

Present:
Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 279 of 2014

M/S. Wills Sports Wear Ltd.

....Appellant

Versus

Trading Corporation of Bangladesh, Principal
Office, T.C.B. Bhaban, Karwan Bazar, Dhaka, and
others

....Respondents

Mr. Md. Sadekur Rahman, Advocate with
Mr. Mahabub-Ule-Islam, Advocate and
Mr. Md. Jawed Kabir, Advocate

....For the Appellant

Mr. Mohammad Mosfequs Salehin, Advocate

....For the Respondent No. 1

Mr. Md. Arifur Rahman, Advocate

....For the Respondent No. 2

Judgment on 02.06.2025.

Md. Iqbal Kabir, J:

The instant First Appeal has been directed against the judgment and decree dated 14.05.2014 (decree signed on 21.05.2014) passed by the learned Joint District Judge, 5th Court, Dhaka in Title Suit No. 22 of 2004, dismissing the suit.

Short facts of the case are that the appellant, as Plaintiff Company, negotiates and procures orders of garments from the foreign buyers directly or through their nominated authorities or agents. The plaintiff company receives the sale proceeds through its business, tries to create opportunities, and explores possibilities to earn foreign exchange for Bangladesh. The defendant No.1-Trading Corporation of Bangladesh (in short T.C.B), through its circular, offered to allocate a quota for 5469 Dozen Readymade Garments under U.S.A. category 341 for exporting the same to the ultimate buyer of the U.S.A. The appellant-plaintiff company participated in the offer dated 14.06.99 and received an allocation in its favor. Thereafter, the plaintiff company, the Seller, and the defendant No.1, the Buyer, entered into an agreement dated

07.07.1999. The quantity of readymade garments was 5469 Dozen, and the unit price was US\$ 61.14 per dozen, and the total value was US\$ 3,34,374.66 (Three lacs, thirty four thousand three hundred seventy-four point six only), and the service charge for the said order was fixed at 3% payable to the defendant No. 1, T.C.B.

Under the agreement the plaintiff/seller furnished a Bank Guarantee for an amount of TK. 5,67,600/= (Taka Five lac sixty-seven thousand and six hundred) only favoring the defendant No. 1. But plaintiff company export 2525 and 1475 total 4000 DZ Readymade Garments at the rate of US\$ 66.60 per dozen and exported rest 1469 DZ at the rate of US\$ 57.00 per dozen. Following the agreement appellant/plaintiff company has paid a service charge of 3% of US\$ 334374.66, equal to Tk. 5,03,773.36 to the TCB through pay order No. 90/99 dated 29.07.1999 under the unit price of US\$ 61.14 DZ. However, the plaintiff company, by its letter, requested to return of the Bank guarantee. But defendant No. 1 TCB did not pay heed in returning the same; moreover, vide its letter dated 12.03.2000 asked the plaintiff why the Bank guarantee would not be encashed or forfeited within 21.03.2000. Knowing such from the bank, the present appellant, having no other alternative, being constrained, filed a suit for a decree of declaration and permanent injunction against the defendant Nos. 1 and 2.

Being aggrieved by and dissatisfied with the judgment and decree dated 28.05.2014 passed by the learned Joint District Judge, 4th Court, Dhaka in Title Suit No. 378 of 2006, the plaintiff as appellant preferred this appeal before this Court.

Mr. Mohammad Mosfequs Salehin, learned Advocate appearing on behalf of defendant-respondent No. 1 (T.C.B), claimed that the plaintiff company, in violation of the condition stipulated in the agreement dated 07.07.99, exported the goods and caused a loss of foreign exchange for the country. According to him, goods were exported at lower prices, but this condition was not followed in exporting the goods. Thereby plaintiff breached the agreement and, not entitled to get back the Bank Guarantee.

Mr. Md. Sadekur Rahman, learned Advocate appearing on behalf of the appellant submits that the plaintiff company exported a total of 5469 DZ Garments hastily for an amount of US\$ 350233.00 which was far above and much more than the total amount contemplated in the said agreement dated 07.07.99 accordingly, the plaintiff company earned much more foreign exchange for the country than the stipulated amount.

Mr. Md. Sadekur Rahman, learned Advocate submits that the plaintiff exported 5724 pieces of Garments at the rate of US\$ 5.55 per piece, 12000 pieces at the rate of US\$ 5.55 per piece, 12576 piece at the rate of US\$ 5.55 per piece, 5664 piece at the rate of US\$ 5.55 per piece, 12036 piece at the rate of US\$ 5.55 per piece and 47928 piece at the rate of US\$ 4.75 per piece. The plaintiff exported a total of 7694 Dozen Garments at the rate of 61.17 US\$ per dozen, which is more than the agreed value of the parties (US\$ 61.14), but the learned Court below, without considering the facts of the case and evidence on record, especially exhibit 5 (L.C No. F.I.MOCC 99/0128 dated 06.05.1999 wrongly found that the plaintiff exported the garments by violating the terms and conditions of the agreement dated 07.07.1999, and dismissed the suit on surmise and conjecture, and as such, the judgment and decree passed by the Court below are liable to be set aside.

