

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

**Present:**

**Mr. Justice Md. Badruzzaman.**

**And**

**Mr. Justice Sashanka Shekhar Sarkar**

**CIVIL REVISION NO. 139 OF 2024.**

**Mohammad Kamal Pasha**

...Petitioner.

-Versus-

**Three Star Properties Limited and others .**

...Opposite parties.

Mr. Hossain Ahmed Ashik, Advocate

... For the petitioner.

Mr. Mohammad Osman , Advocate

... For the opposite party No.1

**Heard on: 20.05.2024, 21.05.2024 and 28.05.2024**

**Judgment on: 30.05.2024,**

**Md. Badruzzaman,J**

This Rule was issued calling upon opposite party No. 1 to show cause as to why order dated 15.10.2023 passed by learned Senior District Judge, Chattogram in Arbitration Miscellaneous Case No. 71 of 2018 should not be set aside.

At the time of issuance of Rule this Court vide order dated 02.01.2024 stayed all further actions of the Arbitral Tribunal in the arbitral proceedings for a period of 06(six) months. Thereafter, upon an application filed by the petitioner this Court vide order dated 27.03.2024 directed opposite party No. 1 to maintain *status-quo* in respect of the Branch Office of National Bank Limited and Walton Show Room situated on the 1<sup>st</sup> Floor of the under construction building for a period of 06(six) months.

Facts relevant, for the purpose of disposal of this Rule, are that the petitioner and two others are land owners of .3960 acre land and

opposite party No. 1 is a Real Estate Company engaged with Real Estate Development business. The land owners and the developer entered into an agreement on 28.09.2010 for construction of multi-storied building in said .3960 acre land followed by Power of Attorney and thereafter, the parties again entered into an agreement on 16.09.2019 with fresh terms and conditions for completion of the construction of the multi-storied building. The developer got plan approved by the concerned C.D.A and started construction of the multi-storied building but it could not complete the project within time specified by the deed of agreements. The land owners took possession forcibly in a part of the constructed building by ousting the developer from the project and accordingly, dispute arose between the parties and the developer company filed Arbitration Miscellaneous Case No. 71 of 2018 before the learned District Judge, Chattogram under section 12 of the Arbitration Act to resolve the dispute as per terms of the agreements by appointing Arbitrator. The land owners as opposite parties in the arbitration proceeding filed written objection denying the material allegations stated in the arbitration miscellaneous case. The learned District Judge, after hearing, vide order dated 09.10.2019 appointed two arbitrators, one was selected by the land owners and the other by the developer and then said Arbitrators appointed an Umpire and accordingly, Arbitral Tribunal was constituted.

In course of arbitration preceding before the Arbitral Tribunal the land owners and developer placed their respective claims before the Tribunal. The land owners on 11.4.2022 filed an application before the Tribunal under Order 26 rule 9 of the Code of Civil Procedure for local investigation by appointing survey knowing Advocate Commissioner to ascertain the quantum of constructed building as well as the cost

incurred by the developer for construction of the building. The Arbitral Tribunal by order dated 30.05.2022 allowed the application appointing themselves as Commissioners for local inspection instead of local investigation. It has also stated in the revisional application that the Arbitral Tribunal was not competent to make survey or ascertain cost by accounting process but they visited the suit property only for one day. After inspection, they did not file any inspection report in the Arbitral proceeding for which the petitioner was unable to know about the result of the inspection and they could not file written objection against the report. It has also stated that the Arbitral Tribunal did not frame any issue to resolve the dispute between the parties but on 29.09.2022 directed the parties to submit Tk. 30,000/- each for the cost of Non-judicial Stamp and other ancillary purpose for pronouncement of Arbitral Award. The developer deposited the cost but the land owners did not deposit cost and filed an application under section 15 of the Arbitration Act, 2001 before the learned District Judge for termination of the Arbitral Tribunal and substitution of the members of the Tribunal under section 16 of the Arbitration Act. The developer company filed written objection against the application (Annexure-D). The learned District Judge, after hearing the parties, rejected the application filed by the land owners by order dated 15.10.2023.

