

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
Civil Revision No. 2153 of 2022.

Shara Khan.

...Petitioner.

-Versus-

Dr. Mandy Karim and another

....Opposite party.

Mr. Minhaz Ul Haque Chowdhury Advocate with
Mr. Md. Asif Hassan, Advocate.

...For the petitioner.

None appears.

..For the opposite party.

Heard : 27.11.23, 03.12.2023, 04.12.2023

Judgment on: 11.12..2022.

Present:

Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon opposite party No.1 to show cause as to why judgment and order dated 28.04.2022 passed by learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 366 of 2020 appointing two Arbitrators should not be set aside.

At the time of issuance of Rule, this Court vide order dated 30.05.2022 stayed operation of the impugned judgment for a period of 3 (three) months which was, subsequently, extended time to time.

Relevant facts, for the purpose of disposal of this Rule, are that Dr. Mandy Karim (opposite party No.1) as petitioner filed Arbitration Miscellaneous Case No. 366 of 2020 under section 12 of the Arbitration Act, 2001 read with section 36 of the Real Estate Development and Management Act, 2010 against the petitioner and opposite party No. 2 before the learned District Judge, Dhaka for appointment of arbitrator to resolve the dispute between the parties. Her case is that she is only daughter of Dr. M. R. Khan (now deceased). She appointed her husband

Mr. Reza Karim to look after her properties by executing a power of attorney dated 15.7.2011. Shara Khan (the petitioner) is the daughter of Muzammel Haque Khan and niece of Dr. M. R. Khan. Since long Dr. Mandy Karim was residing in Canada. Dr. M. R. Khan decided to purchase a flat from Dom-Inno Limited, a developer company (opposite party No. 2), for his daughter, Dr. Mandy Karim but since she was not available at the relevant time her father decided to use the name of Shara Khan in the deed of agreement and accordingly, Dr. M. R. Khan and Shara Khan entered into an agreement with Dom-Inno Limited (the builder company) on 22.09.2010 for purchasing a flat being No. C-4 measuring 1390 square feet located at Green Square, 9, 9/2 and 9/3, Green Road, Dhaka for a consideration of Tk. 85,00,000/-. Dr. M.R. Khan paid all installments against the consideration money to the builder. Shara Khan was a name lender of the petitioner only. Suddenly M. R Khan died leaving behind Dr. Mandy Karim as his only daughter and she inherited the property left by her father. She learnt that her father paid total consideration money of the flat in question and she could collected papers in respect of payment of Tk. 48,50,000/- made by her father. Her husband communicated with the developer company who informed that Dr. M. R. Khan surrendered the flat to the company in 2011 and the company refunded the money back to Mr. Khan and a separate agreement was executed between the developer and Shara Khan (petitioner herein) in respect of that flat. It was not clear as to how the contract was cancelled by her father or he had received back the amount from Dom-Inno. Since Dom-Inno did not give any document in that regard, Dr. Mandy Karim sent a legal notice on 25.08.2019 to the developer company asking it to disclose the real fact but it did not pay any heed. Dr. Mandy Karim has sufficient reason to believe that Shara

Khan has doctored the whole thing to encroach the full ownership of the flat with an ulterior motive to deprive Dr. Mandy Karim. Thereafter, she served arbitration notice on 11.11.2019 to the developer to resolve the dispute but the company and Shara Khan did not give any replay in regards of appointment of arbitrator to resolve the dispute and hence the case.

Shara Khan contested the arbitration case by filing an application for dismissal of Arbitration Miscellaneous case contending, *inter alia*, that she along with Dr. M. R. Khan (now deceased) entered into an agreement with Dom Inno Builders Limited on 22.09.2010 for purchasing Flat No. C-4. Subsequently, they applied for getting allotment of Flat No. C-5 in stead of Flat No. C-4 and on their request the developer company changed the allotment. On 10.09.2011, Dr. M. R. Khan applied to the developer company for cancellation of his allotment and requested to allot the flat in favour of Shara Khan. Accordingly, a fresh agreement was executed on 21.12.2011 between Dom Inno Builders Limited and Shara Khan and she paid full consideration money to the developer company and possession of the flat was handed over to her and she has been possessing the flat by using it as her residence. Since, Dr. M. R. Khan himself revoked earlier agreement dated 22.9.2010 and Mandy Karim, daughter of Dr. M. R. Khan, was not a party to that agreement and there is no arbitration clause therein for resolving any dispute between the parties, the arbitration proceeding is not maintainable and as such, the case is liable to be dismissed.

