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

First Miscellaneous Appeal No. 129 of 2024

In the matter of:

BASIC Bank Limited
… Claimant-Opposite party-Appellant
-Versus-
Business Resources Limited and another
…Respondents-Petitioners-Respondents

Mr. Shamim Khaled Ahmed, Senior Advocate
with
Mr. Md. Asaduzzaman, Senior Advocate and
Mr. Md. Imam Hasan, Advocate
…For the Appellant

Mr. Kamal Ul Alam, Senior Advocate with
Mr. Mohammad Imam Hossain and
Mrs. Yeasmin Akhter, Advocates
... For the Respondent nos. 1 and 2

Heard on 28.08.2024, 27.10.2024, 29.10.2024 03.11.2024, 04.11.2024, 11.11.2024, 12.11.2024, 19.11.2024, 20.11.2024
Judgment on 26.11.2024

Present:

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

Md. Bashir Ullah, J.

This appeal is directed against the judgment and order dated 15.01.2024 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 210 of 2023, allowing the application under section 42 read with section 43 of the Arbitration Act.

The salient facts leading to preferring this appeal are:

The claimant-appellant is BASIC Bank Ltd. holding the status of a public limited company while respondent no. 1 is a developer company and respondent no. 2 is the owner of the land described in schedule-'A' to the Tripartite Agreement. The Board of Directors of the claimant-appellant on 13.12.2009 decided to purchase land and a building for the accommodation of its Head Office and accordingly, tender notices were published in 'The Daily Ittefaq' and 'The Daily Star' on 09.01.2010. In response to that respondent no. 1 and one Rupayan Housing Estate Ltd. submitted their bids. However the bid of respondent no. 1, namely "Business Resources Limited" became the lowest and the Board of Directors of the claimant-appellant then decided to purchase 51,500 square feet of floor space ranging from ground floor to the 11th floor (in total 12 floors) of the building to be built on Schedule-A land described in agreement with proportionate, undivided and undemarcated land and 14 (fourteen) car spaces at a total price of Tk. 80 crore (2,000 square feet of ground floor @Tk. 22,000/- per square foot Tk. 4.40 crore; 4,500 square feet of 1st floor @ Tk. 22,000/- per square foot Tk. 9.90 crore; and 45,000 square feet of 2nd floor to 14th floor @ Tk. 14,600/- per square foot Tk. 65.70 crore). On 16.02.2010 the decision of the Board of Directors of the claimant-appellant was communicated to the respondents.

On 29.03.2010 the claimant-appellant Bank obtained permission from Bangladesh Bank for the said purchase and thereafter on 01.04.2010, a tripartite agreement was executed between the respondents

and the claimant-appellant. The claimant-appellant then paid the first installment and advance of Tk. 40,00,00,000/- (Taka Forty Crore) to the respondents through Payment Order (P.O.) No. 0492016 dated 01.04.2010. It is decided that on completion of the construction works within 30.03.2013, the respondents would hand over the physical possession of the floor spaces to the claimant-appellant and execute and register the sale deed before delivery of physical possession of the floor spaces along with car spaces as per the agreement. However, after execution of the agreement, the respondents did not start construction work in spite of giving several reminders by the claimant. Thereafter, the respondents on 22.03.2011 issued a letter, claiming taka 6,66,66.666.66/- in 5(five) installments stating that they started construction work on 02.11.2010. The claimant-appellant then on 28.04.2011 paid BDT 6,66,66,666.66 to the respondents. The respondents again by letter dated 08.01.2012 requested to pay installments referring to various progress in the construction work and the claimant-appellant on 19.01.2012 again paid taka 2,66,66,666/- in 2(two) installments against an undertaking dated 19.01.2012 on Non-Judicial Stamps valued at Tk. 150/- executed by respondent no. 2 that he would submit certified copies of title deeds, drawings and RAJUK approval to the claimant Bank within 90(ninety) days. But the respondents failed to submit the aforesaid documents and then the respondents again on 19.09.2012 executed another undertaking on Non-Judicial Stamps valued at Tk. 150/-. Respondent no. 2 on 20.09.2012 finally submitted certified copies of title deeds, *Parcha,* City Map, drawings and RAJUK approval to the claimant Bank. After

scrutiny of the above-mentioned documents, Bangladesh Bank on 27.12.2012 directed the claimant Bank to consider the purchase of floor space in the building of Schedule-A land as risky and directed it to resolve all the complications facing the project within 31.01.2013. The direction of Bangladesh Bank was communicated to the respondents. Then the respondents filed Title Suit No. 78 of 2013 before the Court of Assistant Judge, 4th Court, Dhaka for correction of R.S. *Parcha.*

The claimant-appellant by the end of 2014 came to know that the Government of Bangladesh filed Civil Review Petition No. 58 of 2012 before the Appellate Division against the respondents claiming that the Schedule-A land has been enlisted in the list of abandoned properties. Upon getting the information, the claimant-appellant requested the respondents to take the necessary steps to dispose of Civil Review Petition No. 58 of 2012 as quickly as possible vide letters dated 10.12.2014, 21.12.2014, 13.04.2015, 14.10.2015, 11.03.2015, 25.01.2016 and 08.02.2016. After a long time, Civil Review Petition No. 58 of 2012 was dismissed by the Appellate Division on 22.02.2016.

The Rajuk approvals of the drawing and structural designs of the project were sent to Bangladesh Bank. Upon examination of the same, it was revealed that the Rajuk approval was given for a commercial cum residential (2+15) building titled Wahiduzaman Center whereas the respondents promised that the Zaman Basic Bank Tower (3+15) is to be constructed as fully commercial building. The claimant-appellant brought the matter to the attention of the respondents and requested to

resolve the issues vide letters dated 23.04.2013 and 26.05.2013 but the respondents paid no heed.

The respondents decided to extend the floors of the proposed 'Zaman Basic Bank Tower' from 15 to 22 floors and accordingly obtained permission from RAJUK. However, from construction permission dated 21.07.2013 collected by the claimant-appellant from RAJUK, it appeared that respondent no. 2 applied for permission for extension of floors on 12.08.2012 beyond the knowledge of the claimant. The respondents in various letters kept on creating an impression that under the agreement the claimant was bound to purchase additional 7(seven) floors unilaterally extended by the respondents and with that object in view, they also claimed 50% of the purchase price of the floors being Tk. 81.00 crore as advance. But neither the Claimant knew nor showed any interest nor promised to purchase the said additional floors unilaterally extended by the respondents by themselves at their risk and responsibility. The respondents then sent a legal notice dated 26.10.2017 to resolve the dispute about purchase of 7 additional floors. The Claimant with the approval of the Board of Directors sent a reply on 27.11.2017 to the said legal notice denying purchasing additional floors.

