

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Miscellaneous Appeal No. 04 of 2019

In the matter of:

Syed Md. Altaf Hossain, son of late Syed Md. Moksed Ali of Maddy Kanudaskathi, Police Station- Rajapur, District- Jhalakathi and another.
... Appellants

-Versus-

Harun Or Rashaid and others.
... Respondents.

Mr. Taposh Kumar Dutta, Advocate
... For the appellants

Mr. Md. Abdur Rahim, Advocate
... For the respondent nos. 1 and 2

Heard and Judgment on 11.06.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of petitioners in Miscellaneous Case No. 15 of 2015 initiated under section 42 of the Arbitration Act, 2001 dismissing the case, this appeal has been preferred.

The salient facts leading to preferring this appeal are:

The present respondent nos. 1 and 2 as first party made a complaint to the Chairman of Galua Union Parishad, Jhalakathi to settle some landed

dispute with the second party to the petition of complaint (who are the appellants in the instant appeal) and accordingly, the said Chairman appointed as many as seven arbitrators to settle the dispute.

The case so have been described by the first party herein the respondent nos. 1 and 2 as found from the Award (রোয়েদাদনামা) annexed with the impugned judgment are:

The property in J. L. No. 39 of Kanudaskathi Mouza corresponding to S. A. Khatian No. 1966 originally belonged to one, Foyzuddin who died leaving behind one daughter, Chanbaru Bibi and after the demise of Chanbaru Bibi, the full-brother of Foyzuddin namely, Moslem Ali got required share as per inheritance left by his full-brother and after the demise of Moslem Ali, his two sons, the first party herein the respondent nos. 1 and 2 became the heirs as the nephews of Foyzuddin. It has further been asserted that, out of two brothers that is, the said first parties to the said Award, the elder brother, Delwar Hossain got married to the daughter of Chanbaru namely, Shahana Begum and since Shahana Begum died issueless then the said Delwar Hossain was entitled 8 annas share left by Shahana Begum. On the contrary, the case of the present appellants who are the second party found from the Award that, the property of S. A. Khatian No. 1966 originally belong to one, Foyzuddin and after the demise of Foyzuddin, his only daughter Chanbaru got the entire property left by him and after the death of Chanbaru Bibi, her one son, Md. Altaf Hossain and one daughter, Most. Peyara Begum that is, the grandchildren of Foyzuddin became his successors who are the second party to the Award and they are entitled to the property left by their predecessor, named,

Foyzuddin. However, the arbitrators so appointed by the Chairman took up the matter and after framing three different issues and considering the materials so placed before them finally passed an award providing 36.75 decimals of land to the first party to the Award and 106.167 as well as 53.083 decimals to Peyara Begum and Mir Altaf Hossain respectively, the present appellants in this appeal. However, challenging the said award, the second party to the said award filed a Miscellaneous Case being Miscellaneous Case No. 15 of 2015 under section 42 of the Arbitration Act, 2001 for setting aside the award. The learned Additional District Judge, Jhalakathi took up the said case for disposal and by framing different issues and upon considering the material and evidence on record dismissed the said case holding that, there has been no illegality in the award as the award was given as per the *ochalnama* (অচলনামা) so have been furnished by the parties dated 11.12.2014 and the petitioners-appellants remained present in three consecutive occasions before the arbitrators having no occasion to set aside the award. It is at that stage, the petitioners of the said Miscellaneous Case as appellants came before this court and preferred this appeal.

Mr. Taposh Kumar Dutta, the learned counsel appearing for the appellants by filing a supplementary-affidavit and upon taking us to the impugned judgment as well as the award at the very outset submits that, under no circumstances, can an award be given by the alleged seven arbitrators going beyond the statutory provision provided in Arbitration Act, 2001.

To supplement his such submission, the learned counsel then refers the provision of section 27 of the Arbitration Act and contends that, how an arbitration will be initiated has clearly been stated in that section which is totally absent in the entire proceedings alleged to have been made and initiated at the instance of the local Chairman by appointing seven arbitrators.

The learned counsel by referring to section 12 of the Arbitration Act also contends that, in that very provision, there has also been clear stipulation how an arbitrator will be appointed and since the alleged arbitration has been initiated long after the promulgation of the Act of 2001 so there has been no scope to go beyond the said provision in the Arbitration Act.

