

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

Arbitration Application No. 18 of 2012.¹

With

Arbitration Application No. 19 of 2012

Zubayer
Rahman
Chowdhury, J

Bangladesh Power
Development Board (BPDB),
WAPDA Bhaban, Motijheel.
.....Petitioner.

(Both in Arbitration
Application No. 18 of 2012
and Arbitration Application
No 19. of 2012).

VS

Summit Industrial and
Mercantile Corporation (Pvt.)
Limited and others.
.....Respondent.

Judgment on
09.12.2012.

(Both in Arbitration
Application No. 18 of 2012
and Arbitration Application
No 19. of 2012).

For the
Petitioner:

Mr. Forrukh Rahman, Advocate
with
Mr. Husainul Kabir, Advocate

For the
respondent 1
& 2:

Ms Karishma Jahan, Advocate
with
Ms. Narita Navin Khan,
Advocate

Terms, Phrases and Issues:

*Arbitration, appointment of sole
arbitrator, formation of arbitration
tribunal, Conflict of interest of the
arbitrator, cost of arbitration, jurisdiction*

*of the High Court Division in arbitration
under section 20 of the Arbitration Act,
2001.*

Main Legal Issue:

*Whether the provisions in section 20 read
with section 7A can be invoked by the
parties when the parties have excluded
the jurisdiction of the court.....(Para 22).*

Main Findings:

*The provisions in section 20 read with
section 7A cannot be invoked by the
parties when the parties have excluded
the jurisdiction of the court.....(Para 22).*

*Since the parties have excluded the
jurisdiction of any court except for
enforcement of award, the jurisdictional
issue cannot be decided by the court; the
dispute, if any, between the parties is to
be settled through Arbitration and the
parties are to appoint the Arbitrator(s) in
accordance with this stipulation made in
the RFP.....(Para 23).*

The Arbitration Act, 2001: Section 20:

*The provisions in section 20 read with
section 7A cannot be invoked by the
parties when the parties have excluded
the jurisdiction of the court:*

*A careful perusal of the provisions,
quoted above, leaves no room for doubt
that the parties clearly intended that any
dispute arising between them should be
settled through Arbitration. The express
intention is re-enforced by clause 19.4(h),
which stipulates that the parties to be
agreement irrevocably agree not to
initiate any proceeding, file any action or
suit in any Court of competent
jurisdiction except proceedings for the
purpose of recognition and enforcement*

¹ Two applications under sections 20 and 7(a) of the Arbitration Act, 2001.

of the Arbitral award. Therefore, the scope for approaching the Court for determination of any issue including the jurisdiction of the arbitral tribunal has been expressly excluded by both the parties in writing.....(Para 22).

This Court is of the view that the dispute, if any, between the parties is to be settled through Arbitration and the parties are to appoint the Arbitrator(s) in accordance with this stipulation made in the RFP.....(Para 23).

JUDGMENT

ZUBAYER RAHMAN CHOWDHURY,

J:

1. Supplementary affidavits dated 06.12.2012 do form part of the substantive applications both in Arbitration Application No. 18 of 2012 and Arbitration Application No. 19 of 2012.

2. Arbitration Application No. 18 of 2012 is at the instance of Bangladesh Power Development Board (briefly, BPDB) under section 20 read with section 7A of the Arbitration Act, 2001 seeking an order dismissing the Arbitral Tribunal along with an interim order staying the arbitration proceeding of the said Arbitral Tribunal with regard to the settlement of a dispute between the parties with regard to the development of HFO Fired Power Generation Facility of 104, 4108 MW at Syedpur, Bangladesh.

3. Arbitration Application No. 19 of 2012 is also at the instance of Bangladesh Power Development Board (briefly, BPDB) under section 20 read with section 7A of the

Arbitration Act, 2001 containing a similar prayer as the one made in Arbitration Application No. 18 of 2012, however, in relation to a different project at a different location, namely, the construction of HFO Fired Power Generation Facility of 104, 4108 MW at Shantahar, Naogaon, Bangladesh.

4. It is to be noted that the construction of both the projects were to be undertaken by Summit Industrial and Mercantile Corporation (Pvt.) Ltd. (Respondent no. 1).