Being aggrieved by said order dated 15.10.2023 one of the land owners as petitioner has preferred this application under section 115(1) of the Code of Civil Procedure and obtained the instant Rule.

The developer opposite party No. 1 filed counter-affidavit to contest the Rule controverting the statements made in the revisional application and stating that the Arbitral Tribunal proceeded with the

arbitration proceeding in accordance with law and as such, the learned District Judge committed no illegality in passing the impugned order.

Mr. Hossain Ahmed Ashik, learned Advocate appearing for the petitioner submits that from the very initial stage of the proceeding, the members of the Arbitral Tribunal showed their disqualifications in conducting the arbitration proceeding because of the fact that they could not understand the main controversies between the parties, they did not frame any issue to be resolved in regards the dispute of the parties, failed to understand that local investigation was necessary to resolve the dispute, illegally appointed themselves as the local inspectors against the normal judicial practices, did not submit any report of the local inspection conducted by them and did not provide any copy of the report to the parties so that they could raise objection and finally directed to deposit cost for pronouncement of Arbitral Award keeping in dark of the land owners and as such, the members of the Arbitral Tribunal suffer from disqualification to conduct the proceeding and accordingly, their mandates are liable to be terminated under section 15(2) of the Arbitration Act but the learned District Judge without considering above aspect of the matter illegally rejected the application of the petitioner.

As against the above contention of the learned Advocate for the petitioner Mr. Mohammad Osman, learned Advocate appearing for opposite party No. 1 submits that the removal proceeding on the point of impartiality or independency on the part of the Arbitral Tribunal has been enunciated in section 13 read with section 14 of the Arbitration Act and for the alleged disqualification of the members of the tribunal, the petitioner should have filed objection before the Arbitral Tribunal and if failed, they should have filed appeal before the High Court

Division and as such, the application was not maintainable. In regards other points on merit as have been raised by the learned Advocate for the petitioner the learned Advocate for opposite party No. 1 could not make any plausible submission to substantiate that the Arbitral Tribunal conducted the arbitration proceeding in accordance with law.

We have heard the learned Advocates, perused the revisional application, counter-affidavit and other relevant documents as have been annexed thereto. We have also perused the impugned order passed by the learned District Judge and meticulously consulted the Arbitration Act, 2001.

Section 13 of the Arbitration Act, 2001 specifies the grounds for challenge an arbitrator and section 14 of the Act provides the challenge procedure.

For ready reference section 13 and 14 of the Arbitration Act, 2001 is quoted below:-

“**১৩। আপত্তির কারণ সমূহ-** (১) সালিসকারী হিসাবে নিয়োগের অনুরোধ প্রাপ্ত প্রত্যেক ব্যক্তি প্রথমে তাহার নিরপেক্ষতা ও স্বাধীনতা সম্পর্কে সঙ্গত সন্দেহের উদ্ভব হইতে পারে এইরূপ সকল পরিস্থিতি প্রকাশ করিবেন।

(২) প্রত্যেক সালিসকারী তাহার নিয়োগের সময় হইতে সালিসী কার্যধারা চলাকালীন যে কোন সময়ে উপ-ধারা (১) এ উল্লেখিত পরিস্থিতি অনতিবিলম্বে চুক্তির সকল পক্ষকে এবং অন্য সকল সালিসকারীকে অবগত করিবেন, যদি ইতোমধ্যে তাহারা তৎসম্পর্কে অবহিত না হইয়া থাকে।

(৩) কোন সালিসকারীর বিরুদ্ধে আপত্তি উত্থাপন করা যাইবে যদি তাহার নিরপেক্ষতা ও স্বাধীনতা সম্পর্কে সন্দেহ থাকার কোন পরিস্থিতি বিদ্যমান থাকে বা পক্ষগণ কর্তৃক সম্মত যোগ্যতা তাহার না থাকে।