As per the agreement, the construction work of the project was scheduled to be completed on 30.03.2013 which the respondents miserably failed. On 12.03.2013, the respondents executed another undertaking promising to complete the remaining construction work and hand over possession and execute the sale deed in favour of the claimant-appellant Bank by 30.09.2013. However, the respondents

instead of giving importance on continuing with the construction work as per the agreement kept on claiming the balance installments over and over again. In the circumstances, upon request of the respondents to expedite the construction work of the building and relying on the said undertaking of the respondents, the claimant-appellant paid a total amount of Taka 76 crore keeping the outstanding at Tk. 3,99,99,999/- which was agreed to be paid at the time of registration of the sale deed and handing over the completed floors as per terms of the agreement.

The claimant-appellant repeatedly requested the respondents to complete works in the structure of floors and hand over the possession in inhabitable, usable state upon executing sale deed by issuing letters dated 31.03.2014, 21.04.2014, 20.05.2014, 09.07.2014 and 21.08.2014.

In the above circumstances, the claimant on 13.06.2012 appointed an independent surveyor namely “the Royal Inspection International Limited” to inspect the state of development of the "Zaman Basic Bank Tower" and to oversee and monitor the project work.

The claimant-appellant again on 21.11.2016 and 30.06.2016 requested the respondents to complete the construction and execute the sale deed and hand over the possession of the floors of the project but they did not pay any heed to such repeated requests.

However, the claimant-appellant agreed to the call for arbitration of the disputes for the agreed floor space and requested the resondents to appoint their Arbitrator within 10(ten) days under section 36 of the Arbitration Act, 2001 but went in vain. The claimant-appellant performed all its obligations under the agreement but the respondents

failed to hand over possession of the project by 30.03.2013 on execution and registration of the sale deed as stipulated in Clause 2 of the agreement or by 30.09.2013 subsequently extended pursuant to the undertaking dated 12.03.2013. The respondents infracted the terms of the agreement and continued to cause loss by not paying rent to the appellant and thus the claimant faced damage for taking accommodation of its Head Office elsewhere, paying remuneration to the Surveyor to oversee and monitor construction work and on other heads as described in the schedule.

Having failed to settle the dispute amicably by negotiating with the respondents, the claimant then decided to refer the matter to arbitration and sent an arbitration notice to the respondents and filed Arbitration Miscellaneous Case being no. 89 of 2018 before the District Judge, Dhaka. Upon hearing, the learned District Judge, Dhaka constituted an Arbitral Tribunal, comprising of Mr. Justice K. M. Hasan as Chairman; Mr. Justice Mohammad Fazlul Karim and Mr. Justice Abdur Rashid as Arbitrators.

On getting notice of appointment, the Arbitral Tribunal then directed the parties to submit statements of claim and statements of defence and counterclaim, if any.

Accordingly, BASIC Bank Ltd. as the ‘claimant’ by filing a statement of claim before the Arbitral Tribunal prayed for an award for granting performance of the contract dated 01.04.2010 by way of execution and registration of a Sale Deed and delivery of possession of Schedule-‘A’ land and property on receipt of the balance purchase price

amounting to Taka 2,66,66,666/- and for a declaration that the claimant is not liable to purchase additional seven floors, car space that unilaterally extended by the respondent and for recovery of compensation and damages under various heads totalling Taka 177,26,44,984.18 with interest thereon.

The Claimant prayed for an award directing the respondents which is as follows:

i. hand over possession of 51,500 square feet of floor space from the ground floor to the 11th floor (12 floors) of Schedule-A in usable and deliverable state with proportionate undivided and undemarcated land and 14 (fourteen) car parking spaces on receipt of remaining Taka 2,66,66,666/- of the total purchase price of Taka 80 crore and execute and register sale deed in favour of the Claimant;

ii. declare that the claimant is not at all liable to purchase the extended 7(seven) floors under the agreement dated 01.04.2010;

iii. pay Taka 111,44,97,767.01 (one hundred and eleven crore forty-four lakh ninety-seven thousand seven hundred sixty-seven and one paisa) only up to 30.06.2019 as compensation for delay in delivery of possession of the purchased floors with car parking space as per Clause-2 of the Agreement dated 01.04.2010;

iv. pay Taka 36,78,42,680.08 (thirty six crore seventy eight lakh forty two thousand six hundred eighty and eight paisa) only up to 30.06.2019 as compensation for the cost incurred by the claimant by way of reimbursement of rents paid for the accommodation of the head office during the period the respondents failed to deliver possession of the purchased floors with car parking space;

v. pay Taka 7,44,500/-(seven lakh forty-four thousand five hundred) only for the cost incurred for appointing an independent surveyor Royal Inspection International Limited to survey/oversee state of progress of the project on Schedule-A property for 21(twenty one) months (from June, 2012 to February, 2014);

vi. pay Taka 7,66,50,550.97 (seven crore sixty-six lakh fifty thousand five hundred fifty and ninety seven paisa) only up to 30.06.2019 as damage and loss incurred for becoming unable to earn profit by investing the amount incurred as rent for the accommodation of the Head Office of the claimant;

vii. pay Taka 3,64,671.84 (three lakh sixty-four thousand six hundred seventy-one and eighty-four paisa) only up to 30.06.2019 as damage and loss incurred for becoming unable to earn profit by investing the amount incurred for payment of remuneration to independent surveyor Royal

Inspection International Limited to survey/oversee the state of progress of the project on Schedule-A property;

viii. pay Taka 27,71,46,663.99 (twenty-seven crore seventy-one lakh forty-six thousand six hundred sixty-three and ninety-nine paisa) only up to 30.06.2019 as damage and loss incurred for becoming unable to earn profit by investing the amount kept as provisioning as per direction of Bangladesh Bank;

ix. pay interest at the bank rate till realization of compensation and loss and damages;

x. pay cost of the arbitration in favour of the claimant; and

xi. grant any other relief or reliefs to which the claimant is entitled in law and equity.

The respondents then filed a statement of defence and counterclaim against the statement of claim of the claimant and prayed for dismissal of the claim. The counterclaims of the respondents are as follows:

a. As per Section 9 (1) of the Real Estate Developers Act, 2010 and Clause 2 of the said agreement dated 01.04.2010 it is the obligation of the Claimant to pay the second installment amounting to BDT 40,00,00,000/- in 30 equal monthly installments of Tk. 1,33,33,333/- as installment per month from the beginning date of construction to be completed within 30.03.2013. But the Claimant Bank did not pay the remaining outstanding amount of BDT 4 Crore. As

such the Respondent is entitled to the outstanding amount of BDT 4 Crores along with 18% interest per annum.

b. The claimant in the meeting held on 3.1.2012 agreed with the respondent no. 1 reached into agreement to purchase the additional (7 seven) floors of 31500 square feet for an amount of Tk. 162,22,50,000.00 (Taka one hundred sixty-two crores twenty-two lakh fifty thousand). The Claimant Bank repeatedly by its statements/representation made clear promise to the respondent no. 1 that they will purchase the said 7(seven) additional floors of 31500 square feet. The respondent no. 1 started construction of the 7(seven) additional floors on 15.10.2013 and completed structural construction of said seven (7) additional floors of 31500 square feet on 19.06.2015. The claimant Bank did not perform its obligation to purchase the said additional 7(seven) floors. As a result of failure of the claimant Bank to perform its contractual obligation, the respondents have suffered a significant loss amounting to Tk. 162,22,50,000/- (Taka one hundred sixty-two crores twenty-two lakh fifty thousand). As such the respondent is entitled to the said amount along with 18% interest per annum from 01.01.2016.

