

Present:-

Mr. Justice Mahmudul Hoque

**Civil Revision No. 6067 of 2023**

Farhana Yasmin

..... Petitioner

-Versus-

Md. Rashedul Alam and another

..... Opposite-Parties

Mr. Ramzan Ali Sikder, Senior Advocate with

Mr. Md. Motahar Hossain, Advocate and

Mr. Nazmul Hossain Chowdhury, Advocate

... For the Petitioner

Ms. Syeda Nasrin, Advocate with

Mr. Razu Howlader Palash, Advocate

Mr. Sultan Ahmed, Advocate

Mr. Forhad Hossain, Advocate

Mr. Murad Hossain, Advocate

Mr. Bibak Chandra, Advocate

Mr. Golam Kibria Sourav, Advocate

Mr. Saddam Hossain, Advocate and

Ms. Jannat Peya, Advocate

... For the Opposite Party No. 1

**Judgment on 25.01.2024**

In this revision Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 02.11.2023 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 560 of 2023 not considering the prayer for ad-interim injunction at the time of issuing show cause notice should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a narrow compass. The opposite party, as owner in possession of the property measuring 3.59 katha bearing Plot Nos. 9-10, Road No. 1, Block-E,

Section-1, Police Station-Shah Ali, Mirpur, Dhaka-1216 by way of gift from his father Khairul Alam Chowdhury. The opposite party No. 1 on receipt of consideration for half portion of property from the petitioner entered into a registered agreement No. 8178 dated 23.08.2017 for construction of a multistoried building thereon in equal share. The opposite party delayed execution of the work as per terms and conditions of the agreement. But during existence of the agreement between the parties, he without knowledge of the petitioner unfortunately engaged another developer named “Emas Engineering Solution” by executing an unregistered agreement and empowered the developer company to act on his behalf by executing a registered Power of Attorney No. 591 dated 12.09.2022. The petitioner used to live in abroad and in his absence the opposite party inspite of receiving Tk. 1,04,00,000/- (One crore four lac) from the petitioner fraudulently entered into an agreement with the developer company with an intention to deprive the petitioner from his legal right of 50% share of the property. Because of non-co operation and entering into an agreement with the developer during existence of the agreement in between the petitioner and the opposite party, a dispute has arisen, consequently, the petitioner served a notice upon the opposite party referring the matter to the arbitration by appointing his arbitrator and requesting the opposite party to appoint an arbitrator on his behalf, but the opposite party in reply to the notice instead of appointing his arbitrator raised a claim against the petitioner with a demand to be filled in within seven days.

Hence, the petitioner moved before the learned District Judge, Dhaka by filing Arbitration Miscellaneous Case No. 559 of 2023 under section 12 of the Arbitration Act for appointment of an arbitrator on behalf of opposite party. When the opposite party hurriedly started construction on the property in question with the help of the developer, the petitioner has filed Arbitration Miscellaneous Case No. 560 of 2023 under section 7A of the Arbitration Act 2001 before the District Judge, Dhaka seeking an order of injunction till disposal of arbitration proceeding. Learned District Judge after hearing by the impugned judgment and order dated 02.11.2023 issued notice to show cause upon the opposite party No. 1 for ten days as to why he shall not be restrained by an order of temporary injunction as prayed for. Because of urgency of the matter, the petitioner moved this Court by filing this revision and obtained the present Rule and order of ad-interim injunction.

The opposite party appeared in the rule and moved before the Appellate Division against the order passed by this division on 17.12.2023 by filing CPLA No. 3965 of 2023, wherein, the Appellate Division sent the rule to this Bench for hearing and disposal on merit expeditiously without interfering order of this Court.

Mr. Ramzan Ali Sikder, learned Senior Advocate with Mr. Md. Motahar Hossain and Mr. Nazmul Hossain Chowdhury, learned Advocates appearing for the petitioner submit that section 7A of the Arbitration Act provides and empowers the court to pass an order of

injunction pending disposal of arbitration proceeding to keep the subject matter intact, so that the party under arbitration shall not be deprived of getting their rightful relief sought for.

He submits that when the petitioner rushed before the learned District Judge by filing an application under section 7A of the Arbitration Act, the court ought to have passed an order of ad-interim injunction along with issuance of notice to show cause, but the court below failed to appreciate urgency of the matter as well as the provisions of law empowering the court to grant relief in its true perspective.

He further submits that, the court though issued notice to show cause for ten days vide order dated 02.11.2023, because of urgency of the matter the petitioner had no other option, but to move this Court for proper relief, accordingly, this Court considering facts and circumstances of the case and urgency of the matter rightly intervened by granting an order of temporary injunction which has been tested before the Appellate Division in C.P.L.A. but did not interfere, as such, it would be just and proper if the order passed by this Court at the time of issuance of the rule is maintained directing the learned District Judge to dispose of Miscellaneous Case No. 559 of 2023 filed under section 12 of the Arbitration Act within a reasonable time.

