In the Supreme Court of Bangladesh
High Court Division
(Civil Appellate Jurisdiction)

First Miscellaneous Appeal No. 178 of 2019.

With

Civil Rule No. 272 (FM) of 2019.

In the matter of:

Md. Mostafizur Rahman
……. Plaintiff-Appellant.
Vs.
Ms. Amin Maria and others.
……Defendant-Respondents.
Mr. Probir Neogi, Senior Advocate with
Mr. Md. Mozammel Hossain, Advocate
…For the Plaintiff-Appellant.
Mr. Md. Monzur Alam Khan, Advocate
..For the Opposite Party Nos. 1 & 3 and Respondent Nos. 1 & 3.

With

CIVIL REVISION NO. 52 of 2020

In the matter of:

An Application under Section 115(1) of the Code of Civil Procedure.

And

In the matter of:

Md. Mostafizur Rahman.
…….. Petitioner.
Vs.
Mrs. Amin Maria and others.
……..Opposite Parties.
Mr. Dipayan Saha with
Mr. Purnindu Bikash Das, Advocate
….. for the petitioner.
Mr. Md. Monzur Alam Khan, Advocate
..For the opposite party No.1.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Ahmed Sohel

Heard on 18.11.2021 and 02.12.2021.
Judgment on 08.12.2021.

SHEIKH HASSAN ARIF, J

1. Since the questions of law and facts involved in the aforesaid appeal and civil revision are almost same, and they have

arisen from the same suit between the same parties, the same have been taken up together for hearing and are now being disposed of by this common judgment.

1.1 **First Miscellaneous Appeal No. 178 of 2019** is directed, at the instance of the plaintiff in Title Suit 500 of 2018, against Order No. 08 dated 19.02.2019 passed by the First Court of Joint District Judge, Dhaka in the said suit thereby rejecting the application seeking temporary injunction filed by the plaintiff.

1.2 Rule in **Civil Revision No. 52 of 2020** was issued, at the instance of the same plaintiff in the same suit, calling upon the opposite parties to show cause as to why the Order No. 17 dated 17.10.2019 passed by the said Court in the said suit, namely Title Suit No. 500 of 2018, thereby allowing an application filed by the defendant No.1 under Sections 7 and 10 of the Arbitration Act, 2001 and thereby staying all further proceedings of the said Title Suit.

2. <u>Background Facts:</u>

2.1 Since the appellant and the petitioner in both the appeal and civil revision are same person, namely the plaintiff in

the title suit concerned, we will refer him as plaintiff in this matter for the sake of convenience in our discussion.

2.2 Facts, relevant for the disposal of the appeal and Rule, in short, are that the appellant/petitioner, as plaintiff, filed the said Title Suit No. 500 of 2018 against the land owner and two developers seeking Specific Performance of Contract dated 10.04.2014 (Annexure-D in Civil Revision) between the plaintiff and the said two developers and land owner in respect of some flats and proportionate land as mentioned in schedule “Ka” and “Kha” to the plaint.

2.3 The case of the plaintiff, in short, is that the defendant No. 1, being owner of 5 katha land as mentioned in ‘Ka’ schedule to the plaint, entered into a registered development agreement, being No. 8801 dated 28.07.2011, with defendant No.2 developer company (in short “Nagor Vision”) to develop the said property. Accordingly, an irrevocable power of attorney giving extensive power was executed by the land owner (defendant No.1) on the same day in favour of the said developer (Nagar Vision). That during continuation of construction, since Nagor Vision fell into financial crisis, it entered into another development agreement with defendant No. 4-developer vide registered