c) The respondents have completed construction of said seven (7) additional floors of 31500 square feet on 19.06.2015 and asked the Claimant to perform its obligation

by making payment. The Claimant Bank in breach of its obligation did not make payment; hence, the respondent is entitled to get compensation from the Claimant Bank for the opportunity loss of financial gains and for loss of the opportunity of earning. By renting 31,500 square feet of the said 7(seven) additional floors the Respondents could have earned (Tk. 31,500×Tk. 100)= Tk. 31,50,000/- per month. As such the respondents are entitled to get from the claimant as business loss from January 2016 to September 2019, i.e., (Tk.31,50,000×45)= Tk. 14,17,50,000/- (Taka Fourteen crore Seventeen lakh fifty thousand).

d. The respondents have completed construction of said seven (7) additional floors of 31500 square feet on 19.06.2015. After completion of the whole construction works the respondent had been maintaining the whole building till date hence the respondent is lawfully entitled to claim the maintenance cost already borne and to be borne by them.

The tribunal upon perusal of the statement of claim and statement of defence; framed as many as 10(ten) different issues and examined 2(two) witnesses on behalf of the claimant and 1(one) witness on behalf of the respondent.

Upon hearing the parties, the Arbitral Tribunal, by a majority of 2:1 passed the following award:

"(a) declares that the undertaking dated 12 March 2013 executed by the respondents is valid and binding upon the respondents;

(b) rejects the counterclaims of the respondents as not valid and enforceable in law;

(c) declares that the claimant is not legally bound to purchase the additional floors on top of the agreed floors;

(d) declares that the respondents are bound by the Tripartite Agreement dated 01 April 2010 and accordingly, directs the respondents to deliver possession of the agreed floor spaces and parking spaces as fully described in Schedule-A and Schedule-B after completing all the works as described in Annexure-C to the Agreement and execute and register necessary sale deed upon receipt of the outstanding BDT 3,99,99,999/- around (four crores) within a period of one year of receipt of this Award; in default, the claimant shall be entitled to take possession of the project as it is with the help of police and complete the project as per requirement of the agreement and got the expenses adjusted with the outstanding installments;

(e) declares that the claimant is entitled to receive BDT 36,78,42,680/-(Thirty-six crore seventy-eight lakh forty- two thousand six hundred eighty) only paid for the accommodation of the head office from October 2013 to June 2019, and all further amounts to be paid for rents for such accommodation till delivery of possession by the respondents as compensation and accordingly, directs the respondents to pay the Claimant BDT 36,78,42,680/- (Thirty-six crore seventy-eight lakh forty-

two thousand six hundred and eighty) only within 6 (six) months in 3(three) equal installments from the date of receipt of this award;

(f) declares that the respondents are not entitled to any compensation;

(g) declares that the claimant is entitled to the costs of arbitration and the amount is fixed at BDT 34,80,000/- (Thirty-four lakh eighty thousand) only, and accordingly directs the respondents to pay said amount of BDT 34,80,000/- (Thirty-four lakh eighty thousand) only within 3 (three) months of receipt of this award;

(h) declares that the amount of compensation awarded shall carry interest at the rate of two percent more than the Bank rate from the date of Award till the date of payment;

(i) directs the respondents to pay the amount of compensation together with interest upon receipt of this award; and

(j) declares that all other claims of the parties shall be deemed to have been rejected. ”

Challenging the said award dated 09.02.2023 passed by the Arbitral Tribunal, the respondents as petitioners filed Arbitration Miscellaneous Case No. 210 of 2023 before the District Judge, Dhaka under Section 42 read with section 43 of the Arbitration Act for setting aside the Award. The claimant-appellant entered appearance in the case by filing a written objection. Upon hearing the parties, the learned District Judge, Dhaka allowed the Arbitration Miscellaneous Case on

15.01.2024 on contest against the present appellant and set aside the award dated 09.02.2023 passed by the Arbitral Tribunal holding that the arbitration proceeding is not maintainable being violative to public policy.

Being aggrieved by and dissatisfied with the judgment and order dated 15.01.2024 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 210 of 2023 the claimant as appellant then preferred this instant appeal before this Court.

Mr. Shamim Khaled Ahmed, learned Senior Advocate together with Mr. Md. Asaduzzaman, Senior Advocate and Mr. Md. Imam Hasan, learned Advocates appearing for the appellant upon taking us to the impugned judgment and order, Award and all other related documents annexed in the paper book contends that the learned District Judge erred in law by allowing the application violating the provisions of sections 42 and 43 of the Arbitration Act by holding that, the grant of the award in favour of the claimant is a violation of the public policy which is misconceived and without any basis.

He next contends that an undertaking is a promise, pledge or engagement and is legally binding upon the person(s) who signs it and it is always unilateral and admittedly having been executed by the respondents forming part of the Tripartite Agreement dated 01.04.2010 which is admissible under sections 91 and 92 of the Evidence Act, 1872 and therefore, the alleged undertaking dated 12.03.2013 is valid and enforceable. He further submits that, the Respondent witness no. 1, in his

examination stated that, the undertaking dated 12.03.2013 was executed by him as the landowner and another as the representative of builder, although he alleged that the claimant-appellant Bank took the undertaking under coerce to get payment when he also admitted that, he did not complain to anyone about this, thus the allegation of coercion was not proved before the Arbitral Tribunal.

Mr. Ahmed further argues that, Section 8 of the Real Estate Development and Management Act, 2010 provides agreement for the sale of Real Estate and such agreement is not required to be registered and the provision of section 54A of the Transfer of the Property Act, 1882 and section 17A of the Registration Act, 1908 and section 21A of the Specific Relief Act, 1887 are not applicable under the Real Estate Development and Management Act, 2010 which is supported by the case of ***Comprehensive Holdings Limited and another vs. MH Khan Monju and others*** reported in 69 DLR (AD) 420 where the Hon'ble Appellate Division also took the view that, an agreement for sale or purchase of a real estate is not required to be registered and as such impugned judgment and order are liable to be set aside.

In the same vein, Mr. Md. Asadduzzaman, the learned Senior Counsel by adopting the submission made by Mr. Ahmed, further contends that রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০, is a special law and in section 36 of the Act 2010, there is a non-obstante clause and Section 36(4) of রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ clearly provides that the award declared by the Arbitral Tribunal is final and this law will prevail over other laws where Section 42 of the Arbitration Act is not applicable

for setting aside the award passed under রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ and even as per section 36(4) of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০, section 21A of the Specific Relief Act is also not applicable to settle a dispute under রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০।

The learned Counsel draws our attention to page no. 49A appearing at part-I of the paper book and then shows that there are three signatures made by the three Arbitrators in short order but in the long order, there are two signatures of two Arbitrators and since the award was declared by a majority of 2:1, the dissenting award was signed by another Arbitrator where the majority award was sent to the Arbitrator who then upon perusal expressed his disagreement and passed the dissenting award and thereby the deliberation process was rightly completed and thereby section 38(2) of the Arbitration Act, 2001 was duly complied with. He further submits that the arbitral award is not in conflict with law as well as the public policy of Bangladesh and hence, there was no ground for setting aside the Arbitral award under section 43 of the Arbitration Act, 2001 yet the learned District Judge set aside the award on vague.

