

District-Chittagong

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Miscellaneous Jurisdiction)**

Criminal Miscellaneous Case No. 4779 of 2018

In the matter of:

**An application under Section 561A of the
Code of Criminal Procedure for quashment**

In the matter of:

Shantanu Barua and others

..... Accused-petitioners

-VERSUS-

The State and another

.....Opposite Parties

Mr. Faisal Dastagir, Advocate

....for the accused-petitioner

Mr. Md. Zahed-Ul-Anwar, Advocate

.....For the Opposite party No. 02

Mr. Dr. Md. Bashir Ullah, D.A.G with

Mr. MMG Sarwar [Payel], A.A.G

----- For the State

Present:

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Badruzzaman

Judgment on 27.08.2020

Jahangir Hossain, J:

By this Rule the opposite parties were asked to show cause as to why the proceeding in C.R Case No. 194 of 2017 [Khulshi] filed under section 27 of the Real Estate Unnayan-O-Bebosthapona Ain,

2010, now pending in the Court of Metropolitan Magistrate, Cognizance Court No. 02, Chattogram should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

The fact of the case, in a nutshell is that the opposite party No. 02 being complainant filed a petition of complaint before the Chief Metropolitan Magistrate, Chattogram alleging, inter alia that he is the land-owner and the accused-petitioner No.01 is the Chairman, accused-petitioner No.05 is the Managing Director and remaining are Directors of the developer-company namely "Singular Development Limited". The accused-petitioners offered the complainant to develop his land and the complainant accepted their offer. Thereafter, both the parties executed a deed of agreement, being Deed No. 16166 and

a power of attorney, being No. 16167, both registered on 22.08.2010 giving power to the accused-petitioners to develop the complainant's land on conditions that the accused-petitioners shall have to pay Tk. 30,00,000/-[thirty lakh] as signing money out of which Tk. 20,00,000/-[twenty lakh] has been paid and rest Tk. 10,00,000/[ten lakh] was to be paid within 03[three] months after the date of registration of the agreement. Permission from the Chattogram Development Authority [shortly the CDA] by the accused-petitioners to be taken within six months and the building to be constructed within forty months from the date of its inception of the work and the complainant would get 45% of his portion of the share after construction. After completion of the formalities, the accused-petitioners did not start the work nor did they take possession of the complainant's

land despite several requests to the accused-petitioners and lastly, vide exchange of legal notices notified the accused-petitioners to start development-work but with no effect. Hence, the complainant has filed the instant case against the accused-petitioners.

Having examined the complainant under section 200 of the Code of Criminal Procedure [briefly the Cr.P.C] the Metropolitan Magistrate took cognizance and issued summons against the accused-petitioners by order dated 24.07.2017. The accused petitioners appeared in the case and thereafter, filed an application before this Court under section 561A of the Cr.P.C for quashment of the entire proceeding of the case and obtained the instant rule with an order of stay from this Court by order dated 14.01.2018. The ad-interim order of stay has been extended from time to time.

Mr. Foysal Dastagir, learned Advocate for the accused-petitioners, at the very outset, contends that as per clause 10 of the agreement, the complainant on his own must complete some mutations, land tax and other formalities over the land and shall deposit all the necessary documents after its completion and give exclusive possession of the land to the accused-petitioners so that they could start developing work. The accused-petitioners through different letters, oral request and even legal notice approached the complainant to comply with clause 10 of the registered Deed of Agreement but he has miserably failed to do so. It is further contended that the accused-petitioners, in compliance of clause 20 which refers to arbitration of dispute it arises between the parties, offered the complainant to

resolve the dispute but he did not pay heed to that effect.

As per section 36 of the Real Estate Unnayan -O- Bebosthapona Ain, 2010 [hereinafter referred to as Ain] any dispute between the developer and the land owner must be resolved themselves through arbitration. If not amicably solved, the parties can opt for resolving the matter under Arbitration Act 2001 following the proper procedure. But the complainant did not avail the said course of action rather instituted the criminal proceeding which is barred by law and as such, the proceeding brought against the accused petitioners is an abuse of the process of the court and the same is liable to be quashed for securing ends of justice.

On the other hand, Mr. Md. Zahed-Ul-Anwar, learned Advocate for the opposite party No. 02 by filing counter-affidavit

submits that the complainant mutated 0835 decimals of land to be constructed by the accused-petitioners as per clause 2 of the deed of agreement wherein it has been stated that if the complainant fails to mutate his name in some of the land but the remaining being mutated shall be constructed after taking approval from the CDA.