deed No. 9364 dated 13.10.2013 for development of the said property. Subsequently, when the defendant Nos. 1-5 could not continue with the construction/development work because of financial crisis, they executed a registered Baina with the plaintiff on 10.04.2014 for transfer of the developer's portion of the land and flats in favour of the plaintiff. That, as per the terms of the said Baina, the plaintiff paid the entire money, namely Tk. 2,74,22,996.45. However, since the defendants were still unable to complete the development work, the plaintiff paid further amount of Tk. 56,77,003.55 and, accordingly, the plaintiff paid in total Tk. 3,31,00,000/-. That, in the meantime, the construction of the building has been completed and the land owner (defendant No.1) has got her portion of 50% flats as well as car parking spaces in possession and rented out some of them to the tenants. However, the defendants started delaying in giving registered kabala in favour of the plaintiff in respect of the remaining 50% of flats and lands and, accordingly, the plaintiff issued legal notice, but got no positive response. Thus, the plaintiff has filed the said suit seeking Specific Performance of the said Baina dated 10.04.2014.

2.4 Along with the said suit, the plaintiff filed an application under Order 39, rules 1 and 2 read with section 151 of the Code of Civil Procedure seeking injunction for restraining the defendant Nos. 1 and 3 from evicting the tenants of the plaintiff in the suit property. The said application was objected by defendant Nos.1 and 3 by filling written objection mainly contending that the baina in question had adopted the terms and conditions of the earlier development agreement between defendant Nos.1 and 2 and as such by such adoption, the said baina incorporated the arbitration clause as mentioned in clause 17 of the said development agreement. This being so, it was contended by the said defendants by way of such written objection that the relief could not be sought in the way as had been sought by the plaintiff by filling the said suit, rather the plaintiff should have invoked arbitration clause as per Clause 17 of the said development agreement between defendant Nos. 1 and 2 as adopted in the baina in question.

2.5 Thereupon, the Court below, after hearing the parties, rejected the said application seeking temporary injunction vide impugned Order No. 8 dated 19.02.2019 on the ground that the baina in question in fact adopted and incorporated

the arbitration clause as stipulated in Clause 17 of the earlier development agreement between defendant Nos. 1 and 2. Being aggrieved by this order of rejection, the plaintiff has preferred the aforesaid First Miscellaneous Appeal No. 178 of 2019. Upon admission of the said appeal and on an application filed by the plaintiff, this Court issued the connected Rule, being Civil Rule No. 272 (FM) of 2019, and, at the time of issuance of the Rule, vide an ad-interim order dated 03.04.2019, directed the parties to maintain status-quo in respect of possession and position of the suit property for a period of 06 (six) month, which was subsequently extended for further periods in due course.

2.6 Thereafter, the defendant No. 1 filed an application before the Court below under Section 7 read with Section 10 of the Arbitration Act, 2001 seeking stay of the further proceedings of the said suit on the ground that the baina in question adopted an arbitration clause as incorporated in Clause-17 of the development agreement between defendant Nos. 1 and 2 and as such it was contended that the suit in question should be stayed allowing the parties to resolve their disputes through arbitration. The said application was opposed by the plaintiff by filling written

objection mainly contending that the arbitration clause, as incorporated in Clause-17 of the said development agreement dated 28.07.2011, was only applicable to the parties to the said development agreement and that the parties to the baina in question could not be bound by such arbitration clause as incorporated in the said development agreement. It was further contended that although by Clause-12 of the baina agreement, terms and conditions of the earlier development agreement dated 28.07.2011 was adopted to the effect that the parties would be bound by the stipulations in the said agreement, such stipulation as incorporated in Clause-12 of the baina will only apply to the developers portion of the building and in no way will bind the parties to go for arbitration for resolving the dispute arising out of the said baina.

2.7 Thereupon, the Court below, after hearing the parties, allowed the said application filed by the defendant No.1 vide impugned order dated 17.10.2019 and thereby stayed all further proceedings of the said Title Suit No. 500 of 2018 by invoking Section 10 of the Arbitration Act, 2001. Being aggrieved by this order, the plaintiff has invoked the revisional jurisdiction of this Court under Section 115 of the

Code of Civil Procedure and obtained the aforesaid Rule in Civil Revision No. 52 of 2020. At the time of issuance of the Rule, this Court, vide ad-interim order dated 12.01.2020, stayed operation of the said impugned order dated 17.10.2019 for a period of 06(six) months, which was subsequently extended for further periods in due course.