5. Since the petitioners and the respondents in both the Arbitration applications are one and same and since the issues involved in the two Arbitration applications are identical, they were heard together and are being disposed of by this single judgment. Mr. Forrukh Rahman, the learned Advocate appears along with Mr. H. Kabir, Advocate for the petitioner, while the respondents are being represented by Ms. Karishma Jahan, Advocate appearing with Ms. Narita Navin Khan, Advocate.

6. Mr. Forrukh Rahman, the learned Advocate appearing in support of both the applications submits that the opposite-parties had initiated the Arbitration proceeding for settlement of the alleged dispute between the parties. Mr. Rahman has challenged the formation of the Tribunal on a substantive ground as well as a procedural ground. As regards the substantive ground, Mr. Rahman submits that the reference to Arbitration made by the opposite-party is without any basis whatsoever in as much as, no contract has been executed between the parties and therefore, the invocation of the Arbitration clause and the subsequent reference to Arbitration is absolutely without any basis. Mr. Rahman further submits that from a procedural point of view, even if it is

accepted, but not conceded, that there is a validly concluded agreement between the parties, the constitution of the Arbitral Tribunal with a sole Arbitrator is not tenable in law in view of the fact that the sole Arbitrator happens to be a shareholder in the holding company of the opposite-party.

7. Elaborating his submission, Mr. Rahman submits that it is evident from Annexure G1 of the application that the sole Arbitrator appointed by the opposite-party is a shareholder in the said company. Mr. Rahman submits that due to such conflict of interest, the sole Arbitrator is disqualified to act as an Arbitrator for settlement any dispute between the parties. Mr. Rahman has strenuously argued that even through, in the meantime, the sole Arbitrator has resigned and a new Arbitrator has been nominated in his place, nevertheless, since both the parties have already appeared before this very Court, it would be proper if the dispute is settled before this Court rather than referring the matter back to Arbitration.

8. Placing reliance on the provision of section 20 of the Arbitration Act 2001, Mr. Rahman submits that this Court is empowered to decide the dispute between the parties when such determination by this Court is likely to produce substantial saving in cost. Mr. Rahman submits that the petitioners have fulfilled the other two requirements as laid down in section 20 of the Act and, therefore, there is no reason while the matter should not be settled by this Court.

9. Both the applications are being opposed by the respondents by filing respective affidavits-in-opposition.

10. Ms. Karishma Jahan, the learned Advocate appearing on behalf of the opposite-

party submits that the instant application has become somewhat infructuous as because the concerned Arbitrator has already resigned from his position as sole Arbitrator pursuant to filing of the application by the respondents and a new Arbitrator has already been appointed in his place. Ms. Jahan further submits that it is open to the petitioner to accept the new Arbitrator nominated by the opposite-party to act as sole Arbitrator for settlement of the dispute between the parties.

11. Turning to a more substantive issue, Ms. Jahan submits that it is incorrect that there is no agreement between the parties. Referring to the Request For Proposal (briefly, RFP) as well as the Letter of Intent (briefly, LOT), Ms. Jahan submits that from a combined reading of the two, it is evident that the opposite-parties intended to enter into a contract upon settlement of the initial issues between them.

12. Referring to Annexure 1 of the affidavit-in-opposition dated 17.07.2012, Ms. Jahan submits that the concerned sole Arbitrator, against whom the petitioner had a grievance on the ground that he was a shareholder in the respondent company, had already tendered his resignation from the office of the sole Arbitrator on 05.07.2012. Ms. Jahan further submits that subsequently, the opposite-party has appointed Mr. Manjur Hasan, Barrister-at-law as the sole Arbitrator and had also intimated the same to the petitioner by letter dated 15.07.2012. Therefore, according to Ms. Jahan, the first limb of the petitioner's grievance, so far as it relates to the appointment of the sole Arbitrator, does not hold good any further.

13. In response to the argument advanced by Mr. Rahman as to the non existence of a formally executed agreement or contract between the parties, Ms. Jahan submits that a

conjoint reading of the RFP and LOI makes it abundantly clear that the parties have entered into a contractual relationship and therefore, it is both proper and legal for the opposite-party to invoke the Arbitration proceeding for settlement of the dispute between the parties.

