

18 SCOB [2023] HCD 257**HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO.4042 OF 2017****Mitul Properties Ltd.****Vs.****M.N.H. Bulu**Mr. A.M. Amin Uddin, Advocate with
Mr. Taposh Kumar Dutta, Advocate
.....for the opposite partyMr. Mir Md. JoynalAbedin, with
Mr. Md. Mujibur Rahman, Advocates
.....for the petitionerHearing Concluded on 26.05.2022.
Judgment on 11.08.2022.**Present:****Mr. Justice Md. Ruhul Quddus****and****Mr. Justice Khizir Ahmed Choudhury****and****Mr. Justice Kazi Ebadoth Hossain****Editors' Note:**

In this case petitioner challenged an order passed by the learned District Judge, Dhaka in an Arbitration Miscellaneous Case whereby the said court rejected an application for calling for the record of arbitration proceedings from the arbitrators. Question arose as to whether a civil revision is maintainable against any interlocutory order passed in an application under section 42 of the Arbitration Act, 2001. The honorable Chief Justice constituted a Special Bench under Rule 1C of Chapter 2 of the Supreme Court of Bangladesh (High Court Division) Rules 1973 to decide the matter. The Court, after discussing different provisions of the Arbitration Act 2001, General Clauses Act 1897 and relevant case laws, observed that the term “জেলাজজ আদালত” as mentioned in the Arbitration Act, 2001 means the ‘Court of District Judge’, not ‘persona designata’ and any decision passed in a proceeding under this Act is amenable in a civil revision under the Code of Civil Procedure and as such, the civil revision is maintainable. Nevertheless, the Court discharged the rule rejecting the civil revision contending that since the petitioner had an arbitrator appointed by him, he could have easily obtained a copy of the proceeding from his arbitrator. This application for calling for records is unnecessary and only to cause delay. The Court further observed that the Government should frame necessary rules regarding how long and under what modes the arbitrators will maintain the record of any arbitration proceedings after giving the arbitral award.

Key Words:

Persona Designata; Maintainability of Civil Revision; Arbitral Award; Supervisory Jurisdiction of the High Court Division; The Arbitration Act, 2001

The Arbitration Act, 2001, Section 42:

The term “জেলাজজ আদালত” as mentioned in Section 2(Kha) of the Arbitration Act, will be deemed as the ‘Court of District Judge’, not ‘persona designata’ for carrying out the object under Section 42 of the Arbitration Act, and any decision to be passed in a

proceeding under Section 42 of the Act is amenable to revisional jurisdiction under the code of Civil Procedure. ... (Para 12)

The Arbitration Act, 2001, Section 24:

As per Section 24 of the Arbitration Act, 2001 the arbitral tribunal in resolving disputes is not bound to follow the provisions of the Code of Civil Procedure and the Evidence Act, which signifies that the Tribunal in a given case is set to dispose of any dispute according to the terms and reference having set forth by them. ... (Para 15)

Code of Civil Procedure, 1908, Section 115:

Civil Revision is maintainable under Section 115(1) of the Code of Civil Procedure against an order passed by learned District Judge in a proceeding under Section 42 of the Arbitration Act but such power should be exercised sparingly only in a case where it appears that the lower Courts in passing any order committed any error of law resulting in an error occasioning failure of justice. It is to be borne in mind that by repealing Arbitration Act, 1940, Arbitration Act, 2001 has been promulgated for speedy disposal of the disputes through privatized system, no one should be given an opportunity to frustrate the spirit of law by initiating any proceeding against each and every order having no merit. ... (Para 16)

The Arbitration Act, 2001, Section 23:

As per section 23 of the Arbitration Act, the arbitrators are obligated to dispose of the disputes on perusal of evidence of the parties, if produced. So, there should be modalities how long and under what modes the arbitrators will maintain the evidences and other documents of the parties after giving the award, because those may be necessary for perusal in any legal proceeding if initiated challenging the award in the Court as mandated by law. ... (Para 17)

JUDGMENT

Khizir Ahmed Choudhury, J:

1. Upon an application filed under section 115 of the Code of Civil Procedure, this rule was issued challenging order No.9 dated 10.09.2017 passed by the District Judge, Dhaka in Arbitration Miscellaneous Case No.568 of 2016 rejecting the application dated 10.07.2017 filed by the petitioner calling for the record of arbitration proceedings from the arbitrators.

