

19 SCOB [2024] HCD 161**HIGH COURT DIVISION****Criminal Miscellaneous Case No.22300 of 2018****Advocate Abu Saleh Ahmadul Hasan****...Accused-Petitioner****Vs.****The State****... Opposite Party**

Mr. Nur Alam, with

Mr. Md. Ashif Hasan, Advocates

... For the accused-petitioner

Mr. Muniruzzaman, Advocate

...For the opposite party No.2

Mr. S.M. Fazlul Haque, D.A.G with

Mr. M. A. Kamrul Hasan Khan (Aslam),

DAG

... For the State

Heard and Judgment on: 18.01.2023

Present:**Mr. Justice S M Kuddus Zaman****And****Mr. Justice Fahmida Quader****Editors' Note:**

Rule was issued in the instant case calling upon the opposite parties to show cause as to why the proceedings of a C. R. Case filed under section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010 should not be quashed under section 561A of the Code of Criminal Procedure. The High Court Division found that the complainant without making full payment of the price of the apartment filed the CR case against the developer for not completing the construction work, for which there remains no element of initial cheating by the developer in this case. Moreover, article 24 of the deed of contract between the petitioner and opposite party No.2 for purchase of apartment provides for provision of arbitration for settlement of any dispute arising out between the parties while the construction work is in progress. The dispute as stated in the petition of complaint falls within the purview of article 24 of the deed of contract. So, the complainant should have approached the learned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. Finally, the High Court Division refusing to accept the argument of the learned Advocate for the opposite party No.2 that a legal notice served upon the concerned Advocate for the petitioner for completion of construction work could be treated as a notice for Arbitration, observed that a legal notice cannot be construed as a notice for arbitration and a notice for arbitration cannot be addressed to the Advocate of the concerned party.

Key Words:**Section 561A of the Code of Criminal Procedure, 1898; Section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010; Arbitration Act, 2000****Section 27 of the Real Estate Development and Management Act, 2010:****There is no allegation in the petition of complaint that there is no progress of construction of the second apartment or the petitioner has sold out the same to any**

other person. It has merely been stated that the petitioner did not complete the construction work of the second apartment. But since the complainant did not make full payment for above apartment he cannot expect the completion of the construction worker or transfer of ownership of the above apartment. In view of above materials on record we are unable to find any element of initial cheating in this case. As such section 27 of the Real Estate Development and Management Act, 2010 does not have any application in the facts and circumstances of this case. (Para 12 &13)

Appointment of Arbitrators under the Arbitration Act, 2000:

A legal notice cannot be construed as a notice for arbitration and a notice for arbitration cannot be addressed to the Advocate of the concerned party:

A legal notice cannot be construed as a notice for arbitration nor a notice for arbitration can be addressed to the Advocate for the concerned party. A notice for arbitration must be designated as such and be addressed directly to the party concerned. Even if a party on receipt of such a notice for arbitration does not respond or proceed for arbitration then the notice giver party should approach the concerned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. The door for settlement of above dispute through arbitration is still open for the parties of this proceeding. (Para 16)

JUDGMENT

S M Kuddus Zaman, J:

1. On an application under section 561A of the Code of Criminal Procedure the Rule was issued calling upon the opposite parties to show cause as to why the proceedings of C. R. Case No.369 of 2017 under section 27 of the Real Estate Unnayan and Bobosthapara Ain, 2010, now pending in the Court of learned Metropolitan Magistrate No.27, Dhaka should not be quashed and/or pass such other or further order of orders as to this Court may seem fit and proper.

2. Facts in short are that the opposite party No.2 as complainant lodged a complaint to the Chief Metropolitan Magistrate, Dhaka alleging that he entered into a contract with the accused-petitioner namely Poxel Homes Ltd a property Development Company, for purchase of two apartments being Nos.A-3 and B-3. Pursuant to above contract the petitioner has completed the construction of apartment No.A-3 and handed over the same to the complainant by executing and registering a sale deed. But in spite of repeated requests the petitioner did not complete the construction and handover the possession of apartment No. 3-B nor executed and registered a deed of transfer for the same.

3. On consideration of materials on record the learned Magistrate of Metropolitan Magistrate Court No.27, Dhaka framed charge against the petitioner under section 27 of the Real Estate Development and Management Act, 2010.