Learned Advocate further submits that on 12.07.2012 the complainant [opposite party No. 02] served notice to the accused-petitioners demanding compensation and also requested for starting construction work. Thereafter, the opposite party No.02 again served another legal notice on 21.03.2013 and finally sent a legal notice through registered post on 01.12.2016 [signed on 29.11.2016] to resolve the dispute by Arbitration Tribunal within 30 days from the date of its receipt. It is further

submitted that there are so many questions of facts involved in this Case which cannot be judged under section 561A of the Cr.P.C and as such, the Rule is liable to be discharged with cost.

Mr. MMG Sarwar, learned Assistant Attorney General appearing on behalf of the State-opposite party No.01 referring to the decision held in the case of Shahnawaz Akhand-Vs-State and another, reported in 16 BLC [2011] 438 submits that it is not mandatory to exhaust the arbitration clause as cited in the deed of agreement before filing the complaint because the alleged offence is a distinct offence committed by the accused-petitioners.

Heard the contentions of learned Advocates of both the sides, perused the application filed under section 561A of the Cr.P.C along with the petition of complaint, deed of agreement, counter-

affidavit filed by the opposite party No. 02 and other connected documents annexed herewith wherefrom it transpires that the dispute, based on non-compliance, has been ascended between the land owner and the developer-company who executed a deed of agreement and a power of attorney in order to construct building over the scheduled land measuring 0941 decimals cited in the petition of complaint. It appears from the petition of complaint that the opposite party No. 02 received an amount of Tk. 20,00,000/-[twenty lakh] out of Tk. 30,00,000/-[thirty lakh] as signing money from the developer [accused-petitioner No.05]. As per Deed of Agreement, the complainant's liability was that he would mutate his name in the land and hand over the same to the accused petitioners accordingly. The opposite party No. 02 mutated •0835 decimals of land out of •0941

decimals and requested the accused-petitioner No. 05 through legal notices to construct the building over the land mutated as per clause 2 of the deed of agreement but the accused did not pay any heed to that effect. From the contentions of the learned Advocate for the accused-petitioners it appears that during the course of correspondences the accused-petitioners made blame upon the complainant that he has failed to hand over possession of the land whereupon the construction work was supposed to be done. This argument cannot be considered at this stage under section 561A of the Cr.P.C rather it can be looked into at the time of taking evidence.

Now let us see whether there is any bar by the Ain, 2010 to initiate a criminal case against the accused-petitioners without exhausting the provisions laid down thereof. Section 27 under which the case

has been lodged by the opposite party No. 02 stipulates as follows:

“১০। ডেভেলপার কর্তৃক প্রতারণামূলক অপরাধের

দণ্ড।- যদি কোন ডেভেলপার কোন ভূমির মালিকের সহিত রিয়েল এস্টেট উন্নয়ন বিষয়ে চুক্তি সম্পাদন করিয়া বা ক্রেতা বরাবর রিয়েল এস্টেটের বরাদ্দপত্র সম্পাদন করিয়া তদনুযায়ী কোন কার্যক্রম গ্রহন না করে বা আংশিক কার্যক্রম গ্রহণ করিয়া বিনা কারণে অবশিষ্ট কাজ অসম্পাদিত অবস্থায় ফেলিয়া রাখে এবং তজ্জন্য ভূমির মালিককে বা, ক্ষেত্রমত, ক্রেতাকে কোনরূপ আর্থিক সুবিধা প্রদান না করে তাহা হইলে উহা এই আইনের অধীন একটি প্রতারণামূলক অপরাধ বলিয়া গণ্য হইবে এবং উক্ত অপরাধের জন্য ডেভেলপার অনূর্ধ্ব ২(দুই) বৎসর কারাদণ্ড অথবা অনূর্ধ্ব ২০(বিশ) লক্ষ টাকা অর্থদণ্ড অথবা উভয়দণ্ডে দণ্ডিত হইবে।”

It appears that admittedly, the accused-petitioner No.05 did not take any step to construct the building over the scheduled land which was not handed over to him by the complainant. Nothing has been found in the proceeding of the case that the accused petitioner No. 05 took step to get the possession of the land and

construct the building thereof. But there is an argument on behalf of him advanced by his learned Advocate that section 36 of the Ain has not been complied with by the opposite party No. 02 prior to lodging the instant case. Now we are to see what has been incorporated in section 36 of the Ain, 2010 which runs as follows,