(৪) সালিসকারী নিয়োগদানকারী বা সালিসকারী নিয়োগে সম্মতিদানকারী কোন পক্ষ, উক্ত নিয়োগের পরবর্তী সময়ে তাহার জানা কোন পরিস্থিতির কারণে, উক্ত সালিসকারীর বিরুদ্ধে আপত্তি দিতে পারিবেন।

**১৪। আপত্তি দায়েরের পদ্ধতি -** (১) উপ-ধারা (৬) এর বিধান সাপেক্ষে, পক্ষগণ সালিসকারীর বিরুদ্ধে আপত্তি দায়েরের পদ্ধতি নিরূপণে সম্মত হওয়ার ক্ষেত্রে স্বাধীন থাকিবে।

(২) উপ-ধারা (১) এ উল্লেখিত সম্মতিতে উপনীত হইতে ব্যর্থতার ক্ষেত্রে কোন পক্ষ কোন সালিকারীর বিরুদ্ধে আপত্তি দায়ের করিতে চাহিলে উক্ত পক্ষ ধারা ১৩ এর উপ-ধারা (৩) এ উল্লেখিত পরিস্থিতি সম্পর্কে অবগত হওয়ার ত্রিশ দিনের মধ্যে লিখিত বিবৃতির মাধ্যমে আপত্তির কারণসমূহ বর্ণনা করিয়া সালিসী ট্রাইব্যুনালের নিকট আপত্তি দায়ের করিবে।

(৩) সংশ্লিষ্ট সালিসকারী তাহার পদ হইতে নিজেকে প্রত্যাহার না করিলে অথবা অপর পক্ষ বা একাধিক পক্ষের ক্ষেত্রে পক্ষগণ উক্ত আপত্তিতে সম্মত না হইলে, উপ-ধারা (২) এ উল্লেখিত লিখিত বিবৃতি দাখিল হওয়ার ত্রিশ দিনের মধ্যে আপত্তির বিষয়ে সালিসী ট্রাইব্যুনাল সিদ্ধান্ত প্রদান করিবে।

(৪) উপ-ধারা (৩) এর অধীন সালিসী ট্রাইব্যুনাল কর্তৃক প্রদত্ত সিদ্ধান্ত দ্বারা সংশ্লিষ্ট পক্ষ উক্ত সিদ্ধান্ত প্রদানের ত্রিশ দিনের মধ্যে হাইকোর্ট বিভাগে আপীল দায়ের করিতে পারিবেন।

(৫) আপীল দায়ের হওয়ার নব্বই দিনের মধ্যে হাইকোর্ট বিভাগ উক্ত বিষয়ে সিদ্ধান্ত প্রদান করিবে।

(৬) পক্ষগণ কর্তৃক সম্মত পদ্ধতি, কিংবা উপ-ধারা (৩) এ উল্লেখিত পদ্ধতির অধীন দায়েরকৃত আপত্তি অথবা সিদ্ধান্তের বিরুদ্ধে দাখিলকৃত আপীল অকৃতকার্য হইলে সালিসী ট্রাইব্যুনাল সালিসী কার্যধারা অব্যাহত রাখিবে এবং রোয়েদাদ প্রদান করিবে।”

The provisions under sections 13 and 14 of the Arbitration Act, 2001 are clear and unambiguous. Section 13 of the Arbitration Act stated about the disqualifications of an arbitrator for which a party to the proceeding may challenge the authority of a member of the Arbitral Tribunal. According to section 13(3) of the Act, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties. Section 14 of the Act provides the challenge procedure. According to sub-section (1) read with sub-section (2) of section 14, the parties shall be free to agree on a procedure for challenging an arbitrator and failing to such agreement, a party who intends to challenge an arbitrator shall send a written statement for the challenge to the Tribunal within thirty days after

becoming aware of the circumstances referred to in sub-section (3) of section 13 of the Act. Sub-section (3) of section 14 stipulated that unless the arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide the challenge within thirty days from the date of filing the written statement.