4. Being aggrieved by above order of framing of charge and initiation of above proceedings under the Real Estate Development and Management Act, 2010 the sole accused as petitioner moved to this court and obtained this rule.

5. Mr. Nur Alam learned Advocate for the petitioner submits that Clause No.24 of the deed of contract between the complainant and the accused petitioner dated 22.05.2012 provides for arbitration for settlement of any dispute arising out of above contract between the parties during the progress of construction of above apartments. But the complainant instead of proceeding for settlement of the dispute through arbitration has most illegally filed this criminal case on false and fabulous allegations which is an abuse of the process of the court.

6. The learned Advocate further submits that the complainant did not make full payment of the consideration money of apartment B-3 but he is asking for registration of a sale deed and delivery of possession which is neither reasonable nor the same gives rise to any cause of action for initiation of a criminal proceedings.

7. On the other hand Mr. Muniruzzaman learned Advocate for complainant opposite party No.02 submits that the complainant sent a legal notice to the concerned advocate of the petitioner requesting him to complete the construction work of above mentioned two apartments and handover those to the complainant within the stipulated time as mentioned in above deed of contract. Above notice also served as a notice for arbitration for settlement of above dispute between the parties. Since the petitioner did not respond to above legal notice nor came for arbitration the complainant has rightly and legally initiated the proceeding of this case which calls for no interference.

8. We have considered the submissions of the learned Advocates for respective parties and carefully examined all materials on record.

9. At the very outset it needs to be mentioned that section 27 of the Real Estate Development and Management Act, 2010 provides for punishment for commission of the offence cheating by the Developer Company either against the owner of the land or any purchaser of the plot or apartment from that company.

10. In the petition of complaint it has been stated that on receipt of Tk.80,99,706/- (eighty lac ninety nine thousand seven hundred six) out of Tk.1,03,00,000/- (one core three lac) the price of above mentioned two apartments the petitioner has completed the construction of one apartment and executed and registered a sale deed in favour of the complainant for the same and handed over possession of the apartment to the complainant.

11. It is not disputed that the complainant did not make full payment of the price of the second apartment but he was asking for delivery of possession and execution and registration of a sale deed for the same.

12. There is no allegation in the petition of complaint that there is no progress of construction of the second apartment or the petitioner has sold out the same to any other person. It has merely been stated that the petitioner did not complete the construction work of the second apartment. But since the complainant did not make full payment for above

apartment he cannot expect the completion of the construction worker or transfer of ownership of the above apartment.

13. In view of above materials on record we are unable to find any element of initial cheating in this case. As such section 27 of the Real Estate Development and Management Act, 2010 does not have any application in the facts and circumstances of this case.

14. Moreover Article 24 of the deed of contract between the petitioner and opposite party No.2 for purchase of above mentioned two apartments provides for of arbitration for settlement of any dispute arising out between the parties while the construction work is in progress. The dispute as stated above in the petition of complaint falls within the purview of above Article 24 of the deed of contract. The learned Advocate for the opposite party No.2 submits that a legal notice was sent to the concerned Advocate for the petitioner for completion of construction of work of two apartments and hand over those to the opposite party and that notice could be treated as a notice for Arbitration.

15. We are unable to accept above submissions of the learned Advocate for the opposite party.

16. A legal notice cannot be construed as a notice for arbitration nor a notice for arbitration can be addressed to the Advocate for the concerned party. A notice for arbitration must be designated as such and be addressed directly to the party concerned. Even if a party on receipt of such a notice for arbitration does not respond or proceed for arbitration then the notice giver party should approach the concerned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. The door for settlement of above dispute through arbitration is still open for the parties of this proceeding.

17. Since we have found that there is no element of cheating in this case further continuation of this proceedings will not meet the ends of justice but the same shall cause unnecessary sufferings to the petitioner which amounts to abuse of the process of the court.

18. In above view of the materials on record we find substance in this petition under section 561A of the Code of Criminal Procedure and the rule issued in this connection deserves to be made absolute.

19. Accordingly, the Rule is made absolute.

20. The proceedings of C. R. Case No.369 of 2017 under section 27 of the Real Estate Unnayan and Bobosthapara Ain, 2010 is hereby quashed.

21. Communicate this judgment and order to the Court concerned at once.