14. Refuting the argument advanced by Mr. Rahman with regard to the cost/expenses of the Arbitration proceeding under section 20 of the Act, Ms. Jahan submits that the projects in respect of which the dispute arose between the parties runs into hundreds of crores of Taka and therefore, a fee of Tk. 1,00,000/-per day for the sole Arbitrator, which is to be borne equally by both the parties, is too insignificant to attract the provision of section 2(2)(a) of the Act. Ms. Jahan concludes her submission with a prayer that the Arbitration proceeding before the sole Arbitrator may be allowed to proceed.

15. I have perused the applications, the connected documents and the relevant provisions of law. I have also considered the submissions advanced and the decisions cited by the learned Advocates of the contending sides.

16. At the very outset of my discussion, it would be pertinent to refer to section 20 of the Arbitration 2001, which reads as under:

“20. Powers of the High Court Division in deciding jurisdiction: (1) The High Court Division, may, on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal.

(2) No application under this section shall be taken into account, unless the High Court Division is satisfied that-

(a) The determination of the question is likely to produce substantial savings in costs.

(b) the application was submitted without any delay; and

(c) there is good reason why the matter should be decided by the Court.

(3) The application shall state the reasons on which the matter should be decided by the High Court Division.

(4) Unless otherwise agreed by the parties, where any application is pending before the High Court Division under this section, the arbitral tribunal shall continue arbitration proceedings and make an arbitral award.”

17. Having noted the relevant provisions of law, let me now turn to the Request For Proposal (RFP) which contains certain provisions with regard to settlement of dispute between the parties.

18. The provisions with regard to settlement the dispute between the parties are contained in Section 19(4) of the Request For Proposal, which reads as under,

“In the event that (i) any request for arbitration made in pursuance of Section 19.4(a) and Article 6 of the Convention is not registered by the Secretary-General under Article 36(3)

of the Convention or (ii) the Centre or the arbitral tribunal fails or refuses to assume or to exercise jurisdiction or to continue to exercise jurisdiction with respect to any Dispute referred to it or (iii) for any other reason the Dispute cannot be finally determined by arbitral proceedings pursuant to the ICSID Rules, then any such Dispute shall be determined by means of arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("the ICC Rules"), provided, that, notwithstanding the foregoing, any arbitration to be conducted in Dhaka, Bangladesh pursuant to this Section 19.4 shall be carried out under the provisions of Bangladesh Arbitration Act of 2001, (Act I of 2001)."

19. Section 19.4(c), (d) and (e) read as under:

"19.4(c) Any arbitral proceeding under this Section 19.4 shall be conducted in Dhaka, Bangladesh, provided, that if the Company desires that the arbitration be conducted outside of Bangladesh, the arbitration shall be carried out at the seat of the Singapore International Arbitration Centre in the Republic of Singapore and the Company shall pay all of BPDB's costs of the arbitration, as and when incurred by BPDB, including the out of pocket costs of the arbitration of BPDB in excess of the costs that would have been otherwise incurred by BPDB had the arbitration been conducted in Dhaka, Bangladesh (the "incremental Costs"). The arbitrator shall resolve any Disputes as to whether a cost would have been

incurred in connection with the arbitration in Dhaka, Bangladesh or are Incremental Costs. The arbitrator may order that BPDB bear its own Incremental Costs in part or in full if he finds that BPDB's claim or defence in the arbitration was spurious and without any merit whatsoever, and BPDB shall pay the amount ordered provided, however, that if a matter in Dispute involves a sum of ten million Dollars (US\$ 10,000,00) or more, or the legality, validity or enforceability of this Agreement, or the termination of this Agreement, the arbitration shall, unless otherwise agreed by the parties, be conducted in Singapore, and, in such case, each Party shall pay its own costs of arbitration as and when incurred, unless such cost's are ordered by the arbitrator to be paid by one Party, in which case they shall be paid by such Party."

(d) The Parties agree that the arbitral tribunal constituted in pursuance of a request for arbitration made under Section 19.4 (a) or (b), shall consist of a sole arbitrator or, if the Parties agree, three arbitrators, two of which shall be appointed by the Parties and the third party's arbitrator appointed by the two selected arbitrators who shall be a person who has held judicial office for a period of not less than three (3) years in a court of record in England or in a jurisdiction whose laws are substantially derived from the common law of England.