Mr. Asadduzzaman further contends that if any of the parties to the arbitration agreement files a legal proceeding in a Court against the other party, no judicial authority shall hear any legal proceedings as provided in section 7 of the Arbitration Act, 2001. If the Court is satisfied that an arbitration agreement exists, then the Court refers the

parties to the arbitration under section 10 of the Arbitration Act, 2001 and finally prays for allowing the appeal.

Per contra, Mr. Kamal Ul Alam, learned Senior Advocate appearing on behalf of the respondents contends that an agreement has been executed between the appellant and the respondent in respect of sales of land and flats so, the contract must be registered as per section 17A of the Registration Act, 1908 where as per section 2(6) of the Registration Act 'immovable property' includes land and building. He further submits that a contract for the sale of any immovable property can be made only by an instrument in writing and registered as per section 54A of the Transfer of Property Act, 1882 and since the contract was not registered under section 54A of the Transfer Property Act, so the alleged agreement is not valid and proper in the eye of law.

The learned counsel further contends that the alleged contract/agreement is unregistered one and hence it is not enforceable because two conditions must be fulfilled in that regard as per section 21A of the Specific Relief Act, 1877 for enforcement of a contract for the sale of immovable property. The first condition is, the contract should be written and registered under the Registration Act, 1908 and the second condition is, that the balance amount of consideration of the contract is to be deposited before filing of suit. In the instant case the appellant neither paid the balance amount of consideration amounting to Taka 3,99,99,999/- nor registered the agreement for sale, so it is not entitled to have any relief from the tribunal or court. The learned Counsel then add that, even a claim cannot be proceeded without paying

balance consideration and the claimant cannot file the arbitration case and therefore the arbitration case is barred by law and the award is a nullity. In support of his contention, the learned counsel then referred to the decision passed in the case of ***Md. Abdul Kalam Vs. Md. Mohiuddin and others*** reported in 13ADC 309. The learned counsel further submits that, the Arbitration Tribunal has also failed to consider the decision passed in ***Ayurvedia Pharmacy (Dhaka) Ltd. Vs. Meher Banu Bibi and others,*** reported in 21BLT(AD)229.

Mr. Alam further argues that the Arbitral Tribunal misinterpreted and misquoted the principles laid down in the decision passed in the Case of ***Comprehensive Holdings Limited and another vs. MH Khan Monju and others,*** reported in 69 DLR (AD)(2017)420 which is rather inapplicable in the present case as in the aforesaid decision, the Hon'ble Appellate Division did not decide whether the agreement for sale of real estate should be registered or not.

The learned counsel goes on to submit that the tripartite agreement is void because of uncertainty and the undertaking is not lawful one and the same was taken under coercion and it is not part of the agreement where undertaking being a unilateral document cannot form part of a document of a bilateral agreement which is not enforceable yet the tribunal was wrong in treating the undertaking as a part of the agreement and thus the Tribunal failed to appreciate the provision of sections 91 and 92 of the Evidence Act.

The learned counsel further contends that after completion of construction work, the respondents sent a letter on 09.12.2013 requesting

the claimant-appellant to provide interior design, drawing and decoration and furnishing required by the claimant but the claimant-appellant did not provide interior design and drawing to the respondent (vide page 401 of the Paper Book part II) and upon receipt of the said letter, the claimant-BASIC Bank Ltd. published a tender notice for the selection of an architectural firm by publishing it in two newspapers namely 'The Daily Star' and 'The Daily Ittefaq' but the claimant-appellant delayed in providing interior design and drawing and as a result, the respondent could not complete the interior works due to non-supply of interior design by the appellant and therefore, the respondents are not liable for delaying the construction works and as such the award is patently illegal.

The learned counsel further contends that imposition of compensation of taka 36,78,42,680/- (Thirty-six crore seventy-eight lakh forty-two thousand and six hundred eighty) by the Arbitral Tribunal is patently illegal because the tribunal without having any evidence, rental receipt or documents related to rent imposed the compensation where there is no promise made by the respondents, that it would pay rent for the accommodation of the head office of the claimant-Bank in the Tripartite Agreement dated 01.04.2010 and the respondents have not infringed any condition of the contract but the tribunal very wrongly imposed compensation under section 73 of the Contract Act is not applicable in the present case.

The learned counsel contends that there has been no reciprocal promise in the agreement in terms of section 51 of the Contract Act, 1872 but the Arbitral Tribunal failed to consider it and as such the award

is void. In that regard, the learned counsel referred to the decision passed in the case of ***Amir Hossain Sowdagar Vs. Md. Harunur Rashid and others,*** reported in 65 DLR (AD)(2013) 130 and unreported judgment dated 13.01.2020 passed in Civil Appeal No. 320-321 of 2016.

The learned counsel also contends that the Arbitral Tribunal failed to show the reasons in detail in passing the award and the claimant also failed to prove the losses incurred due to the breach of the contract made by the respondents and in support of his contention, learned counsel referred to the decision passed in the case of ***TATA Power Company Ltd. Vs. M/S Dynamic Construction,*** reported in 13ADC(2016)185.

The learned counsel next contends that the claimant Bank assured to purchase seven additional floors but ultimately stayed away from the promise and hence the respondents faced huge losses and as such the respondents filed counterclaims before the Arbitral Tribunal but the same was not addressed by the Tribunal even the respondents are entitled to compensation from the claimant yet, the Arbitral Tribunal fixed the cost of Taka 34,80,000/- which is not valid. However, in support of his contention, learned counsel referred ***State of J & K and other Vs. Dev Dutt Pandit*** case, reported in (1999)7SCC 339.