Opposite party No. 2, Dom Inno Builders Limited also contested the arbitration case and filed another application for dismissal of the case stating similar facts as have been stated by Shara Khan, the present petitioner.

The learned District Judge, after hearing the parties, dismissed the both applications and at his own choice appointed two arbitrators to resolve the dispute between the parties vide order dated 28.4.2022.

Challenging the legality of said order dated 28.04.2022 Shara Khan (opposite party No.2 of arbitration case) as petitioner has come up with this application under section 115 (1) of the Code of Civil Procedure and obtained the instant Rule and order of stay, as stated above.

None appears to oppose the Rule though the notice upon the opposite parties have been served.

Mr. Minhaz Ul Haque Chowdhury learned Advocate appearing with Mr. Md. Ashif Hasan learned Advocate for the petitioner submits that after cancellation of the agreement by Dr. M. R. Khan a new contract has been executed between the present petitioner and the developer company by stipulating fresh terms and conditions; that the daughter of Dr. M. R. Khan or Dr. Mr. M. R Khan himself is not a party to the agreement executed between Sara Khan and Dom Inn Limited and accordingly, the arbitration proceeding is not maintainable at the instance of the daughter of Dr. M. R Khan; that the provisions under the Real Estate Development and Management Act, 2010 only relates to the dispute resolution between the land owner, developer, or purchaser and there is no provision in the said Act to resolve any dispute between third party and developer company and accordingly, the provisions of Real Estate Development and Management Act, 2010 as well as Arbitration Act, 2001 are not also applicable in the instant case; that section 36 of the Real Estate Management and Development Act, 2010 provides provision to resolve the dispute between the developer and land owner or flat purchaser mutually or through arbitral tribunal outside the Court and on failure to resolve the dispute through such tribunal, any party

may file case before appropriate Court constituted under the Ain, 2010 for his (her) redress and accordingly, an arbitration proceeding under section 12 of the Arbitration Act, 2001 is not maintainable but the learned District Judge without considering above aspect of the matter illegally entertained the arbitration miscellaneous case and appointed arbitrators and as such, interference is called for by this Court.

I have heard the learned Advocate, perused the revisional application, the application of arbitration miscellaneous case, the applications filed by the petitioner and the builder for dismissal of the case, the impugned order as well as the relevant provisions of Real Estate Development and Management Act 2010 and Arbitration Act, 2001. As per statement made by Dr. Mandey Karim in the arbitration case it is clear that no agreement was executed between herself and the developer company. Dr Mandy Karim initiated the arbitration proceeding claiming that her father and Shara Khan entered into an agreement with the developer company for purchasing the disputed flat from the developer company. She claims that Shara Khan was a name lender only and her father paid full consideration money from his own purse against the purchase of the flat. As per claim of Dr. Mandy Karim, Shara Khan was her *benamder* and she is the real owner of the disputed flat which means that she is claiming the disputed flat through *benami* transaction which is prohibited in view of the provisions under the Land Reforms Ordinance, 1984.

On the other hand, the developer company and Shara Khan are claiming that earlier agreement between Dr. M. R. Khan and the developer company has been cancelled at the instance of Dr. M. R. Khan and a new agreement for transferring the flat in question was executed between Shara Khan (the present petitioner) and developer company to

Dr. Shara Khan and that Saha Khan paid full consideration to the company and she has been possessing the flat in question. So no admitted agreement exists between Dr. M. R. Khan and the developer company in regards transferring the disputed flat to Dr. M. R. Khan or Dr. Mandey Karim.

