.

Mr. Mohammad Arshadur Rouf, learned Senior Advocate along with Mr. Ashraful Hadi, learned advocate appeared on behalf of the petitioner. Mr. Arshadur Rouf, learned senior advocate relying on the Judgment as delivered in the case of Bkash Limited vs Md. Moinul Alam and another, reported in 77 DLR, page 251 which was subsequently upheld by the Hon'ble Appellate Division in CPLA No. 2600 of 2024 submitted that the Arbitral Tribunal has no other option but to terminate the arbitration proceeding on account of claimant's failure to submit statement of claim within the time frame as fixed by the Tribunal. He next submitted that as per the cited judgment there is no scope for the Tribunal to condone the delay in filing statement of claim. He further submitted that although in the cited judgment the Hon'ble Court while allowing the Arbitration Application further appointed a new arbitrator but as per Section 20 of the Arbitration Act no such power can be exercised. Apart from making such submissions Mr. Rouf further submitted that before invoking the forum of arbitration the claimant was required to raise their objection and dispute by giving notice to the concerned authority which as per clause 20.2 of the General Conditions of Contract to be placed before the Dispute Board and only after exhaustion of that process and thereafter on failure to settle the dissatisfaction raised against the decision of the Dispute Board amicably as per clause 20.5 of the contract, the aggrieved party may invoke the forum of arbitration. But in the present case the respondent no.1-claimant without effectively exhausting the

said provision of clause 20.2 to 20.5 jump to the forum of arbitration and therefore, the entire arbitration proceeding is misconceived and invalid. The learned advocate further submitted that conditions precedent to the operation of an arbitration agreement must be fulfilled before a tribunal will have jurisdiction to determine disputes under it and where the dispute provision is a multi-tiered clause, the steps to be taken prior to commencing arbitration may constitute conditions precedent in which case they must be complied with. In support of his submissions, he cited paragraph no. 2-022 from “Russell on Arbitration” [Twenty-Fourth Edition], the case of Sri Ohm Construction vs The State of Bihar and others, reported in AIR 2021 Pat 41 as well as the case of Genesis System Ltd vs Clapp and Mayne Inc., reported in 9 BLC (HCD) page- 636.

Mr. Zainul Abedin, learned Senior Advocate along with Mr. S M Mahbubul Islam, learned advocate appeared on behalf of the respondent no. 1. While controverting the aforementioned submissions, Mr. Zainul Abedin, learned Senior Advocate appearing with Mr. S M Mahbubul Islam, learned advocate for the respondent no. 1 submitted that even if the arbitration proceeding in question is terminated relying on the judgment passed in the case of Bkash Limited (supra) there is no bar in initiating arbitration proceeding afresh since the question of *res judicata* will not be applicable as the matter was not decided on merit. Mr. Arshadur Rouf the learned advocate for the petitioner while conceding the said submission added that the said proceeding has to be started from Dispute Board. Mr. Mahbubul Islam, learned advocate for the respondent no. 1 failed to agree with this submission and according to him the petitioner on earlier occasion did not

contest on this point rather by proposing the name of the arbitrator before the Hon'ble Appellate Division in CPLA No. 3441 of 2023 the petitioner waived this stage and they are barred by the principle of estoppel and acquiescence from raising this issue at this stage. The learned advocate further submitted that if the Judgment as reported in 77 DLR page 251 (supra) is relied upon then it has to be relied upon in its entirety. Apart from making such submissions Mr. Islam further relying on Sullivan vs Department of Transport, reported in 20 ALR 323 submitted that absence of any application for an adjournment does not necessarily conclude the issue adversely against a party. By referring N. Jayalaxmi vs Veeraswamy and others, reported in 2003(5) ALD 776 the learned advocate submitted that a similar point was raised in the cited decision and ground was taken to set aside an award on the ground of extension of time for filing statement of facts. But the Court in the said judgment held that extension of time for filing pleadings is not a ground to set aside the award. Finally, Mr. Islam reiterated that if the Judgment as reported in 77 DLR page 251 (supra) is relied upon then it has to be relied upon in its entirety.

Heard the learned advocates of both the sides, perused the substantive petition, affidavit-in-opposition, supplementary affidavit as well as the documents annexed therewith.

It appears from record that the engaged advocate for the respondent-claimant resigned from the proceeding on 04.03.2024 and the matter was intimated to the Secretary of the Tribunal on 06.03.2024 requesting 4/5 weeks' time for appointing a new advocate and further requesting not to commence the Arbitration Proceedings on 10th March, 2024. However, the

Tribunal sat on that date and there was no one to represent the claimant and consequently the claimant failed to submit any statement of claim on or before 07.04.2024. On 27.03.2024 the claimant filed an application to the Secretary of the Tribunal to stay the arbitration proceeding on the ground as stated above and till disposal of Arbitration Miscellaneous Case No. 151 of 2024. However, there was no sitting of the Tribunal on 07.04.2024. Subsequently, the newly engaged advocate for the claimant on 08.06.2024 filed two applications but there was no application for extension of time for filing statement of claim. Even on 06.07.2024 during the 2nd sitting of the Tribunal no statement of claim was filed as well as there was no application for extension of time. On 24.07.2024 claimant only filed an application seeking some time regarding payment of the remuneration of the Tribunal. However, when after a long time the Tribunal resumed and fixed the date on 30.05.2025 for virtual hearing, even on that date or on 19.07.2025 no statement of claim was filed. Moreover, the Arbitration Tribunal without disposing the application filed under section 35 of the Arbitration Act, 2001 allowed the claimant additional time to file statement of claim by their order dated 30.05.2025 which in turn indicates that the application for termination of proceeding was virtually rejected. From various applications of the claimant, it further appears that, they were emphasizing on interim matters like filing applications for *status quo* on the tender notice and appointment of contractor as well as *status quo ante* on the encashment of the bank guarantee.