The learned counsel contends that no date was fixed for "deliberation of the award" vide Order no. 23 dated 09.02.2023 passed by the Arbitral Tribunal. The award was signed by 02(two) arbitrators only out of 03(three) (vide page 349 of Part I of the Paper Book). All arbitrators should put their respective signatures following the provisions of section 38(2) of the Arbitration Act, 2001 where admittedly the

arbitrators made no discussion before pronouncing the award where it was incumbent upon the arbitrators to make it manifest that there was discussion among the arbitrators before the award is made and therefore the award is opposed to the law for the time being in force and in conflict with the public policy of Bangladesh and as such the arbitral award is liable to be set aside under section 43(1)(b)(ii) &(iii) of the Arbitration Act, 2001. However, in support of his contention, he referred to the cases of ***Oil and Natural Gas Corporation Vs. SAW Pipes Ltd.,*** reported in AIR2003 Supreme Court, 2629; ***Saudi Bangladesh Services Company Ltd. Vs. Saudi Arabian Airlines Corporation*** reported in 15 BLC (2010)20; ***Saudi Arabian Airlines Corporation vs. Saudi Bangladesh Services Company Ltd.,*** reported in 15 BLC(AD) (2010) 186; ***Oram Ltd. Vs. Reckitt Benckiser (Bangladesh) Ltd.*** reported in 72DLR(2020)459; ***Chittagong Port Authority Vs. Ananda Shipyard & Slipways Ltd***., reported in 32 BLD(HCD)(2012)120; ***World Tel Bangladesh Ltd. Vs. Bangladesh, represented by the Secretary, Ministry of Post and Telecommunications and others,*** reported in 11BLC(AD)37.

The learned counsel then submits that section 9 of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ mandated that the developer will provide possession of the real estate and execute and register the deed in favour of the purchaser within 3(three) months after receiving the full payment against the value of the real estate but the claimant-appellant failed to pay the value of the land and buildings, so it cannot claim the possession of the land and the buildings though there is nothing in section 8 of the

রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ that registration of agreement is required. With those submissions, the learned counsel finally prays for dismissing the appeal.

We have considered the exhaustive submissions so placed by the learned senior counsels for the contending parties, perused memorandum of appeal, Arbitral award and relevant documents appended in the paper books, cited decisions as well as the impugned judgment.

Learned Counsel for the respondents contended that the immovable property must be registered as per section 17A of the Registration Act, 54A of the Transfer of Property Act and 21A of the Specific Relief Act which are reproduced below:

17A of the Registration Act:

17A (1) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, a contract for sale of any immovable property shall be in writing, executed by the parties thereto and registered.

(2) A contract for sale referred to in sub-section (1) shall be presented for registration within thirty days from the date of execution of the contract and the provisions regarding registration of instruments shall apply.

54A of the Transfer of Property Act:

54A. Notwithstanding anything to the contrary contained in this act or any other law for the time being in force, a contract for sale of any immovable property can be made only by an instrument in writing and

registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof.

In a contract for sale of any immovable property, a time, to be effective from the date of registration, shall be mentioned for execution and registration of the instrument of sale, and if no time is mentioned, six months shall be deemed to be the time.

21A of the Specific Relief Act:

21A. Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, no contract for sale of any immovable property can be specifically enforced unless-

(a) the contract is in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof; and

(b) the balance amount of consideration of the contract is deposited in the court at the time of filing the suit for specific performance of the contract.

The 'immovable property' mentioned in the above-mentioned laws is conceptually and practically quite different from the 'real estate' as defined in রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ (in short the Ain, 2010). The definition of "real estate" as given in section 2(12) in the Ain, 2010 reads as under:

"২। **সংজ্ঞা**।- বিষয় বা প্রসঙ্গের পরিপন্থী কোন কিছু না থাকিলে, এই আইনে-

(১)

(২)

(৩)

(৪)

(৫)

(৬)

(৭)

(৮)

(৯)

(১০)

(১১)

(১২) "রিয়েল এস্টেট **(real estate)"** অর্থ উন্নয়ন, ব্যবস্থাপনা ও ক্রয়-বিক্রয়ের নিমিত্ত আবাসিক বা প্রতিষ্ঠানিক বা বাণিজ্যিক প্লট অথবা এপার্টমেন্ট বা ফ্ল্যাট, প্রাতিষ্ঠানিক বা মিশ্র ফ্লোর স্পেস জাতীয় স্থাবর ভু-সম্পত্তি।"

In the case of ***Comprehensive Holdings Limited and another vs. MH Khan Monju and others,*** reported in 69 DLR (AD)(2017)420, our Appellate Division held:

> "Another distinguishing feature between the sale of an immovable property as contemplated in section 54A of the Transfer of Property Act, section 21A of the Specific Relief Act and section 17A of the Registration Act and that of a sale of a "real estate" is that in case of a sale of an immovable property as contemplated in those 3(three) laws, it is the owner of the immovable property who enters into an agreement to sell the same, but in case of sale of a "real estate", it is the developer who sells the "real estate" from his share of the "real estate" to the prospective buyer by virtue of a power of attorney given

to it by the land owner. And in all the said 3(three) sections of the 3(three) laws, the phraseologies used are "contract for sale of any immovable property" and not the "real estate" a new concept of the immovable property. As already stated hereinbefore, in case of an agreement or contract of a "real estate" registration having not been made compulsory in the Ain, 2010."

Upon perusal of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ we find that no provision has been enacted to the effect that the real estate sales/purchase agreement or contract requires any registration. It is provided in sub-section (1) of section 9 of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ that the developer will provide possession of the real estate and execute and register the deed in favour of the purchaser within 3(three) months after receiving the full payment against the value of the real estate. On the other hand, Section 9 of রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ provides as under:

৯. হস্তান্তর দলিল সম্পাদন ও রেজিস্ট্রেশন- (১) রিয়েল এস্টেটের সমুদয় মূল্য পরিশোধের পর ডেভেলপার অনূর্ধ্ব ৩ (তিন) মাসের মধ্যে ক্রেতাকে রিয়েল এস্টেটের দখল হস্তান্তর, দলিল সম্পাদন ও রেজিস্ট্রেশন কার্যাদি সম্পন্ন করিয়া দিবে।

(২) রিয়েল এস্টেট এর দখল হস্তান্তরকালে উহার আয়তন কম বা বেশী হইলে তাহার মূল্য ক্রয়কৃত দর (rate) অনুযায়ী ৩ (তিন) মাসের মধ্যে সমন্বয় করিতে হইবে।

(৩) কোন ডেভেলপার কোন ভূমির মালিকের নিকট হইতে বা পক্ষে আম-মোক্তারনামা দলিল বলে ভূমি প্রাপ্ত হইয়া উক্ত ভূমিতে রিয়েল এস্টেট নির্মাণ এবং তদীয় অংশে প্রাপ্ত রিয়েল এস্টেট ক্রেতাগণের নিকট বিক্রয়ের প্রস্তাব করিলে ভূমির মালিক বা তাহার পক্ষে আম-মোক্তারনামা

দলিলে, উপ-ধারা (৪) এর বিধান সাপেক্ষে, এই মর্মে ডেভেলপারকে ক্ষমতা অর্পণ করিতে হইবে যাহাতে ডেভেলপার তাহার অংশে প্রাপ্ত রিয়েল এস্টেট বাবদ দলিল স্বয়ং সম্পাদন করিয়া বিক্রয় বা অন্য কোনভাবে হস্তান্তর করিতে পারে।