He further submits that the opposite party by filing an application for vacating the order of injunction categorically stated that he also served a notice upon the petitioner seeking arbitration of the matter in dispute which was not duly served upon the petitioner as claimed by the opposite

party. Therefore, where both the parties are agreed to have the dispute resolved by arbitration, purpose of the parties to the litigation will serve and justice will be done if the learned District Judge is directed to dispose of the application under section 12 of the Arbitration Act, maintaining the order of injunction. In support of his such submissions he has referred to the cases of *Mobasher Hossain and others vs. Saidur Rahman Pvt. Limited and others* reported in *55 DLR 51*, *Rama Devi and others vs. Sanganer Co-operative Housing Society Limited* reported in *1987 ALR Raj, 143* and *Md. Nurul Hoque Khan and others vs. Manager, Bangladesh Bank* reported in *39 DLR 310*.

Ms. Syeda Nasrin learned Advocate appearing for the opposite party No.1 submits that the agreement entered in between the petitioner and opposite party No. 1 on 23.08.2017 stipulates certain time for execution of the agreement, but the petitioner failed to comply with the terms and conditions of the agreement and did not make any payment for starting construction within time. Consequently, the opposite party sustained huge loss on account of house rent and other expenses for hiring accommodation.

She further submits that since the petitioner repeatedly failed to comply the terms and conditions on repeated demand by the opposite party No.1, the opposite party finally served a notice upon the petitioner seeking arbitration of the matter in dispute between them, but said notice returned to the opposite party unserved as the petitioner was found absent in the address given by him and mentioned in the agreement dated

23.08.2017. Thereafter, the opposite party No. 1 waited for some time to see whether any positive response is forthcoming on the part of the petitioner, but the petitioner did not communicate with the opposite party and make any payment for starting construction as per agreement between them. Resultantly, the opposite party has no other alternative but to proceed with the construction with the help of a developer, accordingly, entered into an agreement and executed a registered Power of Attorney empowering the developer to act on behalf of the opposite party.

She submits that the facts of entering into another agreement was duly communicated to the petitioner, but he did not raise any objection, consequently, the developer with the knowledge of the petitioner started construction and raised the building upto fourth floor. All of a sudden when the construction was going on and raised upto fourth floor, the petitioner served a notice upon the opposite party seeking arbitration of the matter mainly demanding the amount paid to the opposite party No. 1 with compensation which was duly replied by the opposite party. Thereafter, the petitioner moved before the learned District Judge by filing two miscellaneous cases one under section 12 of the Arbitration Act and another under section 7Ka of the Arbitration Act seeking injunction against the opposite party. The learned District Judge rightly issued notice to show cause upon the opposite party for ten days, but the petitioner without waiting and taking step for service of show cause notice upon the opposite party directly moved this Court by filing this revision and obtained the present Rule and order of injunction.

She argued that there is no order passed by the learned District Judge either rejecting or allowing the application of the petitioner giving any cause of action for filing this revision. She submits that it would be just and practicable if by discharging the Rule, the learned District Judge is directed to dispose of the miscellaneous case under section 7Ka of the Arbitration Act within a reasonable time on merit.

It is also argued that in getting an order of injunction, the petitioner ought to have shown a prima facie case and balance of convenience and inconveniences and irreparable loss. In the instant case, admittedly by serving a legal notice upon the opposite party, the petitioner demanded refund of money paid by him along with compensation, which can be compensated by money, the court always reluctant to grant an injunction to the detriment of the person in possession and enjoyment. Admittedly construction of a building is going on the plot in question which is raised upto 4<sup>th</sup> floor. If the construction is obstructed by an order of the court, the opposite party shall be highly prejudiced and the construction work will be stopped. On the other hand, in the absence of any order of injunction if the petitioner is at all entitled to get compensation or alternatively any flat in the building to be constructed, he will not be prejudiced in any way. As such, the balance of convenience and inconveniences are heavily in favour of the opposite party. In support of his such submissions he has referred to the cases of *Mofazzal Hossain (Md) and another vs. Mainuddin* reported in *3 BLC (AD) 78 and Crown Maritime Company*

*Ltd. vs. Royal Boskalis Westminster NV and others* reported in *16 BLC 140*.

Heard the learned Advocates for both the sides, have gone through the revisional application, application under section 7A of the Arbitration Act, counter affidavit, application for vacating the order of injunction and affidavit-in-reply filed by the petitioner and the impugned judgment and order of the learned District Judge.

Both the parties to the proceeding candidly admit that a registered agreement between the parties was executed and registered on 23.08.2017 stipulating some terms and conditions for construction of a multistoried building on the plot in question in equal share. The agreement also provides that both the parties shall contribute costs of the construction equally. It is also provided in the agreement that all the work whatever necessary for implementation of the project shall be done by the owner of the property. The second party shall provide financial assistance to the extent of equal share as and when required or asked by the owner of the property. Since 2017 upto 2023 no effective step has been taken for construction of the building in question though parties to the agreement made correspondences in between them by text through mobile and both the parties did not take effective step either asking the owner why he is not going to materialize the project in time nor the owner of the property asked the petitioner why he is not providing the money asked for.

