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

First Miscellaneous Appeal No. 246 of 2023
With
(Civil Rule No. 811 (FM) of 2023)

In the matter of:

Md. Kamal Sikder @ Md. Kamruzzaman Sikder, son of late Md. Ershad Ali Sikder of House No. 11, Sonadanga Main Road, Khulna G.P.O., Police Station- Sonadanga, District- Khulna and others.

… Appellants

-Versus-

Nagar Homes Ltd represented by its Managing Director of Meheraba Plaza (6th Floor) 33 Topkhana Road, Dhaka-1000 Head Office: House No. 35, Road No. 07, Block-G, Banani, Dhaka-1213 and others.

…Respondents.

Mr. A. F. Hasan Arif, Senior Advocate with
Mr. Sk. Golam Rasul,
Mr. Md. Golam Rabbani Sharif and
Mr. Md. Asifur Rahman, Advocates

…For the appellants-petitioners

Mr. Md. Masder Hossain, Advocate

....For the respondent-opposite-party no. 1

Heard on 15.05.2024, 20.05.2024 and 28.05.2024.
Judgment on 03.07.2024.

Present:

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

Md. Mozibur Rahman Miah, J.

Since the facts and point of law involved in the appeal and that of the rule are intertwined, they have heard together and are being disposed of by this common judgment.

This appeal is directed against the judgment and order dated 05.04.2023 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 04 of 2022 dismissing the case filed under section 42 read with section 43 of the Arbitration Act initiated by the appellants-petitioners and 4 others for setting aside the award dated 15.04.2019 passed by a three-member arbitral tribunal formed in pursuance of Arbitration Miscellaneous Case No. 391 of 2017 filed by the present respondent no. 1 under section 12 of the Arbitration Act, 2001.

The salient facts leading to preferring this appeal are:

The respondent no. 1 as applicant had originally filed Arbitration Miscellaneous Case No. 391 of 2017 before the learned District Judge, Dhaka for an order of appointing arbitrator for the opposite-parties to the case namely, Md. Kamruzzaman Sikder and Al Helal Sikder (herein appellant no. 1 and respondent no. 2) under section 12 of the Arbitration Act, 2001 pursuant to a contract bearing no. 1087 dated 26.01.2012 executed with one, Nagar Homes Limited, respondent no. 1. After appointment of the arbitrators namely, Mr. Ahmed Jamil Mustafa, retired District Judge for the respondent no. 1 (petitioner in the Miscellaneous Case) and Mr. Md. Shafiqul Islam Talukder also retired District Judge for the appellants (opposite-parties to the Miscellaneous Case) by the learned District Judge, Dhaka vide his judgment and order passed ex-parte dated 14.11.2017, a three-member arbitral tribunal was constituted comprising

Mr. Justice Md. Azizul Haque as Chairman and Mr. Ahmed Jamil Mustafa and Mr. Md. Shafiqul Islam Talukder as two arbitrators representing the respondent no. 1 and the appellants respectively. On 15.04.2019, the three-member arbitral tribunal, Dhaka passed an ex-parte award in favour of the claimant-respondent no. 1, Nagar Homes Ltd. holding that *"This Arbitration Proceeding is allowed ex-parte with cost of Tk. 8,00,000/-. The claimant would get an award of money of taka 9,45,00,000/- against the respondent nos. 1-7 (herein the appellants and 4 others)"*.

It is worthwhile to mention here that, though a bilateral contract dated 26.01.2012 was signed between Nagar Homes Limited, the respondent no. 1 and Md. Kamruzzaman Sikder and Al Helal Sikder, appellant no. 1 and respondent no. 2 (Annexure-'E' to the application for stay) yet the arbitral tribunal passed the award on 15.04.2019 against all the seven land owners who had initiated Arbitration Miscellaneous Case No. 04 of 2022 for setting aside the award. Then the appellants on 16.09.2019 at first came to learn about the award of 15.04.2019 and then on 14.10.2019, at first filed an Arbitration Miscellaneous Case No. 544 of 2019 under section 42 read with section 43 of the Arbitration Act, 2001 for setting aside the award. However, on 05.12.2021, the said case was withdrawn with the permission to sue afresh as there were some mistakes therein. Thereafter on 02.01.2022, the present appellants and others, seven in number filed Arbitration Miscellaneous Case No. 04 of 2022 before the learned District Judge, Dhaka under section 42 read with section 43 of the Arbitration Act, 2001 for setting aside the award in its corrected form. The respondent no. 1 as opposite-party no. 1 contested the case by submitting