“ ৩৬। বিরোধ নিষ্পত্তি। (১) রিয়েল এস্টেট প্রকল্প

বাস্তবায়নের যে কোন পর্যায়ে প্রকল্প সংশ্লিষ্ট ক্রেতা, ডেভেলপার, অথবা ভূমির মালিকের মধ্যে এই আইনের ধারা ২১, ২২, ২৩, ২৪, ২৫, ২৭, ২৮, ২৯ এবং ৩০ এ বর্ণিত অপরাধের জন্য বা তাহাদের মধ্যে সম্পাদিত চুক্তির কোন বিধান লংঘনের জন্য মতবিরোধের সৃষ্টি হইলে পক্ষগণ, প্রথমে নিজেদের মধ্যে আপোষে উহা নিষ্পত্তির চেষ্টা করিবেন।

(২) উপধারা (১) অনুযায়ী আপোষের পদক্ষেপ গ্রহণের পর যদি কোন পক্ষের অসহযোগিতার জন্য উহা ব্যর্থ হয় তবে অপরপক্ষ বিবাদমান বিষয়টি নিষ্পত্তির জন্য সালিস আইন, ২০০১ মোতাবেক সালিসী ট্রাইব্যুনালে যাওয়ার অভিপ্রায় ব্যক্ত করিয়া অপরপক্ষকে নোটিশ প্রদান করিবেন।

(৩) উপধারা (২) এর অধীন নোটিশ প্রাপক উক্ত নোটিশ প্রাপ্তির ৩০(ত্রিশ) দিনের মধ্যে নোটিশ প্রেরকের সহিত যৌথভাবে সালিসী ট্রাইব্যুনাল গঠন করিবেন।

(৪) সালিস আইন, ২০০১ এ যাহা কিছুই থাকুক না কেন, পক্ষগণ কর্তৃক গঠিত সালিসী ট্রাইব্যুনালের রোয়েদাদ পক্ষগণ এবং তাহাদের মাধ্যমে বা অধীনে দাবীদার যেকোন ব্যক্তির উপর বাধ্যকর হইবে এবং উহার বিরুদ্ধে কোন আদালতে কোন পক্ষের আপত্তি উত্থাপনের অধিকার থাকিবে না। (৫) উপ-ধারা (৩) মোতাবেক পক্ষগণ সালিসী ট্রাইব্যুনাল গঠনে ব্যর্থ হইলে যেকোন পক্ষ বিবাদমান বিষয়টি বিচারের জন্য এই আইনের অধীন উপযুক্ত আদালতে মামলা দায়ের করিতে পারিবেন। ”

When the law itself says incorporating section 36 in the Ain, that initially the parties shall try to compromise the dispute between them and if such initiative fails, an aggrieved party shall send notice upon the person who shows non-cooperation with him. From the date of receipt of the notice, both parties shall jointly constitute an Arbitration Tribunal and the decision of the arbitration tribunal shall be binding upon both parties. But if the parties fail to constitute Arbitration Tribunal, then the aggrieved party may file the criminal proceeding before the

competent court of law. Here, it is compulsory/mandatory upon the parties to exhaust the arbitration clause prior to bringing any allegation under the Ain, 2010. It is not like the case of 16 BLC [2011] 438 in which it has been found that there was an arbitration clause inserted in the deed of agreement without referring to any law of the land but in the present case the arbitration clause has been stated in the deed of agreement as per section 36 of the Ain, 2010. Therefore, the very law itself says, that prior to lodging any case under the Ain the aggrieved party has to meet the aforesaid requirement of the Ain. So the contention of the learned AAG is not relevant in the present case in hand.

However, it appears from petition of complaint that the accused-petitioner No. 05 as per deed of agreement paid Tk. 20,00000/-[twenty lakh] as signing money to

the opposite party No. 02 after execution of the deed of agreement and power of attorney. The opposite party No. 02 mutated the maximum portion of the land measuring 0.0835 decimals out of 0.0940 and urged the accused-petitioner No.05 orally and even through legal notice to take over the possession of the land and construct building thereon but had no effect to it. The accused-petitioner No.05 has failed to pay the remaining signing money of Tk. 10,00000/-[ten lakh] within three months. He has also failed to obtain approval of building plan from CDA within 06[six] months and has also failed to construct the building over the scheduled land within forty months as per the deed. It also appears that the complainant [opposite party No. 02] tried to hand over the possession of the land to the accused-petitioner No. 05 after completion of

mutation of •0835 decimals of lands out •0940 decimals but it was all in vain. The opposite party No. 02 thereafter, served legal notice to him on 12.07.2012 and also made requests on 25.09.2012 and 21.03.2013 respectively. Lastly, he served another legal notice signed on 29.11.2016 to the accused-petitioner No. 05 by a registered post with acknowledgement due on 01.12.2016 requesting him to constitute an Arbitration Tribunal in order to resolve the dispute but the accused-petitioner No. 05 did not pay any heed to that effect. Even, according to the petition of complaint the opposite party No. 02 along with some witnesses went to the office of the accused petitioner No. 05 on 18.06.2017 at 03:00 pm but he directly refused to abide by the deed of agreement. From the facts aforesaid, it is quite clear that a case is here against him in prima facie that has to

be proved by providing evidence at the trial.