Section 15 of the Arbitration Act, 2001 provides procedure of termination of arbitrator's mandate which reads as follows:-

“১৫। সালিসকারীর কর্তৃত্বের অবসান- (১) সালিসকারীর কর্তৃত্বের অবসান হইবে যদি-

(ক) তিনি স্বীয় পদ হইতে নিজকে প্রত্যাহার করিয়া নেন;

(খ) তিনি মারা যান;

(গ) সকল পক্ষ তাহার অপসারণে সম্মত হয়; বা

(ঘ) তিনি তাহার দায়িত্ব পালনে অথবা অযৌক্তিক বিলম্ব ব্যতিরেকে দায়িত্ব পালনে অক্ষম হন এবং নিজেকে স্বীয় পদ হইতে প্রত্যাহার করিয়া নেন বা সকল পক্ষ তাহার কর্তৃত্বের অবসানে সম্মত হয়।

(২) যদি কোন সালিসকারী উপ-ধারা (১) এর দফা (ঘ) এ উল্লেখিত কারণে অযোগ্যতার জন্য দায়ী হইয়া স্বীয় পদ হইতে নিজেকে প্রত্যাহার করিতে ব্যর্থ হন এবং সকল পক্ষ তাহার অপসারণে সম্মত হইতেও ব্যর্থ হয়, তাহা হইলে বিধি দ্বারা নির্ধারিত সময়ে মধ্যে, কোন পক্ষের আবেদনের প্রেক্ষিতে-

(ক) আন্তর্জাতিক বাণিজ্যিক সালিস ব্যতীত অন্যান্য সালিসের ক্ষেত্রে, জেলা জজ,

(খ) আন্তর্জাতিক বাণিজ্যিক সালিসের ক্ষেত্রে প্রধান বিচারপতি কিংবা প্রধান বিচারপতি কর্তৃক মনোনীত সুপ্রীম কোর্টের কোন বিচারক-উক্ত সালিসকারীকে অপসারণ করিতে পারিবেন।

(৩) যেইক্ষেত্রে পক্ষগণ সম্মত হয়, সেইক্ষেত্রে পক্ষগণ কর্তৃক সম্মত ব্যক্তির দ্বারা অপসারণ কার্যকর হইবে।

(৪) যদি কোন সালিসকারী স্বীয় পদ হইতে নিজেকে প্রত্যাহার করিয়া নেন অথবা যেইক্ষেত্রে উপ-ধারা (১) এর দফা (ঘ) এ উল্লেখিত পরিস্থিতির অধীন সকল পক্ষ তাহার কর্তৃত্বের অবসানে সম্মত হয়, সেইক্ষেত্রে উহা এই দফা অথবা ধারা ১৩ এর উপ-ধারা (৩) এ উল্লেখিত কোন কারণের বৈধতার অর্থে গ্রহণ করা বুঝাইবে না।

ব্যাখ্যা - এই ধারায় “জেলা জজ“ অর্থে যে জেলা জজের স্থানীয় অধিক্ষেত্রের মধ্যে সংশ্লিষ্ট সালিস চুক্তি সম্পাদিত হইয়াছে সেই জেলা জজকে বুঝাইবে।”

According to sub-section (1) read with sub-section (2) of section 15 of the Arbitration Act, 2001, the mandate of an arbitrator shall terminate, if

- (a) he withdraws himself from his office;
- (b) he dies;
- (c) all the parties agree on the termination of his mandate;
- or
- (d) he is unable to perform his functions of his office or for other reasons fails to act without undue delay and withdraws from his office or the parties agree on the termination of his mandate.

If any arbitrator has incurred disqualifications referred to in clause- (d) of sub-section (1) of section 15 of the Act, the District Judge, in case of other arbitrations excepting international commercial arbitration, and the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration, on the application by any party may terminate the said arbitrator.