written statement stating *inter alia* that, the case is not tenable in the eye of law and the statements made in the petition is false, fabricated, baseless and malafide. It has also been contended therein that, the case is barred by the principle of estoppels, waiver and acquiescence and the same is barred by limitation stating further that, the respondent no. 5, Rajdhani Unnayan Kartipkkha (shortly, RAJUK) formerly known as Dhaka Improvement Trust (briefly, DIT) leased out the case land to one, Nur Mohammad vide lease Deed No. 3749 dated 27.05.1980 for a period of 99 years. Thereafter, with due permission of RAJUK said Nur Mohammad transferred the said land vide registered sell deed no. 14767 dated 05.11.1996 to one, Ershad Ali Sikder and delivered possession of the said land in his favour. On 11.05.2004, Ershad Ali Sikder died leaving behind Md. Kamal Sikder @ Md. Kamruzzaman Sikder and others that is, petitioner nos. 1-7 of the Miscellaneous Case No. 04 of 2022 as his heirs. The said heirs thus became owners of the case land and accordingly mutated their name in respective *Khatians*. Then on 27.04.2010, the Nagar Homes Limited, respondent no. 1 entered into a contract with Md. Kamal Sikder @ Md. Kamruzzaman Sikder and Md. Al Helal Sikder that is, appellant no. 1 and respondent no. 2 vide contract no. 1087 dated 26.01.2012. It has also been asserted that, since they (appellant no. 1 and respondent no. 2 that is, two full-brothers) failed to perform the terms and conditions of the contract, it (Nagar Homes Limited) then filed an Arbitration Miscellaneous Case No. 391 of 2017 for appointing arbitrator for the land owners, the opposite-parties to the said case which was ultimately allowed ex parte and subsequently an arbitral

tribunal was formed as has been stated above who passed its award also ex-parte on 15.04.2019 which has rightly been done.

The learned District Judge, Dhaka took up the said case for hearing and ultimately dismissed the same vide his judgment and order dated 05.04.2023 finding it barred by limitation.

It is at that stage, the petitioner nos. 1, 3 and 6 of the said Miscellaneous Case No. 04 of 2022 as appellants preferred this appeal. After preferring the appeal, the appellants as petitioners filed an application for stay of the operation of the impugned judgment dated 05.04.2023 on which rule was issued and an order of stay was passed which gave rise to Civil Rule No. 811 (FM) of 2023.

Mr. A. F. Hasan Arif, the learned senior counsel along with Mr. Md. Golam Rabbani Sharif, the learned counsel appearing for the appellants-petitioners upon taking us to the memorandum of appeal and all the documents annexed with the application for stay, at the very outset submits that, the learned District Judge failed to understand the validity of the contract dated 26.01.2012 vis-à-vis its enforceability when admittedly it was not signed by all the land owners (seven in number) of the case land resulting in, the said contract ceased to have any legal force and binding upon all the appellants that is, the petitioners of Miscellaneous Case No. 04 of 2022 even though the respondent no. 1 incorporated some unfair terms and conditions therein and therefore, the judgment and order dated 05.04.2023 is liable to be set aside inasmuch as the entire proceeding being proceeded before the arbitral tribunal and award passed thereupon is

absolutely beyond its jurisdiction and hence, the award is *non-est* in the eye of law.

The learned counsel further submits that, the learned District Judge has failed to adjudicate the issue of limitation in its proper perspective innot considering the vital fact that, admittedly the arbitral proceeding was held and award was passed ex-parte when no notice was served upon the appellants so there is no reason to sustain the said award.

The learned counsel next contends that, the court below ignored the fact that, though the arbitral award was given ex-parte on 15.04.2019 but only on 16.09.2019, the appellants first came to learn about the said award and on 14.10.2019, they filed Arbitration Miscellaneous Case No. 544 of 2019 for setting aside the said award but on 05.12.2021, the case was withdrawn with the permission of the court to sue afresh as there found certain mistakes and ultimately on 02.01.2022, the appellants filed Arbitration Miscellaneous Case No. 04 of 2022 and therefore, the case was filed duly within the prescribed period of limitation and the appellants asserted so in paragraph no. 17 of their application and hence, the impugned judgment and order is liable to be set aside.

The learned counsel further contends that, though the learned District Judge in the impugned judgment clearly found that, the award dated 15.04.2019 is contrary to the existing laws of Bangladesh and against the public policy and therefore, the same is voidable as per section 43(1)(খ)(আ)(ই) of the Arbitration Act, 2001 yet the learned Judge failed to interfere with the alleged award and as such, the impugned judgment and order and that of the award are liable to be set aside.