2. On a reference made under Rule 1C of Chapter 2 of the Supreme Court of Bangladesh (High Court Division) Rules 1973, on the point of maintainability of a civil revision under section 115 of the code of Civil Procedure against any interlocutory order passed in an application under section 42 of the Arbitration Act, 2001, learned Chief Justice constituted this Special Bench for deciding the matter.

3. The petitioner filed arbitration Miscellaneous Case No.568 of 2016 in the Court of District judge, Dhaka under section 42 read with section 43 of the Arbitration Act, 2001 for setting aside the arbitral award dated 18.01.2015 contending that the petitioner Mitul Properties Limited executed several contract viz. registered contract deed No.5804 dated 13.07.2010, contract deed No.6977 dated 13.07.2011, deed dated 21.07.2013 and 12.04.2014 with the opposite party for purchasing lands in different parts of the country. In agreement dated 21.07.2013 there is an arbitration clause appointing Mr. Mostofa Mohsin Montu and

Mr. Md. Azam Khan as Arbitrators for the opposite party and the petitioner respectively. On coming to know about award passed by the arbitrators, the petitioner served a legal notice through his lawyer on 08.08.2016 requesting the arbitrators for supplying certified copy of the award dated 18.01.2015 along with related papers of the arbitration proceedings, but Mr. Md. Azam Khan, sent only a signed copy of the award, whereupon the petitioner filed Arbitration Miscellaneous Case No.568 of 2016 before the District Judge, Dhaka for setting aside of the award. The petitioner thereafter, by filing an application on 10.07.2017 in the said Miscellaneous Case, called for records from the arbitrators. Learned District Judge heard the application and rejected the same by the impugned order and hence the instant civil revision.

4. The opposite party by filing a counter-affidavit, asserted that both the parties executed and registered deed of agreements dated 13.07.2010, 13.07.2011, 21.07.2013 and 12.04.2014. Of them, in agreement dated 21.07.2013 they agreed Mr. Mostofa Mohsin Montu and Mr. Md. Azam Khan as their respective arbitrators to conduct arbitration in case of any dispute between them and to obey the decisions of the said arbitrators. It is stated that both the arbitrators sat with the parties on several occasions to resolve their dispute and in furtherance thereto the parties executed agreement dated 14.04.2014 but as the 2nd party thereto (petitioner herein) failed to make payment as per the agreement, the arbitrators passed the award on 18.01.2015 and as such there is no scope to challenge the said award since it has got finality as per clause 8 of the agreement dated 21.07.2013.

5. Mr. Mir Md. Joynal Abedin assisted by Mr. Mojibur Rahman, learned advocate appearing for the petitioner submits that although there is no provision in the Arbitration Act, 2001 for preferring any revision against an interlocutory order passed by learned District Judge in an application under Section 42 and 43 of the Arbitration Act, 2001, still the High Court Division has supervisory jurisdiction under Article 109 of the Constitution of the People's Republic of Bangladesh and as such the instant civil revision is very much maintainable. He next submits that there is no bar in filing civil revision before the High court division against any interlocutory order passed by the District Judge in an arbitration miscellaneous case under section 42 of the Arbitration Act, 2001, hence the revisional jurisdiction of the High court division cannot be ousted. Learned advocate further submits that since no forum of appellate jurisdiction is provided in the Arbitration Act, 2001 against any interlocutory order passed by the District Judge in an Arbitration Miscellaneous Case, the High Court Division can interfere for securing ends of justice under Section 151 of the Code of Civil Procedure. Learned counsel argued that since the High Court Division after perusing the impugned order issued rule in the present revisional application, it should be disposed of on merit without considering the jurisdiction of the High Court Division to this end. Learned advocate averred that the judgment and order of the Court below is based on conjectures and surmises and also the arbitration was held without issuing any notice and without affording the petitioner any opportunity of being heard and as such the record of the arbitration proceedings was required to be called for effective adjudication of arbitration miscellaneous case and as such the learned District Judge committed error of law in not allowing the application calling for the record of the arbitration proceeding which cannot be sustained. Learned counsel laid emphasis that the petitioner by sending legal notice on 08.08.2016 requested the arbitrators for supplying certified copy of the award dated 18.01.2015 along with relevant papers and documents and one of the arbitrators only send a signed copy of the award without relevant document and thus the Court below committed error of law in holding that the petitioner may easily obtain a copy of the arbitration proceeding which caused failure of justice. Learned advocate in support of his contention referred to the case of *Arman Uddin*

vs. *Mst. Lucky Jahan*, passed by a larger bench of the High court division in *Civil Revision No.2831 of 2021*, where two of us were parties.