2.8 The Appeal and Rule are opposed by defendant-respondent Nos.1 and 3 (defendant-opposite party Nos. 1 and 3) through learned advocate Mr. Md. Monzur Alam Khan, who also filed an application for vacating the order of stay, which was kept with the record.

3. <u>Submissions:</u>

3.1 Mr. Probir Neogi, learned senior counsel appearing for the appellant and petitioner in both the matters, mainly submits that there are three agreements between the parties, namely that the first development agreement between defendant Nos.1 and 2, the 2nd development agreement between defendant No. 2 and defendant No. 4 and the 3rd one is the baina in question between the defendants and the plaintiff. Therefore, according to him, although Clause-12 of the registered baina agreement dated 10.04.2014 has

stipulated about the binding effect of the stipulations in the 1st development agreement dated 28.07.2011, such clause will only apply in respect of the developers' portion of the properties, namely 50% of the flats and land, and as such the arbitration clause, as incorporated in Clause 17 of the 1st development agreement dated 28.07.2011, will not be applicable in respect of the said baina. According to him, it is the cardinal principle of interpretation of any document that for interpretation of any clause therein the entire document has to be examined and considered and the said particular clause has to be interpreted as against the context of the entire agreement. Therefore, according to him, clause 12 of the baina dated 10.04.2014 read with Condition No.1 of the said deed makes it clear that the reference made in the said clause in respect of the conditions of the 1st development agreement will only be limited to the extent of share of the developer in the concerned property. In support of his such submissions, he has referred to different pages of the book authored by our late lamented constitutional lawyer Mr. Mahmudul Islam, namely the book titled "**Interpretation of Statutes and Documents"**, Mahmudul Islam, 1st Edition, pages 306-307 and 355-357. Accordingly, he submits that both the

impugned orders being mainly based on the finding of the Court below that the subsequent baina dated 10.04.2014 has incorporated the arbitration clause as stipulated by Clause No. 17 of the first development agreement dated 28.07.2011, the same cannot stand in the eye of law.

3.2 As against above submissions, Mr. Md. Monzur Alam Khan, learned advocate appearing for the defendant-appellants (defendant-opposite parties), submits that Clause-12 of the baina in question has left no doubt about incorporation of the arbitration clause as incorporated in the development agreement dated 28.07.2011, particularly when the said baina was executed not only between the plaintiff and the subsequent developer, rather it was executed between the plaintiff and both the developers and the land owner. This being so, according to him, under no circumstances, the said Clause-12 of the baina in question can be interpreted in an isolated way thereby applying the same only to the developers' portion of the land particularly when the question of arbitrability of the dispute between the parties arises. According to him, although the baina has been executed by the parties in respect of developer's portion of the developed building and land, the said baina has

specifically referred to the terms and conditions of the first development agreement between the defendant Nos. 1 and 2. Therefore, according to him, any dispute, as may arise from the said baina in question, has to be resolved by reference to two earlier development agreements between defendant No.1 and 2 and in between defendant No.2 and 4. This being so, he submits that under no circumstances the dispute arising from the said baina in question can be resolved without invoking the stipulations as incorporated in the said first development agreement dated 28.07.2011.