During subsistence of registered agreement dated 23.08.2017 in respect of construction of a multistoried building on the plot in question



the opposite party without rescinding the agreement and letting know the petitioner entered into an agreement with a developer named “Emas Engineering Solution” for construction of a multistoried building on the plot in question and executed a registered power of attorney empowering the company to act on behalf of owner of the plot. Accordingly, the developer after obtaining required sanction from RAJUK and other permission required by law started construction of the building on the plot in question. Admittedly, the petitioner lives in abroad, he was not supposed to know the act and conduct of the opposite party No. 1, but after raising the building upto certain level, the petitioner sought arbitration by serving notice upon the opposite party who failed to appoint his arbitrator within time specified in notice and law. Consequently, the petitioner moved before the learned District Judge, Dhaka by filing a Miscellaneous Arbitration Case No. 559 of 2023 under section 12 of the Arbitration Act, praying for appointment of an arbitrator on behalf of the opposite party No. 1 to get the dispute solved through arbitration. Side by side the petitioner filed Miscellaneous Arbitration Case No. 560 of 2023 under section 7Ka of the Arbitration Act, praying for temporary injunction against the opposite party not to construct building on the plot in question and by subsequent amendment added that the opposite party be restrained by an order of injunction not to let out or sold out any flat to be constructed on the plot in question till disposal of arbitration proceeding. Learned District Judge after hearing issued a

notice to show cause upon the opposite party asking him to show cause within ten days from the date of receipt of such notice.

None of the parties apprised this Court whether the notice to show cause duly served upon the opposite party No. 1, but fact remains that the opposite party No. 1 entered appearance in this Rule and well aware about notice to show cause as well as filing of two miscellaneous cases before the learned District Judge. Because of urgency of the matter the petitioner had to move this Court by filing this revision and obtained this Rule and order of injunction which is still subsisting.

It is true that the opposite party No. 1 without rescinding the agreement entered in between the petitioner on 23.08.2017 took step for construction of the building on the plot in question by entering into another agreement with a developer company who was duly empowered by Power of Attorney to act on his behalf and the developer company started construction on the plot in question and the construction is going on as admitted by both the parties.

In this instant case show cause was issued on 02.11.2023, it means that, the petitioner without waiting for service of show cause notice upon the opposite party moved this Court by filing this revision. Section 7Ka of the Arbitration Act provides for ad-interim relief in favour of the petitioner only in case of any arbitration matter pending to keep the subject matter intact. Here from the language and the demand made by the petitioner in notice of arbitration is mainly refund of money paid along with compensation. In the event of constitution of arbitral tribunal as

desired by the petitioner, the subject matter would be whether the petitioner is entitled to get refund of earnest money along with the compensation as claimed by him or entitled to get any flat in the building. The learned Advocate for the opposite party No. 1 submits that the opposite party is always ready to refund the earnest money to the petitioner without any compensation. Such admission and willingness of the opposite party does not mean that the petitioner is not at all entitled to get compensation who invested crore of taka for last ten years. Because of this situation the dispute between the parties required proper adjudication through arbitration. The opposite party No. 1 has ample scope to get the arbitrator appointed on his behalf as early as possible and to commence the arbitration proceeding to get rid of unpleasant situation.

From record, I find that the construction work of building has already been commenced and it is raised upto 4<sup>th</sup> floor ceiling. If the proceeding of arbitration is commenced there will be a decision as to whether the petitioner is entitled to get refund of earnest money along with compensation as demanded or entitled to get flats in the building to be constructed as per value of the flat. In this situation, if the construction work is stopped for uncertain period, the opposite party as well as the developer will be put in trouble and on that view of the matter the balance of convenience and inconvenience is in favour of the opposite party. However, it is to be borne in mind that in the event of letting out the flat or transferring the same to any other person during pendency of the arbitration proceeding, he will not get any other property belonging to the

opposite party for realization of the money awarded in favour of the petitioner or flats in the proposed building and in that event he will be prejudiced and there will be obstruction in getting rightful claim of the petitioner. This contention of the petitioner has substance. Considering all the facts and circumstances pros and con, I think that justice will be met and the purpose of the parties will serve if instead of granting injunction against construction work, an order of injunction restraining the opposite parties is passed from selling any flat of the proposed building to anybody till disposal of the arbitration proceeding.

In view of the above, I am inclined to maintain the order of injunction granted at the time of issuance of the rule with modification.

In the result, the Rule is disposed of with the following modification;

Pending disposal of arbitration proceeding, the opposite party No. 1 and his constituted attorney “Emas Engineering Solution” are hereby restrained by an order of injunction from allotting and/or selling the flats or any part of schedule property to anybody till conclusion of the arbitration proceeding.

Communicate a copy of this judgment to the court concerned at once.