(৪) উপ-ধারা (৩) এ বর্ণিত মতে ভূমির মালিক বা তাহার পক্ষে ডেভেলপারকে আম-মোক্তারনামা দলিলের মাধ্যমে দলিল সম্পাদন করিয়া রিয়েল এস্টেট বিক্রয় বা হস্তান্তরের ক্ষমতা অর্পণ করা না হইলে, নির্মিত রিয়েল এস্টেট বিক্রয় বা হস্তান্তরযোগ্য হইবার পর ডেভেলপার কর্তৃক লিখিতভাবে অনুরুদ্ধ হইবার ১৫ (পনের) দিনের মধ্যে ভূমির মালিক বা তাহার পক্ষে ক্রেতার অনুকূলে দলিল সম্পাদন করিয়া দিতে হইবে।

(৫) প্রচলিত অন্য কোন আইনে ভিন্নতর যাহাই থাকুক না কেন, ডেভেলপার কর্তৃক উপ-ধারা (৪) এর অধীন অনুরুদ্ধ হইয়া নির্ধারিত সময়ের মধ্যে ভূমির মালিক বা তাহার পক্ষে দলিল সম্পাদন করা না হইলে, ডেভেলপার স্বয়ং এই ধারার ক্ষমতাবলে তদীয় অংশ এইরূপে ক্রেতার বরাবরে দলিল সম্পাদন করিয়া দিতে পারিবে যেন ডেভেলপার নিজেই উক্ত ভূমি ও রিয়েল এস্টেটের মালিক।

Even we find no provision has been enshrined in section 8 of the রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা আইন, ২০১০ that the Real Estate sales/purchase agreement or contract requires registration. The section is reproduced below for convenience:

রিয়েল এস্টেট ক্রয়-বিক্রয়ের শর্তাবলী।-

(১) প্রসপেক্টাসে বা বরাদ্দপত্রে রিয়েল এস্টেট এর বিক্রয়যোগ্য এলাকার বিভাজনসহ যথাযথ ব্যাখ্যা বা বিশ্লেষণ উল্লেখ করিতে হইবে।

(২) রিয়েল এস্টেট উন্নয়ন ও ক্রয়-বিক্রয় সংক্রান্ত বিস্তারিত শর্ত, পক্ষদের মধ্যে সম্পাদিত চুক্তিতে উল্লেখ করিতে হইবে।

(৩) কোন ডেভেলপার ক্রেতার সম্মতিক্রমে বরাদ্দকৃত নির্দিষ্ট প্লট বা ফ্ল্যাট পবির্তন করিতে পারিবে।

(৪) কোন ডেভেলপার ক্রেতার নিকট হইতে চুক্তিতে উল্লিখিত শর্তের বাহিরে অতিরিক্ত অর্থ গ্রহণ করিতে পারিবে নাঃ

তবে শর্ত থাকে যে, যদি কোন পক্ষ পরবর্তীতে কোন উন্নতমানের সরঞ্জামাদি সংযোজনের প্রস্তাব করিয়া পরস্পর সম্মত হইয়া এই মর্মে সম্পূরক চুক্তি সম্পাদন করিলে এই বিধান কার্যকর হইবে না।

In the context of the above laws we are of the view that, the dispute arising out of the agreement dated 01.04.2010 between the claimant-appellant and respondent falls under section 8 read with section 39 of the Real Estate Development and Management Act, 2010 and such agreement does not require registration. So, the provisions of section 54A of the Transfer of Property Act, 1882, section 21A of the Specific Relief Act, 1877 and section 17A of the Registration Act, 1908 are irrelevant in the case in hand. Rather, the provisions of the Real Estate Development and Management Act, 2010 shall prevail over all the provisions so provided in section 54A of the Transfer of Property Act, 21A of the Specific Relief Act and section 17A of the Registration Act. The said issue was settled by our Appellate Division in the case of ***Comprehensive Holdings Limited and another vs. MH Khan Monju and others*** (supra) which is binding on this Court.

However, the learned District Judge, Dhaka travelled beyond its jurisdiction by allowing the Arbitration Miscellaneous Case on setting aside the award dated 09.02.2023 ignoring the above-mentioned decision passed by the Appellate Division.

Next, it is evident from Clause 3(C) of the Deed of Tripartite Agreement dated 01.04.2010 that the appellant-BASIC Bank Ltd was

not obliged to purchase the extended seven floors of the disputed building because it was enshrined in Clause 3(C) of the aforesaid agreement that if the first party, builders extended floor space thereon, the second party shall get priority to purchase the same in its name on prevailing market rate.

On the contrary, the decision passed in ***Ayurvedia Pharmacy (Dhaka) Ltd. Vs. Meher Banu Bibi and others,*** reported in 21BLT(AD)229 has not been found to be applicable in the case in hand because the decision is not related to arbitration.

We find that রিয়েল এস্টেট উন্নয়ন ও ব্যবস্থাপনা অইন, ২০১০ (Real Estate Development and Management Act, 2010) is a special law and section 36(4) provides that the award declared by the arbitral tribunal is final. Section 36(4) of the said act also provides as follows:

> ‘‘সালিস আইন, ২০০১ এ যাহা কিছুই থাকুক না কেন, পক্ষগণ কর্তৃক গঠিত সালিসী ট্রাইব্যুনালের রোয়েদাদ পক্ষগণ এবং তাহাদের মাধ্যমে বা অধীনে দাবীদার যে কোন ব্যক্তির উপর বাধ্যকর হইবে এবং উহার বিরুদ্ধে কোন আদালতে কোন পক্ষের অপত্তি উত্থাপনের অধিকার থাকিবে না।’’

We further find, the undertaking dated 12.03.2013 executed by the respondents is a part of the original agreement. The claim raised by the respondents that it was made under coercion and duress has no basis in it because the respondents did not go for any legal step against such undertaking on account of the alleged coercion. Rather Respondent Witness 1 stated in his cross-examination that he did not complain to anyone about the undertaking. When the respondents failed to complete

the construction work within 30.03.2013 then they executed the undertaking on 12.03.2013 expressing that, “We also undertake to complete the unfinished works within 30.09.2013” (Vide Page 59 of the Paper book, Part II).

The learned Senior Counsel appearing on behalf of the respondent argues that there was no effective participation, consultation and deliberation among the arbitrators and the award was not signed by all three arbitrators, hence the award “conflicts with the law” as well as contrary to the public policy and as such the same will be set aside under section 43(1)(b)(iii) of the Arbitration Act. On the other hand, the learned senior counsel for the appellant vehemently opposes the submission made by the learned Senior Counsel for the respondents. He contends that the draft award passed by the majority arbitrators was sent and delivered to the dissenting arbitrator which he admitted in his dissenting award and there was no lack of deliberation and the ground of violation of public policy under section 43(1)(b)(ii) & (iii) of the Arbitration Act, 2001 has no basis. Before scrutiny, we have to examine whether any deliberation before passing an award was made for which, we would like to look at the definition of “deliberation”.

According to Black’s Law Dictionary (Seventh Edition), deliberation means “The act of carefully considering issues and options before making a decision or taking some action; especially, the process by which a Jury reaches a verdict, as by analyzing, discussing and weighing the evidence.”