It is also evident that the arbitration proceeding was disrupted because of the sudden resignation of the engaged advocate for the claimant as well as

due to the fact that one of the arbitrators left the country after 05.08.2024 and the Chairman of the Tribunal was also untraceable. Ultimately, the respondent no.1-claimant is now the sufferer.

Now, as to the legal aspect of the matter, from the cited decision by the petitioner which is Bkash Limited vs Md. Moinul Alam and another, reported in 77 DLR, page 251 it appears that in that matter the arbitrator accepted the statement of claim which was filed beyond the time specified by the arbitrator upon condonation of delay as well as extended the order of *status quo* despite there being no application or prayer. In that backdrop of facts his Lordship meticulously examined the provision of Section 29 and 35 as well as section 20 of the Arbitration Act, 2001 and held that,

“From a plain reading of section 35(2) it appears that the section mandatorily sanctions the termination of the proceedings contingent upon claimant’s failure to submit its claim etc., within the time determined by the tribunal and there are no two ways about it. The use of the word “shall” as opposed to “may” is clearly in evidence of the fact that a failure by the claimant to submit the statement of claim within the time specified does not leave the arbitrator with any discretion and scope not to terminate the proceedings. Sections 29(1) and 35(2)(a) represent a composite whole that may aptly be termed as a double imperative the failure to comply with which shall invariably prove to be fatal for the claimant. There is no statutory mechanism available at circumventing this statutory entrenched double imperative not even by reference to the section 35(5) avenue of limited redress. Let it be noted that the discretionary relief that may be

obtained through section 35(5) does not extend so far as to neutralize in any way the absolute and mandatory effect of section 29(1) and 35(2)(a) provisions. Section 35(5) has a sphere of operation limited by and outside of or beyond the firm statutory tenets of section 29(1) and 35(2)(a) provisions. In other words, it is residual power given to the tribunal under section 35(5) to provide discretionary redress leaving untouched and not encroaching upon the firm, absolute and reinforcing provisions of section 29(1) and 35(2)(a).”

Finally, it that judgment his Lordships set aside the impugned orders and terminated the appointment of the sole arbitrator and appointed a Senior Advocate of the Supreme Court as new sole arbitrator. This judgment was admittedly upheld by the Hon’ble Appellate Division. Therefore, I find no reason to deviate from the said judgment.

Although, Mr. Arshadur Rouf emphasized that without going through the process of Dispute Board and amicable settlement there is no scope to invoke arbitration but I cannot concur with the said submissions. As pointed out, earlier a notice was served invoking Dispute Board though that was not effectively followed and without giving any reasonable time to the authority, the claimant again served notice invoking arbitration clause but at the end of the day when the matter was pending before the Hon’ble Appellate Division in connection with CPLA No. 3441 of 2023 the present petitioner who was the petitioner before the Hon’ble Appellate Division nominating an arbitrator on their part informed the matter to the Hon’ble Court and consequently the Arbitral Tribunal was constituted by the Hon’ble Appellate Division on consensus. Therefore, it appears that there was a voluntary,

deliberate and intentional waiver on the part of the present petitioner to skip the contractual provision to invoke the Dispute Board and amicable settlement. The conduct of the petitioner before the Hon'ble Appellate Division in CPLA No. 3441 of 2023 is clear evidence of voluntary and deliberate abandonment/relinquishment of that procedure i.e. Dispute Board and amicable settlement. As it is evinced to this court that the petitioner waived the procedure of invoking Dispute Board or amicable settlement, therefore, those provisions has now become inoperative and the petitioner is now barred by the principle of waiver from raising that point to the prejudice of the respondent no.-1. Section 6 of the Arbitration Act, 2001 also lend its support to this view.

Moreover, from the impugned order dated 04.06.2025 it appears that the Tribunal extended their earlier oral order directing the respondent of the arbitration proceeding not to appoint new contractor till 19th July, 2025. In the light of the cited decision there is no alternative but to declare that order as illegal.

It is also admitted that till now the chairman and one of the arbitrators are not in a position to sit physically to conduct the arbitration proceeding and the learned arbitrator nominated by the respondent no. 1-claimant is also seriously ill.

Under the above facts and circumstances as well as in view of the judgment delivered in Bkash Limited vs Md. Moinul Alam and another (supra) I am inclined to allow the instant arbitration proceeding with a direction to start arbitration proceeding afresh by constituting a new Arbitral Tribunal. Accordingly, the instant arbitration application is allowed. The

Arbitration Proceeding in question is hereby terminated. However, Mr. Md. Moniruzzaman Asad, Senior Advocate of Supreme Court of Bangladesh, Room No. 410 (Main building), Supreme Court Bar Association Building, Dhaka-1000 (Mobile No. 01715800289) E-mail: moniruzzamanasad72@gmail.com is hereby appointed as the arbitrator for the respondent No. 1 as proposed by the said respondent. On the other hand, since the petitioner refused to propose any name, therefore, this Court appoint Mr. Mohammad Aneek Rushd Haque, learned Senior Advocate of Supreme Court of Bangladesh, Room No. 105 (Main Building) of Supreme Court Bar Association Building, Dhaka, Mobile No. 01711564788, E-mail: aneekrh@gmail.com as the Court appointed arbitrator for the petitioner. The said arbitrators will take decision about appointment of Chairman of the Arbitral Tribunal. The Tribunal will conclude the proceeding within 6 months from the date of the constitution of the arbitral tribunal. Furthermore, the parties are directed to maintain status- quo in respect of fresh tender process till the 1st sitting of the arbitral tribunal.

However, there will be no order as to cost.

Communicate the judgment at once.

(Sikder Mahmudur Razi, J:)