

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 1723 of 2023

Al-Safa Tower Ltd.

....Petitioner

-Versus-

B.N.S. Read Estate Ltd. and others

....Opposite parties

Mr. A.M. Mahbub Uddin, Senior Advocate with
Mr. Saqeb Mahbub, Advocate

....For the petitioner

Mr. Md. Borhan Khan, Advocate

....For the opposite party No. 1

**Heard on: 16.03.2025, 20.04.2025, 07.05.2025 &
08.05.2025**

Judgment on: 15.05.2025

Present opposite party No. 1 (B.N.S. Real Estate Ltd.) and present opposite party No. 2 (Rajuk Kormochari Bohumukhi Somobay Shomiti Limited) entered into an agreement in respect of land development and building construction which was registered on 30.06.2015. Clause 22 of the said registered agreement contained an arbitration clause which expressly made the Arbitration Act, 2001 applicable to the arbitration proceedings. Subsequently, the said agreement was terminated. Later on, another agreement was entered into between present opposite party No. 2 (Rajuk Kormochari

Bohumukhi Somobay Shomiti Limited), its representative and present opposite party No. 1 B.N.S. Real Estate Ltd. containing an arbitration clause being clause No. 11. Neither the present petitioner nor its vendor Swadesh Enterprise Ltd. (present opposite party No. 5) was party to the earlier and the subsequent agreement.

Eventually, dispute arose between the parties to the earlier agreement as well as the subsequent agreement which could not be settled amicably. Present opposite party No. 1 (B.N.S. Real Estate Ltd.) as applicant filed Arbitration Miscellaneous Case No. 71 of 2020 impleading the present opposite party No. 2, its President, General Secretary and Swadesh Enterprise Ltd. before the Court of District Judge, Dhaka to appoint Arbitrators under Section 12 of the Arbitration Act, 2001. The present petitioner (Al-Safa Tower Ltd.) was not made a party in the said application. Subsequently, on an application filed by the B.N.S. Real Estate Ltd. the present petitioner Al-Safa Tower Ltd. was added as opposite party No. 5 in the Arbitration Miscellaneous Case on 03.08.2022. The learned District Judge, vide the impugned judgment and order dated 22.01.2023 allowed the arbitration miscellaneous case and appointed Mr. Md. Manjurul Basit, retired District and Sessions Judge as Arbitrator for B.N.S. Real Estate Ltd. and Mr. Md. Mahbubul Haque, retired Senior District and Sessions Judge as Arbitrator for the other sides.

Challenging the same, Al-Safa Tower Ltd. as petitioner filed the instant revisional application and obtained the Rule on 14.05.2023.

The Rule has been contested by the opposite party No. 1 B.N.S Real Estate Ltd. by filing a counter affidavit.

Heard the learned Advocates of both sides and perused the materials on records.

It appears from the application of the Arbitration Miscellaneous Case No. 71 of 2020 that the applicant (B.N.S Real Estate Ltd.) categorically mentioned about arbitration clause No. 11 of the subsequent agreement. However, the learned District Judge in the impugned judgment and order referred to clause 22 of the earlier registered agreement dated 30.06.2015. It is apparent that a palpable mistake had occurred in the impugned judgment and order perhaps due to oversight which can be considered as clerical error. However, this is not the real area of controversy between the parties.

Section 9 of the Arbitration Act runs as follows:

“9. Form of arbitration agreement.- (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in—

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams, Fax, e-mail or other means of telecommunication which provide a record of the agreement; or

- (c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Explanation- The reference in a contract is a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

Section 10 of the Arbitration Act runs as follows:

“10. Arbitrability of the dispute.- (1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filing a written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration,

(2) Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

Materials on record reveal that the agreement in question containing the arbitration clause was entered into between Rajuk Kormochari Bohumukhi Somobay Shomite Ltd., its representatives

and B.N.S. Real Estate Ltd. Neither the present petitioner Al-Safa Tower Ltd. nor its vendor Swadesh Enterprise Ltd. was party to the arbitration agreement. Therefore, in view of the provisions contained in Sections 9 and 10 of the Arbitration Act, which make it clear that the Act only applies to the parties to the arbitration agreement, the learned District Judge was wrong in allowing the Arbitration Miscellaneous Case against the present petitioner Al-Safa Tower Ltd. and opposite party No. 5 Swadesh Enterprise Ltd.. Accordingly, the impugned order dated 22.01.2023 passed by the learned District Judge requires modification by way of striking out the present petitioner and Swadesh Enterprise from the arbitration proceedings.

It has come to the notice of this Court that Mr. Md. Manjurul Basit, retired District and Sessions Judge has been appointed as a Judge of International Crimes Tribunal No. 2. Mr. Md. Borhan Khan, learned Advocate for opposite party No. 1 has proposed the name of Mr. Md. Abdul Majid (retired District and Sessions Judge) of 3/5, Eastern Arzoo, 61, Bijoy Nagar, Dhaka, mobile No. 01711977811 to replace Mr. Manjurul Basit and to act as an Arbitrator for opposite party No. 1. The proposed name is not opposed. Accordingly, Mr. **Md. Abdul Majid** (retired District and Sessions Judge) is appointed as Arbitrator for opposite party No. 1. **Mr. Md. Mahbubul Haque**, retired District and Sessions Judge shall continue to act as Arbitrator for the other side.

The Arbitrators shall jointly appoint an additional Arbitrator to act as Chairman of the Tribunal who shall proceed with the matter in terms of clause No. 11 of the subsequent agreement as mentioned in paragraph No. 1(ta) of the application filed by B.N.S. Real Estate Ltd. under Section 12 of the Arbitration Act in the Arbitration Miscellaneous Case No. 71 of 2020. The present petitioner Al-Safa Tower Ltd. and Swadesh Enterprise Ltd. are struck out of the arbitration proceedings.

The Rule is disposed of accordingly.