On perusal of the complaint petition it reveals that the opposite party No. 02 as complainant filed the instant case implicating 09[nine] persons including the managing director [accused-petitioner No.05] of the company in the commission of offence. The complainant did not make it clear in the complaint petition as to the involvement of the other accused-petitioners except the accused-petitioner No.05, Managing Director of the company and whether they had any knowledge or complicity about the deed of agreement and the power of attorney. The complainant as the owner of the land and the accused-petitioner No. 05 as the Managing Director of the company signed the deed of agreement and the accused-petitioner No.05 has been made attorney in order to sell out the

flats if the construction is done along with other necessary acts and deeds. The legal notices, which have been allegedly mentioned in the complaint-petition with particular dates, were also served by the complainant addressing the accused-petitioner No. 05 only. Hence, the knowledge and participation by the other accused-petitioners becomes doubtful in the function of the alleged transaction.

If, the other accused-petitioners had no knowledge and participation in the dealing with the task of developing work as per deed of agreement, they will not be held responsible in the alleged crime under section 27 of the Ain.

Section 31 of the Real Estate Unnayan-O-Bebosthapon AIn, 2010 which runs as follows,

“৩১। কোম্পানী কর্তৃক অপরাধ সংঘটনঃ- এই আইনের

অধীন কোন ডেভেলপার নিগমিত (incorporated) কোম্পানী

হইলে উক্ত কোম্পানীর মালিক, পরিচালক বা কোন কর্মকর্তা যাহার
জ্ঞাতসারে এবং অংশগ্রহণে এই আইনের অধীন কোন অপরাধ
সংঘটিত হইবে তিনি উক্ত অপরাধের জন্য ব্যক্তিগতভাবে দায়ী
হইবেন।”

According to this section, accused-petitioner Nos. 2-9 must have knowledge and participation in the transaction but it is totally absent in this case. They may be chairman and directors of the company but merely on this point of view it cannot be said that they were involved in the alleged crime as brought by the complainant. From the entire dossier of the case before us it seems that the allegation against the other accused-persons is a very perfunctory one which does not constitute any offence against them, under the Ain, 2010.

According to the petition of complaint, the opposite party No. 02 informed the developer that the mutation of some land has been done in his name and requested to

take over the possession of the same to prepare plan for the construction with the permission from CDA. When it was not done by the developer then the dispute arose. As per section 36(1) of the Ain, 2010 opposite party No.02 made attempt to resolve the dispute within the ambit of both parties' initiation.

It also appears that opposite party No. 02 invited the developer i.e accused-petitioner No. 05 through legal notice in order to constitute Arbitration Tribunal under Salish Ain, 2001 within 30[thirty] days from the date of receipt of the notice. But Arbitration Tribunal could not be constituted due to the ignorance of the accused-petitioner No. 05 as alleged in the complaint-petition. It is to be noted here that the accused-petitioner No. 05 had invested and paid Tk. 20,00000/-[twenty lakh] to the opposite party No. 02 as

signing money. And as such he ought to have shown his interest faster than the opposite party No. 02 to perform his part as per the Deed of Agreement but it was apparently silent on his part. If the land owner showed any sort of negligence in respect of the Deed, then the accused-petitioner No. 05 could bring the allegation before appropriate court of law but he did not do so. Now, he is saying negligence was done by the opposite party No.02 that as defence materials and question of facts which cannot be verified under section 561A of the Cr.P.C. The present claim of the accused-petitioner No.05 may be taken into consideration at the time of trial of the case. And as such, we do not find merit in the Rule in respect of accused-petitioner No.05.

Therefore, the proceeding against the other accused-persons [petitioner Nos. 2-9]

except the accused-petitioner No. 05 is hereby quashed. In the above discussion and view, the rule is made absolute in part.

The order of stay, granted earlier shall stand vacated.

The trial court is directed to proceed with the case against the accused-petitioner No. 05 expeditiously.

Communicate the Judgment and order at once.

Md. Badruzzaman,J

I agree