The learned counsel goes on to submit that, if the original contract is found to be invalid and ineffective no award can be given basing on that inefficacious contract and the learned District Judge in the impugned judgment though found the award to be ineffective but most illegally dismissed the Miscellaneous Case under misconception of law which cannot be sustained.

The learned counsel further contends that, no valid cause for arising any dispute among the parties has ever been disclosed in the "notice of arbitration" alleged to have issued by the respondent no. 1 upon the appellants before filing of the Arbitration Miscellaneous Case No. 391 of 2017 in absence of which appointment of arbitrators followed by formation of arbitral tribunal and then passing the alleged award are all illegal.

The learned counsel next contends that, admittedly only two land owners are the party to the bilateral contract dated 26.01.2012 so under no circumstances, can an award be given against seven land owners who stood as petitioners in Miscellaneous Case No. 04 of 2022 filed for setting aside the award so the alleged award is nothing but a product of illegal act done by three-member arbitral tribunal which is liable to be set aside.

The learned counsel also contends that, since there is no award in the eye of law so the point of limitation will not affect to set aside the said award and in this connection, the learned counsel has placed his reliance in the decision appeared in an online portal namely, "*manupatra*" which has also been reported in AIR 1990 Bom 45, 1989 (3) Bom CR 535 and takes us through paragraph nos. 34 where it has been held that:

"34... In the present case, the award is a nullity from its inception since the very appointment of the arbitrator was without jurisdiction. The Court which made the appointment had no power under section 8 to appoint the arbitrator and hence no arbitrator could have been appointed under the said section at all. This is not a matter of mere illegality in the appointment of the arbitrator but a lack of power to appoint the arbitrators in question. Since the arbitrator/s in question could not have acted in law, they had no legal existence. The arbitrators so appointed were prohibited by law to proceed with the arbitration. Hence the proceedings conducted and the award/s made by him/them are non-est from the beginning and will have always to be regarded as such. The award is thus patently illegal and void. This illegality which goes to the very foot of the award is not necessarily covered only by section 30. It can be raised as a ground to set aside the award even independently of the said section. ***Hence the Court not only has the power but also a duty to quash the award or to ignore it. The nullity in such cases further runs with the award and the objection with regard to it can be raised at any stage including the stage of its execution or enforcement. The bar of limitation enacted by Article 119 of the Limitation Act therefore***

does not either prevent a party from raising such objection or prevent the court from using its suo motu power to set aside the award on that ground."

With the above submissions and relying on the decision, the learned counsel finally prays for allowing the appeal and making the rule absolute.

On the flipside, Mr. Md. Masder Hossain, the learned counsel appearing for the respondent-opposite-party no. 1 very robustly opposes the contention taken by the learned senior counsel for the appellants-petitioners and submits that, the learned District Judge has rightly passed the impugned judgment which is liable to be sustained.

To fortify the said submission, the learned counsel by referring to the provision of section 42 of the Act contends that, under that provision there has been no scope to file a Miscellaneous Case for setting aside the award after 60 days of receipt of the award and since the appellant did not file the Miscellaneous Case under section 42 of the Act within that statutory period of limitation so the learned District Judge had no other option but to dismiss the Miscellaneous Case which he has perfectly done.

However, in support of this such submission, the learned counsel has relied upon a decision of Allahabad High Court passed in the case of *Sh. Dharmveer Tyagi and others-Vs-Competent Authority, DFCC, Special Land Acquisition (Joint Officer Organization) and others* and takes us through paragraph no. 16 thereof and contends that, similar point of limitation has been raised in the decision and the High Court came to a conclusion that no time barred petition can be entertained in setting aside

an award quoting the provision of section 34 of the Indian Arbitration and Conciliation Application Act, 1996.

When we pose a question to the learned counsel about specific observation of the learned District Judge finding gross illegality in the award, the learned counsel then retorted that, since the learned Judge has ultimately dismissed the Miscellaneous Case so such observation will bear no substantive value and have no effect in sustaining the impugned judgment and finally prays for dismissing the appeal and that of discharging the rule.

However, we have considered the submission so advanced by the learned counsels for the parties, perused the memorandum of appeal, impugned judgment and that of the application for stay and the documents annexed therewith.