The deliberations of the arbitral tribunal take place in private, usually after a hearing or procedural session when the members of the arbitral tribunal are all gathered or meet in an in-person meeting. Deliberations can also be held by telephone or video conference or by correspondence. It is the collaborative process of discussing on contentious issues by considering various perspectives in order to form opinions and guide judgment. Effective deliberation incorporates sustained and appropriate modes of argumentation.

Arbitration Rule 34(2) of the International Centre for Settlement of Investment Disputes (ICSID) provides:

> "The deliberation of the tribunal take place in private and can be held by any means that the tribunal considers appropriate, including in person, by telephone, video conference or correspondence."

It is revealed from the order sheets of Arbitral Tribunal that initially the tribunal sat physically. But due to COVID Pandemic, they decided to continue further proceedings through video conference. It is stated in order no. 06 dated 14.11.2020 that "After deliberation amongst the learned members of the Arbitral Tribunal, it is decided that the application of the claimant be considered in presence of the parties in order to decide whether further proceedings of the case can continue via video conference." It is evident from the order sheets that learned arbitrators gave both parties equal opportunity to present their cases including evidence and arguments. Arbitrators carefully reviewed all

evidence and submissions presented by the parties. The order no. 22 dated 18.12.2021 stated,

> "Hearing of the case closed after the submissions on behalf of the respective parties. After due **deliberations** amongst the learned arbitrators, the award would be declared in due course with notice to the parties."
>
> (Emphasized by us)

The arbitrators concluded the deliberation and issued the award on 09.02.2023 vide order no. 23 putting their signatures. We find that the arbitral tribunal declared the award complying with section 38(2) of the Arbitration Act, 2001.

It is divulged from paragraph 87 (c) of the dissenting award (vide page 394 of the Paper Book Part I) that the draft award passed by the majority arbitrators was delivered to the dissenting arbitrator. Upon receipt of the draft award and having deliberation Mr. Justice Mohammad Fazlul Karim passed the dissenting award putting his signature. Hence, we cannot accept the argument made by the learned counsel for the respondent as we find that three arbitrators signed the award after due deliberation which is evident from order no. 23 dated 09.02.2023 (Vide page 49A of the paper book, Part-II). The assertion made by the learned Counsel for the respondents regarding the violation of public policy is unsubstantiated. The award does not contravene any fundamental principles of law or public interest and does not violate any legal principles or procedural requirements. Hence, the cited decisions referred to by Mr. Alam are not applicable in the present case. The

award includes detailed reasoning for each decision. It also dealt with all claims, counterclaims and defenses raised by the parties, indicating that the arbitrators considered the entirety of the case. It followed a clear and logical structure, demonstrating the arbitrators' thoughtful deliberation. We find no grounds for setting aside the arbitral tribunal as per section 43 of the Arbitration Act, 2001. A Court may set aside an award on the grounds provided under section 43 of the said Act which is reproduced below:

"৪৩। **সালিসী রোয়েদাদ বাতিলের কারণসমূহ-** (১) কোন সালিসী রোয়েদাদ বাতিল করা যাইতে পারে, যদি-

(ক) কোন পক্ষ আবেদন দাখিল করিয়া এই মর্মে প্রমান উপস্থাপন করে যে-

(অ) সালিসী চুক্তির কোন এক পক্ষের কোনরুপ অক্ষমতা ছিল:

(আ) যে আইনের অধীন পক্ষগণ সালিস চুক্তি করিয়াছে সেই আইনটি বৈধ আ্ইন নহে;

(ই) আবেদনকারী পক্ষকে সালিসকারী নিয়োগে বা সালিসী কার্যধারা সম্পর্কে যথাযথ নোটিশ প্রদান করা হয় নাই অথবা উক্ত পক্ষ তাহার মামলা উপস্থাপন করিতে অন্য কোন যুক্তিসংগত কারণে অক্ষম হইয়াছিল:

(ঈ) সালিসী রোয়েদাদ এমন কোন বিরোধীয় বিষয় সম্পর্কিত যাহা সালিসে প্রেরিত বিষয়ের উদ্দেশ্য বা শর্ত বহির্ভূত বা উহাতে এমন সিদ্ধান্ত রহিয়াছে যাহা সালিসে প্রেরিত বিষয়ের পরিধি বহির্ভূতঃ

তবে শর্ত থাকে যে, যদি সালিসে প্রেরিত হয় নাই এইরুপ বিষয়কে সালিসে প্রেরিত হইয়াছে এইরুপ বিষয় হইতে পৃথক করা সম্ভব হয় তাহা হইলে সালিসে প্রেরিত না হওয়া বিষয়ের উপর সিদ্ধান্ত সম্পর্কিত অংশ বাতিল করা যাইতে পারে;

(উ) সালিসী ট্রাইব্যুনালের গঠন বা সালিসী পদ্ধতি পক্ষগণের চুক্তির সহিত সংগতিপূর্ণ ছিল না অথবা এইরুপ চুক্তির অবর্তমানে এই আইনের বিধানাবলীর সহিত সংগতিপূর্ণ নয়;

(খ) আদালত কিংবা ক্ষেত্রমত, হাইকোর্ট বিভাগ এই মর্মে সন্তুষ্ট হয় যে-

(অ) বিরোধের বিষয়বস্তু বাংলাদেশে প্রচলিত আইন অনুসারে সালিসের মাধ্যমে নিষ্পত্তিযোগ্যে নহে;

(আ) সালিসী রোয়েদাদ দৃশ্যতঃ বাংলাদেশে প্রচলিত কোন আইনের পরিপন্থী;

(ই) সালিসী রোয়েদাদ বাংলাদেশের জননীতির পরিপন্থী; অথবা

(ঈ) সালিসী রোয়েদাদ তঞ্চকতা বা দুর্নীতি দ্বারা প্ররোচিত বা প্রভাবান্বিত।

...

(emphasized by us)

We find that the award does not fall within the mischief of the above-mentioned section 43 of the Act and as such there remains no ground to set aside the award dated 09.02.2023 passed by the majority arbitrators.

Further, from the statement of claim filed by the claimant-appellant it shows that, the claimant prayed for Taka 111,44,97,767.01 as compensation for delay in delivery of possession of the purchased floors up to 30.06.2019, taka 36,78,42,680.08 as compensation for the cost incurred by the claimant by way of reimbursement of rents paid for the accommodation of the head office during the period failing to give delivery of possession of the purchased floors, taka 7,44,500/- for the cost incurred for appointing independent surveyor, taka 7,66,50,550.97 as damage and loss incurred for failure to earn profit by investing the amount incurred as rent for the accommodation of the head office of the claimant, taka 3,64,671.84 as damage and loss incurred for failure to earn profit by investing the amount for payment of remuneration to independent surveyor, taka 27,71,46,663.99 as damages and loss

incurred for failure to earn profit by investing the amount kept as provisioning as per direction of Bangladesh Bank and interest till realisation of compensation. It also appears from the award that the arbitral tribunal declared that the claimant is entitled to receive Taka 36,78,42,680/- only for accommodation of the head office from October, 2013 to June 2019 as compensation and interest at the rate of two percent more than the bank rate from the date of award till the date of payment. The tribunal rejected all other claims of the claimant and counterclaims prayed by the respondents. We do not find substance in the argument made by the learned counsel of the respondent to the effect that the Arbitral Tribunal failed to consider the provision of section 29 of the Arbitration Act.