By pointing out to the impugned judgment, the learned counsel further contends that, from the judgment, it is on the record that on 30.11.2014, the parties to the arbitration mentioned the name of the arbitrators so there has been no scope for any proceedings or any hearing to be held beforehand and therefore, the impugned judgment can never be sustained.

Insofar as regards to the validity of the *ochalnama* dated 11.12.2014, the learned counsel further contends that, that *ochalnama* has got no application in the entire Arbitration Act because in order to initiate an arbitration there must be an agreement where a clause of resolving any dispute is to be incorporated therein but admittedly in the alleged *ochalnama* nothing short of this has been inserted.

The learned counsel by referring to the award also contends that, in that very award, there has been nothing to show any participation of the present appellants who will shown as second party even though out of seven arbitrators, there has been no signature of one arbitrator therein rendering that award as nullity.

The learned counsel by referring to the provision of section 43 of the Arbitration Act also contends that, under what circumstances, an award can be cancelled has clearly been set out therein and clause (umo) to section 43(1) as well as sub-clause (অ) of clause (খ) are applicable in setting aside an award and the alleged award is totally inconsistent with the Arbitration Act and the arbitrators reserve no authority to make any award as per the prevailing law. With those legal submissions, the learned counsel finally prays for allowing the appeal by setting aside the impugned judgment vis-à-vis the alleged award.

On the contrary, Mr. Md. Abdur Rahim, the learned counsel appearing for the respondent nos. 1 and 2 opposes the contention taken by the learned counsel for the appellants and submits that, as per section 9 of the Arbitration Act, there has been no impropriety or illegality on the part of the arbitrators to settle the dispute and therefore, the arbitrators had every authority as per the said section to give award and the learned Additional District Judge has rightly dismissed the Miscellaneous Case finding the award has been passed legally and within the framework of the provision of law.

When the learned counsel is confronted with the authority exercised by the seven arbitrators to settle any landed dispute other than the

respective court of law, the learned counsel then finds it difficult to make any submission to that effect as the arbitrators in the alleged award has distributed the property so left by Foyzuddin among his successors which can only be adjudicated by a competent civil court not by any private persons in holding arbitration. At this, the learned counsel though contends that, such kinds of arbitration (সালিশ) is prevalent in this country having no scope to rule out the said reality but we don't find any substance to the said submission because no court can give such recognition of any kind of Arbitration (সালিশ) other than permitted by any statute.

Anyway, we have considered the submission so advanced by the learned counsel for the appellants and that of the respondent nos. 1 and 2 and perused the memorandum of appeal and other documents appended therewith.

Now let us look at the judgment passed by the learned Additional District Judge. While the learned Additional District Judge dismissed the Miscellaneous Case failed to touch upon any legal point as enshrined in different sections of Arbitration Act, 2001. Since that Miscellaneous Case was filed under the provision of section 42 of the Arbitration Act, the learned Judge ought to have looked into the Arbitration Act but in the entire judgment, there has been no discussion with regard to legal provision of the Arbitration Act let alone the provision provided in section 43 of the Act through which an award can be set aside rather he discussed and observed some extraneous facts which is totally unsustainable in the eye of law which proves the lack of legal acumen of the learned Additional District Judge in adjudicating the Miscellaneous Case which was filed

under section 42 of the Arbitration Act. However, we find that, section 9 of the Act has got no application in appointing any arbitrator to resolve any dispute among the parties in absence of any agreement or any contract and under no circumstances, can an *ochalnama* be considered any contract within the mischief of section 9 or section 12 of the Arbitration Act, 2001. Over all, the learned Additional District Judge has committed a grave mistake in not perusing the legal provision filed for setting aside the award.

Given the above facts and circumstances, we don't find any shred of substance in the impugned judgment which is liable to be set aside.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and order dated 20.05.2018 passed by the learned Additional District Judge, Jhalakathi in Miscellaneous Case No. 15 of 2015 is hereby set aside consequently, the so called award given by a seven member of arbitrators annexed with the impugned judgment dated 09.04.2015 stands strike down.

Let a copy of this judgment be transmitted to the learned Additional District Judge, Jhalakathi forthwith.

Md. Bashir Ullah, J.

I agree.