On going through the impugned judgment, we find that, the learned District Judge has very robustly assailed the award. For that obvious reason, we feel it expedient to reproduce some of the pivotal observations arrived at by the learned District Judge in the impugned judgment which runs as follows:

> *"তর্কিত রোয়েদাদ পর্যালোচনায় দেখা যায়, বিজ্ঞ আবিট্র ৗল ট্র াইব্যুনাল the Contract Act, 1872 এর বিধানাবলী যথাযথভাবে পর্যালোচনা না করে এবং তারা উক্ত আরবিট্রে শন প্রে াসিডিংএ কোন আবশ্যকীয়পক্ষ না হওয়া, তাদের সাথে ১ নং দাবীদার-প্র তিপক্ষে কোন সালিসী চুক্তি না থাকা এবং সর্বোপরি, তাদের বিরুদ্ধে কোন আরবিট্র ৗল রেফারেন্স না থাকা সত্বেও বিজ্ঞ আরবিট্র াল ট্র াইব্যুনাল* ***অবৈধ,***

বেআইনী ও এখতিয়ার বর্হিভূতভাবে তাদেরকে উক্ত প্রে াসিডিংএ ৩-৭ নং রেসপনডেন্টপক্ষ হিসেবে শ্রে ণীভুক্ত করে একইরুপ অবৈধ ও বেআইনীভাবে তাদের বিরুদ্ধে বিপুল অংকের টাকার রোয়েদাদ প্র দান করেছেন।

The learned District Judge went on to observe that:

বিজ্ঞ আরবিট্র াল ট্র াইব্যুনাল তর্কিত রায় প্র দান কালে ১ নং দাবীদার-প্র তিপক্ষ নালিশী ভূমির দখল গ্র হণ করেন মর্মে দাবী করার বিষয়টিসহ উক্ত চুক্তির শর্ত সমূহ ও পূর্ববর্ণিত ১,৭০,০০,০০০/- টাকা প্র দান করার বিষয়টি নিশ্চিৎ না হয়ে অনেকটা সর্ববিষয়ে অধিক বিশ্বাসী (আস্তিক) হয়ে ১ নং দাবীদার-প্র তিপক্ষের সকল দাবীকে একবাক্যে সত্য বলে স্বীকারে মারাত্মক ভুল করেছেন।

আবার, তর্কিত রায় পর্যালোচনায় দেখা যায়, বিজ্ঞ আরবিট্র াল ট্র াইব্যুনাল ৯,৪৫,০০,০০০/- টাকার রোয়েদাদ প্র দানসহ উক্ত টাকা আদায় না হওয়া পর্যন্ত প্র তিমাসে ৫,০০,০০০/- টাকা এবং উক্ত টাকার উপর বার্ষিক ১০% হারে সুদ প্র দানের ডিক্রী প্র চার করেন। উক্তরুপ আদেশটি সালিসী আইন, ২০০১ এর ৩৮ ধারার পরিপন্থি হয়।''

However, the learned District Judge came to a conclusion observing that:

''উপর্যুক্ত আলোচনা ও অবস্থাধীনে সিদ্ধান্ত গৃহীত হয় যে, তর্কিত সালিশী রোয়েদাদটি দৃশ্যতঃ বাংলাদেশ প্র চলিত আইনের ও জননীতির পরিপন্থী হয়। এক্ষেত্রে, তর্কিত রোয়েদাদ সালিসী আইন, ২০০১ এর ৪৩(১)(খ)(আ)(ই) ধারার বিধান অনুসারে বাতিলযোগ্য হলেও এ মোকদ্দমা তামাদিতে বারিত হওয়ায়, রেসপনডেন্ট-

দরখাস্তকারীপক্ষ প্র ার্থীতরুপে কোন প্র তিকার লাভের অধিকারী হবেন না।''

From the above, it is admitted position that challenging those very negative observation where the learned District Judge found the award illegal yet challenging those observation no step has been taken by the respondent no. 1 nor it placed any argument controverting the same before this court as well, so it implies that, the respondent no. 1 admitted those observation. Be that as it may, save for the impropriety of the award, the learned District Judge dismissed the Miscellaneous Case only on the point of limitation. It is admitted position that, other than the present appellant no. 1 and respondent no. 2 none of other 5 (five) land owners have either been made any party to Arbitration Miscellaneous Case No. 391 of 2017 nor those 5 owners are any party to the contract dated 26.01.2012 still the award was given against all the 7(seven) land owners. Further, if we look into the order bearing no. 4 dated 14.11.2017 passed in Arbitration Miscellaneous Case No. 391 of 2017 (we called for the record of the case from the court below) filed for appointing arbitrators, we find that, the learned District Judge is silent as to whether the case was being disposed of on contest or ex parte though he found that "The opposite-party did not enter appearance despite service of summons". Curiously enough, he even appointed an arbitrator for the petitioner (respondent no. 1 herein) though in the respective application under section 12 of the Arbitration Act, the respondent no. 1 prayed for appointing arbitrator for the opposite-party which is the *sine qua non* of section 12 of the Act. In the above panorama, it is obvious that, a glaring illegality has been committed in both the

Arbitration Miscellaneous Case No. 391 of 2017 appointing arbitrators, formation of arbitral tribunal followed by passing the award on 15.04.20119 keeping all the land owners completely in the dark while passing the order dated 14.11.2017 in the above Miscellaneous Case and the award which is nothing but a classic case of grabbing a valuable properties of the appellants and their four siblings.

