

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

**First Miscellaneous Appeal No. 256 of 2023**

**With**

**Civil Rule No. 380 (FM) of 2023**

**In the matter of:**

Shahida Akther being dead her heirs: 1(a) Gazi  
Golam Kabir, son of late Gazi Gulam Mustofa  
and others.

... Appellants

-Versus-

Masuma Begum, wife of Md. Jahangir Alam of  
House-11/A, Road-41, Gulshan-2, Dhaka.

...Respondent.

Mr. Khandaker Aminul Haque, Advocate

...For the appellants-petitioners

Mr. Monjurul Basit with

Mr. Shahriar Shahid Saad, Advocates

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

**Heard on 15.07.2024, 28.07.2024 and  
30.07.2024.**

**Judgment on 31.07.2024.**

**Present:**

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

**Md. Mozibur Rahman Miah, J.**

Since the point of law and fact so figured in the appeal and that of the rule are intertwined, they have heard together and are being disposed of by this single judgment.

At the instance of the claimant-petitioner in Arbitration Miscellaneous Case No. 207 of 2019, this appeal is directed against the judgment and order dated 14.12.2021 passed by the learned District Judge, Dhaka in the said Arbitration Case dismissing the same filed for setting aside the award passed by a two-member Arbitral Tribunal on 27.03.2019. Mentionable, the said award was given in favour of the present opposite-party directing the claimant-petitioner (since deceased her heirs being substituted as appellants-petitioner nos. 1(a) to 1(d)) to handover physical possession of the flat bearing no. 6A, Level-6 of the scheduled apartment namely, SPL-Angon within two weeks from the date of award as well as to execute and register a sale deed in respect of the said flat within a period of 3(three) weeks also from the date of award further directing the claimant to pay an amount of taka 50,000/- per month to the respondent-opposite-party till delivery of possession of the flat if possession of the flat is not handed over to her (respondent) within that stipulated period.

The salient facts leading to preferring the appeal are:

The predecessor of the present appellant nos. 1(a) to 1(d) namely, Shahida Akhter as claimant initiated an arbitration on the back of arising dispute with regard to not making payment by the opposite-party for the additional portion of the flat measuring 704.48 square feet that comes taka 1,00,52,929/60 to the claimant in the event of finding total space of the flat at 4139.48 square feet in place of proposed measurement of the flat at 3434

square feet. In view of the appointment of arbitrators by the parties comprising Mr. Justice Syed Amirul Islam, arbitrator for the claimant-petitioner i.e. the seller of the flat and Mr. Justice Md. Abdur Rashid, arbitrator for the opposite-party, the purchaser of the flat. The claimant by filing a statement of claims sought taka 1,00,52,929/60 as price for the increased 704.48 square feet whereas the respondent-opposite-party sought physical possession of the flat and taka 1,61,00,000/-. Ultimately, the tribunal set aside the claim of the claimant-appellant though allowed the claim of the purchaser herein the respondent having found claim to have legal basis and passed the award on 27.03.2019 as has been mentioned hereinabove.

Feeling aggrieved by and dissatisfied with the said award, the claimant as appellant then preferred this appeal and subsequently, on the demise of the sole appellant her heirs have been substituted as appellant nos. 1(a) to 1(d).

At the time of preferring the appeal, the appellant also filed an application for staying further proceeding of title execution case no. 15 of 2022 which was initiated by the opposite-party as decree-holder to execute the said award and this court vide order dated 06.04.2023 issued rule and stayed further proceedings of the said Title Execution Case No. 15 of 2022 for a period of 6(six) months but record shows that, no extension was taken by the petitioner afterwards.

Mr. Khandaker Aminul Haque, the learned counsel appearing for the appellants-petitioners upon taking us to the memorandum of appeal at the very outset submits that, the learned Judge erred in law innot

considering the relevant documents though placed before the Arbitral Tribunal in support of increased space measuring 704.48 square feet that had been added to the proposed space of 3434 square feet for which the appellants-petitioners are entitled to taka 1,00,52,929/60 at the rate of taka 14,270/- per square feet as per the agreement furnished between the claimant-appellants and the opposite-party-respondent dated 09.02.2011 and therefore, the judgment impugned in this appeal is liable to be set aside and the appeal be allowed.

By supplying us to the “Joint Consent” so have been furnished between the land owner herein the predecessor of the appellants as well as the real estate developer that is, Shanta Properties Ltd. also contends that, that very “Joint Consent” clearly shows that, the total area of flat no. 6A is 4139.48 square feet but in spite of placing that very vital document before the Arbitral Tribunal, it has not been taken due consideration leaving the award untenable.