6. Per contra, Mr. A M Amin Uddin, learned Advocate appearing with Advocate Tapash Kumar Dutta for the opposite party submits that the petitioner herein appointed Mr. Md. Azam Khan while the opposite party appointed Mr. Mostofa Mohosin Montu as their arbitrators respectively for resolving the dispute as per agreement between them and the arbitrators gave award on 18.01.2015 and thereafter on getting notice from the petitioner on 08.08.2016, Mr. Md. Azam Khan forwarded a copy of the award to the petitioner who filed the Miscellaneous Case No.568 of 2016 before the District Judge, Dhaka with certain allegations and the said miscellaneous case would be decided on merit, but calling for records of the arbitration proceeding and filing revisional application before this Court on refusal of the application for records is not amenable to revisional jurisdiction, which is liable to be rejected as being not maintainable. Learned advocate argued that while rejecting the application, the learned District Judge rightly observed that since the petitioner appointed an arbitrator in the arbitration proceedings he can easily collect necessary papers from his own arbitrator. Learned advocate contended that the purpose of enacting the Arbitration Act, 2001 is to resolve the dispute out of Court avoiding the lengthy and formal process of adjudication, but the petitioner with a view to prolong the proceeding and to deprive the opposite party from reaping the fruits of arbitration, obtained the instant rule, which is liable to be discharged. Learned counsel asserted that the interference of the Court in the arbitration proceeding has been significantly minimized in the Arbitration Act, 2001 as the arbitrators are not required to submit the award in the Court for making the same rule of the Court unlike the provision of Arbitration Act, 1940. He argued that in the present case, the award was made on 18.01.2015 and challenging the said award, the petitioner filed the Arbitration Miscellaneous Case on 08.09.2016 and subsequently by filing an application called for the records from the arbitrators on 10.07.2017, after elapse of more than 2 years 6 months and considering the facts and circumstances, the District Judge rightly rejected the application holding that after such long period, there was no provision to keep the record of the arbitration proceeding. Learned counsel also argued that the learned District Judge rightly held that the arbitration proceeding having done as privatized system of settlement of disputes outside the Courts and the District Judge being not Court of appeal rightly rejected the application calling for the records. He stressed that in the proceeding of arbitration, there is no requirement to submit the records of arbitration proceeding to the Court of District Judge and as such learned District Judge rightly rejected the application which does not call for any interference.

7. At the inception, we shall deal with the matter whether in a proceeding sprang out from the Arbitration Act, 2001, the Code of Civil Procedure is applicable or not. More particularly, whether the instant civil revision is maintainable or not. Naturally question has come to the fore whether the term “জেলাজজ আদালত” as mentioned in Section 2(L) of the Arbitration Act, 2001 is a Court or *Persona Designata*. For convenience, Section 2(L) is reproduced below:

২(খ) "আদালত" অর্থ জেলাজজ আদালত, এবং সরকার কর্তৃক, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, এই আইনের অধীন জেলাজজ আদালতের কার্য সম্পাদনের জন্য নিযুক্ত অতিরিক্ত জেলাজজ আদালতও ইহার অন্তর্ভুক্ত হইবে;

8. The term ‘District Judge’ is defined in Sub-Section (15) of Section 3 of the General Clauses Act, 1897 in the following manner:

3(15) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include the High Court Division in the exercise of its ordinary or extraordinary original civil jurisdiction.

9. Contrarily the expression ‘Persona Designata’ is described in Aiyar’s Law Lexicon of British India in the following manner:

"Where a person is indicated in a statute or legal instrument not by name, but either by an official designation or as one of a class a question sometimes arises whether he ceases to be the person so indicated in losing his official designation or his character as one of the class, or whether the intention was to single him out as a persona designata, that is, an individual, the designation being merely a further description of him."