Now question arises whether Dr. Manday Karim has *locus standi* to initiate any arbitration proceeding in view of the provisions under section 36 of the Real Estate Development and Management Act, 2010 read with section 12 of the Arbitration Act, 2001. For ready reference, section 36 of the Real Estate Development and Management Act, 2010 is reproduced below:

- 36। (১) রিয়েল এস্টেট প্রকল্প বাস্তবায়নের যে কোন পর্যায়ে প্রকল্প সংশ্লিষ্ট ক্রেতা, ডেভেলপার, অথবা ভূমির মালিকের মধ্যে এ 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 সালিশি আইন, ২০০১ মোতাবেক সালিশী ট্রাইবুনালে যাওয়ার অভিপ্রায় ব্যক্ত করিয়া অপর পক্ষকে নোটিশ প্রদান করিবেন।
- (৩) উপধারা (২) এর অধীন নোটিশ প্রাপক উক্ত নোটিশ প্রাপ্তির ৩০ (ত্রিশ) দিনের মধ্যে নোটিশ প্রেরকের সহিত ঐকান্তিকভাবে সালিশী ট্রাইবুনাল গঠন করিবেন।
- (৪) সালিশি আইন, ২০০১ এ যাহা কিছুই থাকুক না কেন, পক্ষগণ কর্তৃক গঠিত সালিশী ট্রাইবুনালের রোয়েদাদ পক্ষগণ এবং তাহাদের মাধ্যমে বা অধীনের দাবীদার যে কোন ব্যক্তির উপর বাধ্যকর হইবে এবং উহার বিরুদ্ধে কোন আদালতে কোন পক্ষের আপত্তি উত্থাপনের অধিকার থাকিবে না।
- (৫) উপধারা (৩) মোতাবেক পক্ষগণ সালিশী ট্রাইবুনাল গঠনে ব্যর্থ হইলে যে কোন পক্ষ বিবাদমান বিষয়টি বিচারের জন্য এই আইনের অধীন উপযুক্ত আদালতে মামলা দায়ের করিতে পারিবেন।”

(emphasis supplied)

A plain reading of sub-sections (1) - (4) of section 36 of the Real Estate Development and Management Act, 2010 as a whole suggests that those provisions stipulate alternative dispute resolution mechanism amicably or through appointing joint arbitral tribunal as per provision of

Arbitration Act, 2001 at the instance of the Purchaser, Developer, or the Land Owner at any stage of implementation of a real estate project in respect of the offences provided under sections 21-25 and 27-30 of the Act, 2010 or violation of any terms of the contract between them and the decision of the arbitral tribunal would be binding upon them and the arbitral award cannot be questioned before any court of law. The provision under sub-section (5) of section 36 of the said Act, 2010 is very significant which clearly provides a forum to the parties to file case in an appropriate Court constituted under the said Act, 2010 for their redress if the parties fail to constitute arbitral tribunal under section 36(3) of the Act, 2010.

In other words, section 36 of the Real Estate Development and Management Act, 2010 as a whole provided provisions to resolve specific dispute(s) among the purchaser, developer, or the landowner during implementation of a real estate project through amicable settlement or by constituting joint arbitral tribunal amicably and if they fail to constitute such joint arbitral tribunal, any party to the contract may file case before any appropriate Court constituted under Real Estate Development and Management Act, 2010. In that view of the matter there is no scope to initiate any second arbitration proceeding before the Arbitration Court by any party to the contract under section 36 of the Real Estate Development and Management Act, 2010 read with section 12 of the Arbitration Act, 2001.

In that view of the matter Dr. Manday Karim has no *locus standi* to initiate the arbitration case under section 36 of the Real Estate Development and Management Act, 2010 read with section 12 of the Arbitration Act, 2001 before the learned District Judge. Though the arbitration proceeding initiated by Dr. Manday Karim was not

maintainable but the learned District Judge without taking into consideration of the relevant provisions of law, as discussed above, illegally entertained the case and appointed arbitrators by the impugned order which is without jurisdiction and *corum non judice*. Accordingly, interference is called for by this Court.

In that view of the matter I find merit in this Rule.

In the result, the Rule is made absolute, however, without any order as to costs.

The impugned order dated 18.04.2022 is set aside. Arbitration Miscellaneous Case being No. 366 of 2020 of the Court of learned District Judge, Dhaka is dismissed as being not maintainable.

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)