The learned counsel by supplying us “sale permission letter” so have been issued by RAJUK dated 01.06.2015 in respect of flat no. 8-A also contends that, even the total area of the flat that is, flat no. 8/A is 4139.48 square feet showing its valuation at taka 1,05,06,000/- so that very letter also substantiates the measurement of the disputed flat no. 6A but in spite of submitting this vital document, the Arbitral Tribunal has clearly avoided the said important piece of evidence and very misconceivably dismissed the Miscellaneous Case.

The learned counsel wrapped up his submission contending that, though as per clause 13, it has been clearly asserted that, the floor area may

vary more or less 10% based on final working design but in the instant case, it has been found that, the additional area of 704.48 square feet clearly surpasses that 10% having no scope to apply clause 13 of the agreement here and therefore, the opposite-party is liable to pay for the increased space but that very point has not been taken into consideration by the learned Judge while dismissing the Miscellaneous Case and finally prays for allowing the appeal and making the rule absolute.

On the contrary, Mr. Monjurul Basit along with Mr. Shahriar Shahid Saad, the learned counsels appearing for the respondent-opposite-party no. 1 (purchaser) vehemently opposes the contention so taken by the learned counsel for the appellants-petitioners and submits that, the learned District Judge while dismissing the Miscellaneous Case has rightly found that, none of the provision so have been provided in section 43 of the Arbitration Act, 2001 where various reasons have been set forth in setting aside an award attracts the case of the appellants-petitioners and therefore, the impugned judgment and order is liable to be sustained and the appeal be dismissed.

Insofar as regards to the factual aspect, the learned counsel further contends that, though an architect was appointed at the instance of the Arbitral Tribunal to assess the measurement of the flat in question however he found the total area of flat 6A at 3440.79 square feet which come within the ambit of condition no. 13 of the agreement so signed by the claimant as well as the respondent dated 09.02.2011 and therefore, the judgment and order impugned in this appeal is liable to be sustained. On those scores, the learned counsel finally prays for dismissing the appeal and discharging the rule.

We have considered the submissions so advanced by the learned counsels for the appellants-petitioners and that of the respondent-opposite-party no. 1. We have also very meticulously gone through the impugned judgment annexed with the memorandum of appeal as well as the application for stay and the documents appended therewith especially the award so annexed as of Annexure-‘A’ to the application.

On going through the award passed by a two-member Arbitral Tribunal, we find that, the tribunal upon an exhaustive discussion of all the points-in-dispute among the parties finally came to a decision that, the purchaser herein respondent is entitled to get possession of the flat which she agreed to purchase at a cost of taka 5,00,00,000/- and since the entire amount has already been paid to the claimant-appellants so there remains no scope to seek any claim by the claimant. The tribunal also came to a decision that, though the claimant-appellants alleged that 4139.48 square feet has been found in flat no. 6A so the purchaser-respondent got additional 704.48 square feet as addition to the proposed area but in support of that increased area, there has been no evidence even placed before the tribunal.

Furthermore, though an architect was appointed as surveyor but he found on physical inspections that, the floor space of flat 6A is 3440.79 which clearly come within the ambit of clause no. 13 of the agreement.

Moreover, that surveyor has not been examined by the claimant-appellants to deviate from his such assertion. Then again, if we go through the schedules so annexed with the agreement dated 09.02.2011, we find from schedule-‘B’ that, an area of 3434 square feet was proposed to be sold

by the claimant-appellants to the respondent with two car parking and the valuation of two car parking was fixed at taka 5,00,000/- X 2 =10,00,000/- and the floor space of flat 6A is 3434 square feet was valued at taka 4,90,00,000/-. So for argument's sake, if any additional space was claimed to have added by calculating the space of car parking and common space with that floor space and it comes 4139.48 square feet then it cannot be taken into consideration. However, all those factual aspect can never be taken into consideration in setting aside an award because it is a settled proposition that in setting aside an award under sections 42 and 43 of the Arbitration Act, 2001, the District Judge cannot be regarded as any appellate or revisional court. On top of that, there has been some specific reasons set out in section 43 of the Act on which an award can only be set aside and the learned counsel for the appellants-petitioners at the very onset of his submission clearly admits that very legal proposition. For that obvious reason, we are not inclined to dwell on any factual aspect. Since it is an admitted position that, none of the reason so have been set forth in section 43 of the Arbitration Act, 2001 attracts the case of the appellants in setting aside the award so we don't find any illegality or legal infirmity in the impugned judgment and order which is liable to be sustained.

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

Since the appeal is dismissed, the connected rule being Civil Rule No. 380 (FM) of 2023 is hereby discharged.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this judgment be communicated to the court concerned forthwith.

**Md. Bashir Ullah, J.**

I agree.