10. Admittedly an award has been given by two arbitrators on 18.01.2015 following an agreement dated 21.07.2013 and challenging the said arbitral award the present petitioner preferred an arbitration miscellaneous case being No. 568 of 2016 in the Court of District Judge, Dhaka wherein by application dated 10.07.2017 the petitioner called for the records from the arbitrators which having been rejected, he preferred the instant revisional application. The petitioner filed Miscellaneous Case No.568 of 2016 for setting aside the award under Section 42(1) of the Arbitration Act. As mentioned above the definition of the term "আদালত" has been given in Section 2(Kha) of the Act naming ‘Court of District Judge’ and also empowering ‘Court of Additional District Judge’ by gazette notification for performing the functions of the ‘Court of District Judge’. Since in the instant case, proceeding has been initiated before the District Judge, Dhaka we shall be confined ourselves to the term ‘Court of District Judge’ as "আদালত" for disposal of the matter.

11. Similar question has been raised and addressed in the case of *A.K.M. Ruhul Amin vs. District Judge and Appellate Election Tribunal Bhola 38 DLR AD 172*, wherein an election appeal was preferred in the Court of District Judge against the judgment and order passed by the election tribunal within whose jurisdiction the election dispute arose. Civil Revision under Section 115 of the Code of Civil Procedure was preferred and question came whether Civil Revision was maintainable or Writ Petition was to be preferred under Article 102 of the Constitution. On detailed deliberation it was held that the term “District Judge” as mentioned in the Local Government (Union Parishad) Ordinance, 1983 was a ‘Court’ and not ‘Persona Designata’ with analogy that as “District Judge” he has to exercise judicial power under the provisions of law. Similar view was reiterated in the decisions reported in 17 BLC AD 50, 42 DLR 311, 42 DLR 483 and 7 BLT 241.

12. Very recently a similar question arose whether application under section 115(1) of the Code of Civil Procedure was maintainable against the judgment and decree passed by the District Judge in a family appeal as the Code of Civil Procedure was not applicable in the proceeding before the Family Court excepting Sections 10 and 11 thereof. This question has been dealt with by a larger bench of this division, wherein two of us were parties and the bench upon hearing the Amicus Curies by detailed deliberation held that Civil Revision was maintainable against the judgment and order passed by “District Judge” sitting on an appeal against a family court proceeding and it was also held there that the “District Judge” as mentioned in the Family Court Ordinance was a Court of District Judge and not a persona designata. So from the aforementioned principles and deliberations our conclusion is that the term “জেলাজজ আদালত” as mentioned in Section 2(Kha) of the Arbitration Act, will be deemed as the ‘Court of District Judge’, not ‘persona designata’ for carrying out the object under Section 42 of the Arbitration Act, and any decision to be passed in a proceeding under Section 42 of the Act is amenable to revisional jurisdiction under the code of Civil Procedure and as such the instant revisional application is maintainable.

13. Regarding the submission of the learned counsel for the petitioner that the High Court Division has supervisory jurisdiction under Article 109 of the Constitution of the People's Republic of Bangladesh and as such the instant civil revision is maintainable, we are of the view that such submission has got no leg to stand upon as under Article 109 of the Constitution, the High Court Division shall have superintendence and control over all Courts and Tribunals subordinate to it. The said power may be used for the purpose as enumerated therein. Since there is specific provision in the Code of Civil Procedure, it will govern the field so far revisional jurisdiction is concerned. Apart from that, after the amendment of Section 115 of the Code of Civil Procedure, the High Court Division may call for any record of any suit or proceeding upon an application of any aggrieved party whereas before amendment, the High Court Division was empowered to call for the record of any case suo motu which has been decided by any Court subordinate to it where no appeal lies, but the Court below committed an error of law resulting in an error in the decision occasioning failure of justice.