4. <u>Deliberations, Findings and Orders of the Court</u>:

4.1 To address the issues raised by the parties and to understand the issues whether the baina in question has in fact adopted the arbitration clause as stipulated by Clause 17 of the first development agreement, we have examined the relevant provisions of the Arbitration Act, 2001, in particular the definition of the term ‘arbitration agreement’ (সালিশ চুক্তি) and the provisions under Section 10 of the said Act. For our ready reference, both the provisions, namely Section 2 (Dha) and Section 10 of the Arbitration Act, 2001 are reproduced below:

"২।(ঢ) "সালিস চুক্তি" অর্থ সুস্পষ্টভাবে বিধৃত চুক্তিগত বা চুক্তিবহির্ভুতভাবে পারস্পরিক সম্মতিক্রমে আইনানুগ সম্পর্ক হইতে উদ্ভুত কিংবা উদ্ভুত হইতে পারে এইরুপ সকল বা যে কোন বিষয়ের বিরোধ সালিসের মাধ্যমে নিষ্পত্তি করার জন্য উক্ত আইনানুগ সম্পর্কের পক্ষগণ কর্তৃক সালিসে প্রেরণ করা সম্পর্কিত চুক্তি;

১০। **বিরোধের সালিসযোগ্যতা-** (১) সালিস চুক্তির কোন পক্ষ বা উক্ত পক্ষের অধীন দাবীদার কোন ব্যক্তি সালিসের মাধ্যমে মীমাংসা হইবে মর্মে মতৈক্য হইয়াছে এমন কোন বিষয়ে চুক্তির অন্য কোন পক্ষ বা অনুরুপ পক্ষের অধীন দাবীদার কোন ব্যক্তির বিরুদ্ধে কোন আদালতে কোন আইনগত কার্যধারা রুজু করিলে, উক্ত কার্যধারায় লিখিত জবাব দাখিল করিবার পূর্বে যে কোন পক্ষ বিষয়টি সালিসে অর্পণ করিবার জন্য সংশ্লিষ্ট আদালতে আবেদন করিতে পারিবে।

(২) উপ-ধারা (১) এর অধীন আবেদনের প্রেক্ষিতে আদালতের নিকট যদি প্রতীয়মান হয় যে, সংশ্লিষ্ট সালিস চুক্তি বিদ্যমান আছে এবং উহা বাতিল, অকার্যকর বা সালিস দ্বারা নিষ্পত্তির অযোগ্য হয় নাই, তাহা হইলে আদালত বিষয়টি সালিসে প্রেরণ করিবে এবং উক্ত কার্যধারা স্থগিত করিবে।

(৩) উপ-ধারা (১) এর অধীন আবেদন আদালতের বিবেচনাধীন এবং আইনগত কার্যধারা বিচারাধীন থাকা সত্ত্বেও সংশ্লিষ্ট বিষয়ে সালিস সূচনা করা, অব্যাহত রাখা এবং সালসী রোয়েদাদ প্রদান করা যাইবে।"

4.2 It appears from the above quoted definition of the term "সালিস চুক্তি", as provided by the said Act, that it has referred to the relationship between the parties under the agreement or beyond the agreement. It has also referred to a future dispute which may arise between the parties within the terms of the agreement or beyond the terms of the said agreement. Therefore, it appears from the term "সালিস চুক্তি"

that it has been defined by our Legislature in a very wide way thereby incorporating any dispute arising out of the relationship between the parties within the terms of the agreement and beyond the terms of the agreement. Same intention of the Legislature is apparent from the clear words as mentioned in the above quoted provisions under Section 10 of the said Act. Two types of parties to an arbitration agreement have been referred to therein, namely that the specific parties to such agreement or any party claiming under such parties to such agreement. Apart from above, Explanation to Section 9 (2) of the said Act categorically recognizes such arbitration agreement by way of reference to a contract containing such arbitration Clause [see **M.R. Engineers vs. Som Datt. Builders, 2009 (3) RAJ 448 (SC)**]. These being the specific provisions of law without giving any space for interpretation by the Court by referring to any other external materials or text books, we are of the view that an arbitration clause in an agreement may be adopted by other parties who are claiming under the parties to the said agreement if the agreement in between such other parties adopts the said arbitration clause in the main agreement for resolving the dispute arising from the said subsequent agreement. We find support of this position of

law in one case decided by the full bench of the Calcutta High Court in **Dwarkadas & Co. vs, Daluram, A.I.R 1951 Calcutta-10**.