The claimant submitted detailed expenditures and rent receipts marked as Exhibit nos. 55 to 123 and upon due examination, the arbitral tribunal declared Taka 36,78,42,680/- which the claimant paid for rent for the accommodation of the head office of the claimant from October, 2013 to June 2019 and further amount to be paid for rent till delivery of possessions of the floors and spaces in question. We find no illegality in awarding such compensation which was paid as rent for the accommodation of head office.

It is evident from Clause 2 of the Deed of Tripartite Agreement dated 01.04.2010 that the construction of the building was to be completed within 30.03.2013 but the respondent failed to complete the construction work within the stipulated time. Hence the respondents are obliged and liable to pay compensation as per award. In Clause 2 of the

Deed of Tripartite Agreement (vide page 23 of the Paper Book Part II) it is clearly stated, “In case of failure, delay, defer, held up or negligence to commence the construction works within time specified then the second party shall have the liberty to postpone or delay in payment of the installment to be due thereon. In that event, Second party reserves the right to get compensation @ 8% p.a. on paid amount for such delay.”

The learned counsel for the respondents argues that the tribunal fixed the costs of arbitration at Taka 34,80,000/- which is hefty and inflated. In support of his argument, he referred to the case of ***State of J & K and other Vs. Deb Dutt Pandit***, reported in (1999)7SCC 339. On the other hand, learned counsel for the appellant contends that the referred citation is not applicable in the present case. The Arbitral Tribunal fixed the cost complying with the provision of section 38 of the Arbitration Act, 2001.

We also find that the tribunal has rightly followed the provision of section 38(7) of the Arbitration Act. Section 38(7) of the Arbitration Act is thus quoted below:-

৩৮(৭)। পক্ষগণ অন্যভাবে সম্মত না হইলে-

(ক) সালিসের খরচ সালিসী ট্রাইব্যুনাল কর্তৃক নির্ধারিত হইবে; এবং

(খ) সালিসী ট্রাইব্যুনাল রোয়েদাদে-

(অ) খরচ পাইতে অধিকারী পক্ষের নাম;

(আ) খরচ প্রদানকারী পক্ষের নাম;

(ই) খরচের পরিমান অথবা উক্ত পরিমান নির্ধারণের পদ্ধতি; এবং

(ঈ) খরচ প্রদান করার পদ্ধতি উল্লেখ করিবে।

Learned Senior Counsel, Mr. Kamal-Ul-Alam argues that if any developer does not take any initiative according to the agreement, then it shall be deemed to be an offence of fraud and for such offence, the developer shall be punished with imprisonment for a term which may extend to 2(two) years under section 27 of the Real Estate Development and Management Act, 2010. Section 28 of the above-mentioned Act also provides punishment for failure to deliver possession within the specific time. So, the claimant could have lodged a criminal case. In reply to that the learned Senior Counsel for the appellant, Mr. Khaled submits that the aggrieved party can file a civil suit or criminal case under section 36 of the Real Estate Act, 2010 to resolve the dispute. We find substance in the submission so placed by Mr. Khaled. There is no bar to go to arbitral tribunal for settling the disputes. Section 36 of the Real Estate Development and Management Act, 2010 is reproduced below for convenience:

৩৬।(১) **বিরোধ নিস্পত্তি:** রিয়েল এস্টেট প্রকল্প বাস্তবায়নের যে কোন পর্যায়ে প্রকল্প সংশ্লিষ্ট ক্রেতা, ডেভেলপার, অথবা ভুমির মালিকের মধ্যে এই আইনের ধারা ২১,২২, ২৩, ২৪, ২৫, ২৭, ২৮, ২৯ এবং ৩০ এ বর্ণিত অপরাধের জন্য বা তাহাদের মধ্যে সম্পাদিত চুক্তির কোন বিধান লংঘনের জন্য মতবিরোধের সৃষ্টি হইলে পক্ষগণ, প্রথমে নিজেদের মধ্যে আপোষে উহা নিস্পত্তির চেষ্টা করিবেন।

(২) উপ-ধারা (১) অনুযায়ী আপোষের পদক্ষেপ গ্রহণের পর যদি কোন পক্ষের অসহযোগিতার জন্য উহা ব্যর্থ হয় তবে অপর পক্ষ বিবাদমান বিষয়টি নিস্পত্তির জন্য সালিস আইন, ২০০১ মোতাবেক সালিসী ট্রাইব্যুনালে যাওয়ার অভিপ্রায় ব্যক্ত করিয়া অপর পক্ষকে নোটিশ প্রদান করিবেন।

(৩) উপ-ধারা (২) এর অধীন নোটিশ প্রাপক উক্ত নোটিশ প্রাপ্তির ৩০(ত্রিশ) দিনের মধ্যে নোটিশ প্রেরকের সহিত যৌথভাবে সালিসী ট্রাইব্যুনাল গঠন করিবেন।

(৪) সালিস আইন ২০০১ এ যাহা কিছুই থাকুক না কেন, পক্ষগণ কর্তৃক গঠিত সালিসী ট্রাইব্যুনালের রোযেদাদ পক্ষগণ এবং তাহাদের মাধ্যমে বা অধীনে দাবীদার যে কোন ব্যক্তির উপর বাধ্যকর হইবে এবং উহার বিরুদ্ধে কোন আদালতে কোন পক্ষের আপত্তি উত্থাপনের অধিকার থাকিবে না।

(৫) উপ-ধারা (৩) মোতাবেক পক্ষগন সালিসী ট্রাইব্যুনাল গঠনে ব্যর্থ হইলে যে কোন পক্ষ বিবাদমান বিষয়টি বিচারের জন্য এই আইনের অধীনে উপর্যুক্ত আদালতে মামলা দায়ের করিতে পারিবেন।

Given the above facts and circumstances, we do not find any iota of substance in the impugned judgment and order which is liable to be set aside. The learned Senior District Judge, Dhaka erred in law in setting aside the arbitral award. The arbitral tribunal acted within its jurisdiction and the award is consistent with the prevailing law as well as the terms of the tripartite agreement dated 01.04.2010.

Taking into account of all the materials stated herein above, we find merit in the appeal.

Resultantly, the appeal is allowed, however without any order as to costs.

The judgment and order dated 15.01.2024 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No.210 of 2023 is thus set aside.

Consequently, the award dated 09.02.2023 passed by majority arbitrators is restored and hereby affirmed.

The appellant is at liberty to execute the said award as per law.

Let a copy of this judgment and order along with the lower courts record be communicated to the Court concerned forthwith.

Md. Mozibur Rahman Miah, J.

I agree.

Md. Ariful Islam Khan
Bench Officer