14. Now turning to the merit of the instant rule it appears that the petitioner has challenged the order dated 10.09.2017 of the District Judge, Dhaka whereby the application filed by the petitioner calling for the record of the arbitration proceeding was rejected on the ground that it was a privatized system of settlement of dispute outside the Court and that arbitration proceeding was not a civil suit, where interference of the Court in arbitration proceeding has been significantly minimized. Unlike the Arbitration Act, 1940 the arbitrators are not required to submit the award to the Court for making the same rule of the court in the Arbitration Act, 2001. Learned District Judge also held that since the petitioner had an arbitrator in the proceeding, he could have, easily obtained a copy of the proceeding from his arbitrator. Learned District Judge also held that the petitioner failed to show any law, under which the record from the arbitration proceeding may be called for.

15. It is apparent that more than one agreements have been entered into between the parties and particularly in clause 8 of agreement dated 21.07.2013, Annexure C, as submitted in the counter-affidavit of the opposite party, it reveals that the parties appointed their respective arbitrators whose decision will be binding upon the parties. It is also apparent that arbitration award was passed on 18.01.2015 which has been challenged on 08.09.2016 before the Court of District Judge, Dhaka in Miscellaneous Case No.568 of 2016 and thereafter by filing an application therein record was called for from the arbitrators on 10.07.2017 after more than 2 years 6 months. It is inexplicable why a long time was taken for calling the record from the arbitrators. Apart from these admittedly the petitioner has an arbitrator namely Md. Azam Khan from whom he had scope to get all relevant papers of arbitration proceeding. It is not the case of the petitioner that the arbitrator appointed by him did not represent him for furtherance of his cause and as such the application filed by the petitioner to call for records does not seem to be bonafide one. Besides, as per Section 24 of the Arbitration Act, 2001 the arbitral tribunal in resolving disputes is not bound to follow the provisions of the Code of Civil Procedure and the Evidence Act, which signifies that the Tribunal in a given case is set to dispose of any dispute according to the terms and reference having set forth by them. Although Section 23 of the Arbitration Act, 2001 stipulates that the

Tribunal will afford opportunity to produce evidence and will consider documents of the parties by affording opportunity to them, but Sub-Section (2) of Section 23 stipulates that the Tribunal will dispose of any dispute as expeditiously as possible. In the instant case the petitioner sat idle for long period in filing the miscellaneous case and also took considerable time in filing the application to call for the record and as such it is our considered view that the learned District Judge on weighing and considering the facts and circumstances of the case, rightly rejected the application.

16. Although as per the discussion hereinabove we find that Civil Revision is maintainable under Section 115(1) of the Code of Civil Procedure against an order passed by learned District Judge in a proceeding under Section 42 of the Arbitration Act but such power should be exercised sparingly only in a case where it appears that the lower Courts in passing any order committed any error of law resulting in an error occasioning failure of justice. It is to be borne in mind that by repealing Arbitration Act, 1940, Arbitration Act, 2001 has been promulgated for speedy disposal of the disputes through privatized system, no one should be given an opportunity to frustrate the spirit of law by initiating any proceeding against each and every order having no merit.

17. Further, as per section 23 of the Arbitration Act, the arbitrators are obligated to dispose of the disputes on perusal of evidence of the parties, if produced. So, there should be modalities how long and under what modes the arbitrators will maintain the evidences and other documents of the parties after giving the award, because those may be necessary for perusal in any legal proceeding if initiated challenging the award in the Court as mandated by law.

18. Learned Counsels of the parties apprised this Court that no rules have been framed as yet under the Arbitration Act, 2001. So for carrying out the avowed objects of the Arbitration Act, 2001 the Government in the Ministry of Law, Justice and Parliamentary Affairs should frame necessary rules within the scope of Section 57 of the Arbitration Act, detailing modalities how long and under what modes the arbitrators of arbitral tribunal will maintain the record of any arbitration proceedings after giving the arbitral award.

19. However, in the facts and circumstances of the case in hand, we find no merit in the rule and accordingly the rule is discharged without any order as to costs.

20. Since the matter is pending for long, learned District Judge is directed to dispose of the matter as expeditiously as possible preferably within 3 months from the date of receipt of this order.

21. The order of stay granted at the time of issuance of the rule stands vacated.

22. Communicate the order to the District Judge, Dhaka with a copy to the Secretary, Ministry of Law, Justice and Parliamentary Affairs.