The disqualifications as stated in Clause – ‘d’ of sub-section (1) of section 15 of the Act of 2001 has not been defined in the Arbitration Act. As per said Clause disqualification means ‘if the arbitrator is unable to perform his functions of his office or for other reasons fails to act without undue delay and withdraws from his office’. “Unable to perform his function is a big term which includes unable to work at all, unable to perform any one of the essential functions of his or her position i.e the fundamental job duties of the employment position and a manifest lack of qualities.



Rule 14 of the ICSID Convention Arbitration Rules 2022 specifies the qualities required of the Arbitrators. They must possess high moral Character, recognized competence in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment. The most frequently proposed ground for disqualification of a member of a Tribunal is alleged lack of reliability to exercise independent or impartial judgment. An Arbitrator may also be removed for incapacity or failure to perform the duties required of an arbitrator.

In the instant case, the land owners and developer entered into development agreement and as per terms of that agreement the developer started to construct building in the land owned by the petitioner and two others but admittedly, could not complete the construction work in stipulated time for which the land-owners sustained financial loss. The developer alleges that the land owners forcibly dispossessed them from a portion of the constructed building before completion of the project and accordingly, the developer incurred huge financial loss. The land owners also claimed that the land in question was under mortgage in financial institution and tri-partied agreement was executed among the developer, land owners and the bank for repayment outstanding dues of the land owners from the proceeds of the constructed flats but since the developer could not complete the project within specified time and violated the tri-partied agreement and did not pay the installments to the bank as per the agreement the land owners rightly took possession of some portion of the under constructed and unfinished building. To resolve the dispute, arbitrators were appointed by the learned District Judge. Accordingly, it was the duty of the arbitrators to assess the cost incurred by the developer and the loss of the land-owners for non-completion of the

project in stipulated time. How the cost of the unfinished constructed building would be determined ? Is it possible by local inspection? Answer is obviously no. But the arbitrators instead of allowing the application for local investigation for ascertaining the actual cost, loss and damage appointed themselves as local inspectors to see the building only and not to determine the actual loss or profit or expense or expenditure of the building or the measurement of the unfinished constructed building. A local inspection cannot determine the actual loss or expense or cost of the building and accordingly, the arbitrators should have allowed the application for local investigation. It is also against the norms of judicial practices that the arbitrators themselves would collect the evidence by way of local inspection. It is one kind of misconduct on the part of the arbitrators. Moreover, the Arbitrators did not frame any issue to resolve the dispute and after inspection they did not supply any inspection report to either of the parties but directed to pay cost for preparing arbitral award. Accordingly, we are of the view that the members of the arbitral tribunal were unable to perform their functions of their office as per law and also failed to act without undue delay because of the fact that the tribunal was constituted in 2019 and it could not give any award till 15.10.2023, the date of passing the impugned order and they did not withdrawn from their office and accordingly, such disqualifications, as stated above, fell within the preview of “he is unable to perform his functions of his office or for the reasons fails to act without undue delay” as stated in clause ‘(d)’ of subsection (1) of section 15 of the Arbitration Act, 2001 and as such, the application filed by the land-owners before the learned District Judge was maintainable.

It appears that the learned District Judge without considering above aspect of the matter illegally rejected the application filed by the land owners. We are of the view that the dispute between the parties should be resolved by appointing fresh arbitrators who are competent to resolve the dispute in the prevailing facts and circumstances of the case.

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

In the result, the Rule is made Absolute. The impugned order dated 15.10.2023 is hereby set aside. The mandate of the arbitrators is terminated.

The learned District Judge is directed to appoint another arbitral tribunal consisting of three members to resolve the dispute between the parties afresh. The Chairman of the tribunal will be selected by the learned District Judge from the retired District Judges. Out of other two members, one will be appointed by the choice of the land owners and another by the choice of the developer company.

The order of stay and *status-quo* granted earlier is hereby vacated.

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

**(Justice Md. Badruzzaman)**

**I agree.**

**(Mr. Justice Sashanka Shekhar Sarkar)**