So this court is completely at one with the specific observation made by the learned District Judge in regard to committing gross illegality in passing the alleged award.

Now let us take the point of limitation which is the core point left for adjudication in sustaining the Miscellaneous Case No. 04 of 2022 filed under section 42 of the Arbitration Act. At this, it will be profitable if we reproduced the said provision here:

> *"৪২। (১) কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ প্রাপ্তির ষাট দিনের মধ্যে দাখিলকৃত আবেদনের ভিত্তিতে আদালত আন্তর্জাতিক বাণিজ্যিক সালিসে প্রদত্ত রোয়েদাদ ব্যতীত এই আইনের অধীন প্রদত্ত কোন সালিসী রোয়েদাদ বাতিল করিতে পারিবে।*
>
> *(২) কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ প্রাপ্তির ষাট দিনের মধ্যে দাখিলকৃত আবেদনের ভিত্তিতে হাইকোর্ট বিভাগ বাংলাদেশে অনুষ্ঠিত আন্তর্জাতিক বাণিজ্যিক সালিসে প্রদত্ত কোন সালিসী রোয়েদাদ বাতিল করিতে পারিবে।"*

From the above, we find that, an aggrieved party to the award will have to file an application for setting aside the same within 60 days from the date of receipt of the award (কোন পক্ষ কর্তৃক সালিসী রোয়েদাদ প্র াপ্তির ৬০ দিনের মধ্যে). From the operative portion of the award, we find that, the arbitration

proceeding was allowed ex parte (Annexure-'A' to the application for stay). So there is no earthly reason for the appellant to receive the award. Rather it is the assertion of the appellants, they came to learn about the award only on 16.09.2019 and filed two consecutive Miscellaneous Cases. But their such knowledge cannot be shaken. It is true that, there remains no scope in section 42 of the Act in reckoning limitation from the date of knowledge for setting aside any award. But when a patent illegality is committed deliberately upon any individual having no fault on his/her part, then to cure such injustice, a court of law can come to their aid by exercising its inherent power **for ends of justice**. Because, from the above discussion, observation and ultimately from the specific observations of the learned District Judge made in the impugned judgment, it has become crystal clear how a three-member tribunal who reached to the highest echelon of judiciary could pass such a dreadful and perversed award for which they should have rather been penalized not to speak about sustaining such unlawful award.

To substantiate our such view, we can profitably rely on the decision reported in 27 DLR 232 where it has been propounded that:

> *"**Section 151: Where however due to the court's or its officer's mistake some injustice is being caused to a particular party, then in spite of law's prohibition, court will intervene for the sake of doing justice.***
>
> *If there is specific provision in the Code which covers a particular case or if there is a positive prohibition against an act, the said powers under section 151 are*

not to be invoked. Of course as was pointed out in the said decision there is an important exception to this general rule. Where a mistake of a court or court's officer cases some injustice to a particular party, the power under section 151 of the Code can be exercised in a particular case for the purpose of giving necessary relief, even though such an act is prohibited under the general law or there is any alternative remedy for doing the same."

Apart from that, the decision cited by the learned senior counsel for the appellants is found to be quite applicable in the facts and circumstances of the instant case. On the contrary, the decision relied upon by the learned counsel for the respondent no. 1 is not applicable here because the appellant admittedly did not receive the award as the case narrated in the cited decision so referred by the respondent no. 1.

Given the above facts and circumstances, we don't find any earthly reason to sustain the impugned judgment and order which is liable to be set aside.

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

The judgment and order dated 05.04.2023 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 04 of 2022 and that of the award passed by the arbitral tribunal dated 15.04.2019 stands set aside.

Since the appeal is allowed, the connected rule being Civil Rule No. 811(FM) of 2023 is hereby made absolute.

The proceedings of the Execution Case No. 17 of 2019 pending before the learned District Judge, Dhaka is thus struck down.

Let a copy of this judgment along with the lower court records be transmitted to the learned District Judge, Dhaka forthwith.

Md. Bashir Ullah, J.

I agree.

Abdul Kuddus/**B.O**.