Mr. Rahman submits that the plaintiff company exported 2525 and 1475 total of 4000 DZ Readymade Garments at the rate of US\$ 66.60 per dozen, and exported the remaining 1469 dozen at the rate of US\$ 57.00 per dozen. According to him, it is more than the agreed value of the parties, which was denied by the opposite parties. He claims that under the agreement, TCB is entitled to get 3% service charge, against which a Bank guarantee has been deposited. Under the contract, TCB is entitled to encash the Bank guarantee if the plaintiff, as the seller, fails to deliver the goods. In this case, no such failure took place. However, if any difference arises, all such disputes or differences have to be settled by arbitration. Before the settlement of such a dispute by the Arbitration Tribunal defendant had no authority to take the initiative to encash the Bank Guarantee. The dispute between the parties in respect of the contract has to be settled following the provision for Arbitration made in the agreement. He claims the court below, without considering the above clause, relates to Arbitration and exhibits Gha & Uma, most illegally and arbitrarily dismissed the suit with a finding that the letter issued by the defendant No. 1 dated 03.01.2003 for encashment of the Bank guarantee is legal and as such the impugned judgment and decree are liable to be set aside.

We have considered the submissions so placed by the counsels, perused the memorandum of appeal and the impugned judgment and documents that are exhibited herewith.

From the submissions, it has transpired to us that the parties have agreed to settle the dispute following the provision of arbitration. But, due to the dissenting opinion made by the Arbitration Tribunal, the arbitrators failed to

arrive at a decision acceptable to the parties. They brought notice to this Court that the clause related to the provision of Arbitration clearly states what the next steps are and, following such process, the matter can be settled.

At this juncture, for our better understanding, the clause relating to Arbitration is reproduced below:

“Any dispute or difference which may arise in connection with the present contract or the interpretation of any clause thereof should be settled as far as possible amicably between the buyers and the sellers without any recourse to legal action. In case no amicable settlement could be arrived at all, such disputes or differences will be settled by arbitration when each party will appoint an arbitrator, If the arbitrators fail to arrive at a decision acceptable to both the buyers and the sellers, an umpire acceptable to both the arbitrators will be appointed whose decision should be binding upon both the buyers and the sellers. In the event of failure of both sides to agree to the selection of an Umpire, the Metropolitan Chamber of Commerce, Dhaka, will be requested to nominate an Umpire whose decision will be final and binding upon both parties. The venue of arbitration shall be in Dhaka.

...”

It is admitted that the dispute is pending before the Arbitration Tribunal and upon plain reading of the above mentioned clause related to Arbitration, it appears under the above provision, an Umpire has to be appointed, and the Umpire will be appointed by the arbitrators, and the decision of the Umpire should be binding upon the parties, i.e., buyers and sellers, i.e., plaintiff and defendant TCB. The record shows that to appoint and or engage an Umpire, both parties made an application to the Arbitration Tribunal, and arbitrators are trying to appoint such an Umpire under the provisions of law to settle the dispute.

Indeed, following the provision of Arbitration plaintiff and the Trading Corporation of Bangladesh filed their respective application addressed to the Registrar, Tribunal of Arbitration, Metropolitan Chamber of Commerce, Dhaka, thereby, praying to appoint an umpire to settle the matter. Therefore, it can be said that the appointment of an Umpire is in process. In such a situation, the dispute can be settled by the arbitration process instead of in this appeal. According to the parties, the appeal may be disposed of with observations.

However, it was revealed that TCB had tried to encash the bank guarantee while the issue was pending in the forum of arbitration. Knowing such from the bank defendant No. 1, present appellant/plaintiff, having no

other alternative, being constrained, filed a suit for the decree of declaration and permanent injunction against defendants Nos. 1 and 2.

It is pertinent to note that under the law, there was no provision in law to deal with the matter or grant an injunction/stay by the Arbitration Tribunal against the encashment of the Bank Guarantee. In this context, the appellant/plaintiff filed the suit, and the suit was dismissed by the Court; against such dismissal order, this appeal has been filed. However, it is pertinent to note that by this time new provision has been incorporated in the law, and the tribunal is empowered under the law to grant an injunction against the encashment of the Bank Guarantee. At this juncture, we are of the view that justice would be met if the appellant may get an opportunity/scope to file such an application for intervention from the Arbitration Tribunal and may get an appropriate order from the Arbitration Tribunal under the law, if the plaintiff made such an application.

In light of the above, the appeal is allowed without any order as to cost.

The judgment and decree dated 14.05.2014 (decree signed on 21.05.2014) passed by the Joint District Judge, 5th Court, Dhaka in Title Suit No. 22 of 2004, dismissing the suit, is hereby set aside.

However, this Court allowing 02 (two) months to the plaintiff to apply afresh for an injunction relating to the encashment of Bank Guarantee, if so advised and the Arbitration Tribunal is at liberty to dispose of such application, if any, following due process of the law within the next 01 (one) month from the date of the filing such application.

The Arbitration Tribunal/Metropolitan Chamber of Commerce is also directed to appoint an Umpire to conclude or settle the dispute within the next 04 (four) months thereafter.

Let a copy of this judgment along with the lower Court records be communicated to the Court concerned forthwith.

Md. Riaz Uddin Khan, J:
I agree.