4.3 With the above position of law, let us now examine the issues raised by the parties. Admittedly, the plaintiff in the suit concerned entered into the registered baina dated 10.04.2014 (Annexure-D to Civil Revision) as the First Party to the said contract. The Second parties to the said contract are Mrs. Amin Maria (land owner-defendant No.1), represented by the developer Nagor Vision Development Ltd. (defendant No. 2), and Nijhum Property Ltd., the subsequent developer (defendant No.4). Further admitted position is that the said agreement or baina was executed in respect of the developer's portion of the property, namely 50% of the property. Admittedly, defendant No.2 (Nagor Vision) and defendant No.4 (Nijhum properties) became parties to the said baina and executed the same mainly on the strength of the first development agreement, namely agreement dated 28.07.2011 (Annexure-D1 to the Civil Revisional application). Therefore, it appears that the land owner (defendant No.1) entered into a development agreement with defendant No.2 in 2011 and, pursuant to

the same, executed an irrevocable power of attorney giving extensive power in favour of defendant No. 2 for the development of the land and building thereon. Thereafter, on the strength of this agreement dated 28.07.2011 and the irreparable power of attorney executed on the same day, Nagor Vision (defendant No.2) entered into another development agreement with Nijhum properties (defendant No.4) for development of the said building because of its financial difficulties in continuing with the construction.

4.4 It now appears from the baina in question that because of the difficulties in continuing with such construction due to scarcity of funds, the said parties, namely the land owner (represented by Nagor Vision) and subsequent developer (Nijhum Properties) executed the said baina and thereby gave commitment to transfer 50% of the developed property (flats and proportionate land) in favour of the plaintiff. By virtue of Clause 12 of the baina in question, the parties to the baina agreed, amongst others, that the conditions in the first development agreement, namely agreement dated 28.07.2011, would be binding on them. Clause 12 of the said baina is reproduced below:

"১২। বিগত ২৫/০৫/১১ ইং তারিখে সম্পাদিত রেজিষ্ট্রিকৃত ব্যাপক ক্ষমতা সম্পন্ন একই আমমোক্তার নামা দলিল যাহার দলিল নং ৮৮০২ এবং একই তারিখে

সম্পাদিত ভূমির মালিক ও ডেভলপার এর মধ্যে রেজিঃকৃত চুক্তিনামা দলিল যাহার দলিল নং ৮৮০১ এ অনুযায়ী এর তপসিল সম্পত্তি কিংবা ডেভোলপমেন্ট এর সমুদয় হিস্যা অত্র ১ম পক্ষের বরাবর হস্তান্তর হইবে এবং উক্ত দলিলের সকল শর্ত মানিতে বাধ্য থাকিব।"

(Underlines supplied)

4.5 Admittedly, the first development agreement dated 28.05.2011 has an arbitration clause under Clause 17. The exact Clause 17 of the said development agreement is also reproduced below for our ready reference:

"১৭। অত্র চুক্তিপত্র নামায় পক্ষদ্বয়ের মধ্যে চুক্তি বিষয়ে কোন বিরোধ সৃষ্টি হইলে উক্ত বিরোধ নিষ্পত্তির জন্য ১ম ও ২য় পক্ষ উভয়ের সম্মতিক্রমে তিনজন শালিশকারক নিয়োগ করা হইবে। আরবিট্রেশন এ্যাক্ট-২০০১ এর বিধানমতে উক্ত শালিশকারকের রায় বা পরামর্শ সকল পক্ষ মানিয়া চলিতে বাধ্য থাকিবেন।"