(e) No arbitrator appointed pursuant to this Section 19.4 shall be a national or resident of the jurisdiction of either party or of any shareholder or group of

shareholders owing directly jurisdiction of either Party or of any shareholder or group of shareholders owing directly or indirectly five percent (5%) or more of the Ordinary Share Capital, nor shall any such arbitrator be an employee or agent or former employee or agent of or have any material interest in the business of or in any Party or any such person.”

20. Section 19.4(h) reads as under:

“19.4(h) Until such time as any arbitral proceedings began in pursuance of Section 19.4(a) or (b) have been finally concluded (and, for this purpose, all rights of appeal, if any shall have been exhausted), each Party irrevocably agrees not to initiate any proceedings, file any action or suit in any court of competent jurisdiction or before any judicial or other authority arising under, out of, in connection with or relating to this Agreement, the arbitration agreements set forth in this Section 19.4, any Dispute (whether or not any such Dispute shall have been referred to arbitration in pursuance of Section 19.4(a) and (b), the subject matter of any Dispute or any arbitral proceeding began, in pursuance of Section 19.4(a) or (b), including without limitation (i) proceedings brought with a view to recourse or appeal against or revision or the annulment of any arbitral award or procedural order made by the arbitral tribunal or proceedings, or (ii) proceedings in which relief or remedy is sought by way of injunction or other judicial order (interlocutor or final) which would have the effect (directly or indirectly) of restraining impeding

the maintenance or prosecution by either Party of any arbitral proceeding initiated in pursuance of Section 19.4(a) or (b), except proceedings brought exclusively for the purpose of recognition and enforcement of any arbitral award or procedural order made by the arbitral tribunal.”

21. Section 19.05 (a)(iii) reads as under:

“(a).....

(i)

(ii)

(iii) it consents generally to the jurisdiction of, any court of competent jurisdiction (including courts in Bangladesh) for any action filed by the Company to enforce any award or decision of any arbitrator ‘who was duly appointed under this Agreement to resolve any Dispute between the Parties (including without limitation, the making, enforcement or execution against or in respect of any of its assets (other than the Protected Assets regardless of its use or intended use) and specifically waives any objection that any such action or proceeding was brought in an inconvenient forum and agrees not to plead or claim the same. BPDB agrees that service of process in any such action or proceeding may be effected in any manner

permitted by the law applicable to the aforementioned court.”

22. A careful perusal of the provisions, quoted above, leaves no room for doubt that the parties clearly intended that any dispute arising between them should be settled through Arbitration. The express intention is re-enforced by clause 19.4(h), which stipulates that the parties to be agreement irrevocably agree not to initiate any proceeding, file any action or suit in any Court of competent jurisdiction except proceedings for the purpose of recognition and enforcement of the Arbitral award. Therefore, the scope for approaching the Court for determination of any issue including the jurisdiction of the arbitral tribunal has been expressly excluded by both the parties in writing.

23. However, there is another issue which appears to have been overlooked by both the sides. Clause 19.4(c) of the RPF reads as follows:

“No arbitrator appointed pursuant to this Section 19.4 shall be a national or resident of the jurisdiction of either Party.”

24. From the affidavit-in-opposition dated 17.07.2012 it appears that the respondents have appointed Mr. Manjur Hasan, MBA, Barrister-at-law as Arbitrator for settlement of the dispute between the parties. The incumbent, being a citizen of Bangladesh appears, *prima-facie*, to be disqualified to be appointed as Arbitrator for settlement of any dispute between the parties, as per the provisions of clause 19.4(e) of the RFP.

25. Therefore, having regard to the facts and circumstances of the case and the relevant provisions of law as contained in the

Arbitration Act, 2001 as well as the relevant provisions contained in the RFP, this Court is of the view that the dispute, if any, between the parties is to be settled through Arbitration and the parties are to appoint the Arbitrator(s) in accordance with this stipulation made in the RFP.

26. With the observations made above, both the Arbitration Applications are hereby disposed of.

27. There will be no order as to cost.