4.6 Therefore, the question arose in the aforesaid appeal and Civil Revision is as to whether this Clause 17 of the first development agreement should be regarded as one of the clauses or conditions of the baina in question. As stated above, subsequent development agreement with Nijhum properties and the baina in question were executed by defendant Nos. 1-5 basically on the strength of the said first development agreement dated 28.07.2011 between the land owner and Nagor Vision. This basis of every subsequent transaction is further reflected from the context of the baina in question. Admittedly, the second

party in the said baina are the said land owner and subsequent developers (Nagor Vision and Nijhum Properties) and they jointly agreed to transfer the developer's portion of the properties, namely 50% of the developed properties, in favour of the plaintiff, and the suit in question has been filed for enforcement of the said registered baina.

4.7 Therefore, under no circumstances, the said registered baina can be examined in an isolated way. In other words, the said baina, or the terms of the said baina, cannot be examined with its entirety ignoring the terms of the said original development agreement dated 28.07.2011 and the power of attorney executed thereon. Different terms of the said baina in question also acknowledge such correlation. The said baina has also made specific reference in respect of the said development agreement between the land owner and Nagor Vision. Therefore, if the said baina categorically stipulates that the terms of the said development agreement, namely development agreement dated 28.07.2011, will be binding on the parties to the said baina, it cannot be said that the arbitration clause

incorporated in the development agreement is not incorporated or adopted by the parties in the said baina. It cannot be denied that the parties to the said baina, before execution of the same, have themselves read the terms and conditions of the said development agreement dated 28.07.2011 including Clause 17 therein, and upon realizing the terms and conditions thereof, they have agreed to execute the said baina incorporating Clause 12 therein stipulating that the parties to the said baina would be bound by the terms and conditions of the said development agreement dated 28.07.2011.

4.8 Therefore, as stated above, the parties to the said baina are now claiming to enforce their rights, or opposing such enforcement, under the parties of the said development agreement. Although the plaintiff was not a party to the said development agreement, by executing baina in question with Clause 12 therein, he has agreed to be bound by the terms of the said development agreement including Clause 17 thereof. Therefore, as per the definition of the ‘arbitration agreement’, as provided by Section 2 (Dha) of the Arbitration Act 2001, the said baina should be termed as an agreement which arose

from the said development agreement dated 28.07.2011 incorporating an arbitration clause therein under Clause-17. Thus, it cannot be denied that this baina dated 10.04.2014 also contains an arbitration agreement.

4.9 This being the position, it cannot also be denied that the parties claiming or opposing their rights and title under the said baina are doing so under the parties to the arbitration agreement. Accordingly, the relevant provisions of the Arbitration Act, 2001, in particular Section 10 of the same, may be invoked in case of any proceeding initiated by any of such parties before any Court in Bangladesh. In this regard, we have examined relevant parts of the book authored by Mr. Mahmudul Islam, namely the book titled “Interpretation of Statutes and Documents”. However, the contents of those parts are not relevant in the facts and circumstances of this case.

4.10 In view of above, since in the suit concerned the defendant No.1, who is admittedly a party to the said development agreement dated 28.07.2011 and the baina in question, has the right to file an application before the Court seeking stay of further proceedings of the said suit

by referring to the arbitration clause, or arbitration agreement, between the parties, the Court below has committed no illegality in rejecting the application filed by the plaintiff seeking temporary injunction as well as in staying the further proceedings of the suit concerned by invoking Section 10 of the Arbitration Act, 2001. Thus, we do not find any merit in both the aforesaid appeal and Rule. Accordingly, both of them should fail.

4.11 In the result, the appeal is dismissed. Connected Rule, namely Civil Rule No. 272(FM) of 2019, is also disposed of. Ad-interim order, if any, thus stands recalled and vacated. Rule issued in Civil Revision No. 52 of 2020 is also discharged. Ad-interim order, if any, passed therein stands recalled and vacated.

Communicate this.

…….....
(Sheikh Hassan Arif, J)

I agree.

…….....
(Ahmed Sohel, J)