

District: Dhaka

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 6042 of 2023

With

Civil Revision No. 102 of 2024

In the matter of :

Ms. Tahmina Zakaria

...Petitioner (in C.R. No. 6042 of 2023) .

-Versus-

Sharmina Jakaria and others

...Opposite parties (in C.R. No. 6042 of 2023)

And

Promote Holdings Limited

... Petitioner (in C.R. No. 102 of 2024)

-Versus-

Sharmina Jakaria and others

...Opposite parties (in C.R. No. 102 of 2024)

Mr. Abul Kalam Chowdhury, Senior Advocate

...For the petitioner (in C.R. No. 6042 of 2023) and

...For opposite party No. Nos. 2 and 3 (in C.R.No.102 of 2024)

Mr. Md. Omar Faruk, Advocate

...For the opposite party No. 2 (in C.R.No.6042 of 2023) and

...For the petitioner (in C.R. No. 102 of 2024)

Mr. M. Tashdid Anowar, Advocate

...For opposite party No. 1 (in C.R.No.6042 of 2023) and

...For opposite party No. 1 (in C.R. No. 102 of 2024)

Heard on: 05.12.2024 and 30.01.2025

Judgment on: 18.03.2025

Both the revisional applications are directed against the identical order dated 26.10.2023 passed by the District Judge, Dhaka in Arbitration Miscellaneous Case No. 70 of 2023 disposing of the miscellaneous case filed under section 12 of the Arbitration Act, 2001 and thereby appointing arbitrators together with an order of restraintment, restraining the opposite parties from proceeding with further construction work into the scheduled property till sitting of the Arbitral Tribunal and as such, both the revisions applications are heard together and disposed of by this single judgment.

The present opposite party No. 1 (in both the revisions) being petitioner filed Arbitration Miscellaneous Case No. 70 of 2023 before the District Judge, Dhaka under section 12(3) of the Arbitration Act, 2001 for appointing an arbitrator for the opposite party of the arbitration miscellaneous case, Promote Holdings Limited to resolve the disputes in arbitration proceeding. Case of the petitioner in short are that petitioner is the owner of the

scheduled property by way of Heba deed No. 10020 dated 29.09.2016. Petitioner and her 2(two) sisters entered into an agreement with Developer Company-opposite party for constructing of a 9(nine) storied building into the scheduled property. In agreement there is stipulation for building a complete residential complex upon 4.52 kathas of land of which developer would get a proportion of 50% and the petitioner along with her 2(two) sisters would get 50%. Developer Company-opposite party in violation of terms of the agreement put a signboard in the said project stating it as residential-cum-commercial building. Petitioner i.e. present opposite party No.1 contacted with the developer several times but it did not pay heed. It is further stated at paragraph No. 11 of the application that the petitioner (present opposite party No. 1) received the first installment of the signing money amounting to Tk.35,00,000/-(thirty five lac) in proportion, but the rest Tk.32,50,000/-(thirty two lac and fifty thousand) has not been paid. Petitioner sent several legal notices to developer to settle the dispute but the developer is reluctant to settle the matter

amicably. Petitioner lastly on 26.10.2022 sent a notice under Section 12(3) of the Arbitration Act, but developer-company did not response to it and as such petitioner has constrained to file this Arbitration Miscellaneous Case for appointing arbitrator for the developer to resolve the dispute.

It is pertinent to mention here that in the aforesaid arbitration miscellaneous case the present opposite party No. 1 (petitioner of arbitration proceeding) did not implead her 2(two) sisters, the co-owners of the land and co-first parties to the agreement as party of aforesaid Arbitration Miscellaneous Case, and or no notice for appointing arbitrator was issued on them.

The other 2(two) sisters namely, Tahmina Zakaria and Sabrina Zakaria appeared in the miscellaneous proceeding by filing an application to be added as opposite party Nos. 2 and 3, stating, inter-alia that their sister Sharmina Jakaria, who is the co-owner of the property in equal share did not make them party in the arbitration proceeding or did not serve any notice upon the co-

owners of the property, co-first party to the agreement, with a vested interest, best known to her. It is further asserted that although the applicants [other 2(two) sisters] are parties to the agreement and they have equal and identical interest as of the petitioner, thus, in their absence, the arbitration miscellaneous case cannot be adjudicated upon. Their application was allowed and they were added as opposite party Nos. 2 and 3 in the arbitration miscellaneous proceeding.

Thereafter, the added opposite party Nos. 2 and 3 filed a written objection contending, inter alia that the scheduled property measuring an area of 0746 ojutangsha was originally belonged to A.B.M Jakaria Alamgir who gifted the same to his 3(three) daughters, Tahamina Zakaria, Sabrina Zakaria and Sharmina Jakaria vide Heba deed No. 10020 dated 20.09.2016. The said 3(three) daughters (petitioner and added opposite party Nos. 2 and 3 to the arbitration miscellaneous proceeding) entered into an agreement with present opposite party No. 1 on 22.07.2019 (Promote Holding Limited) for construction of 9(nine) storied

building on the scheduled property. Accordingly a registered power of attorney being No. 3438 was also executed and registered on the same date.

Thereafter, after obtaining necessary approval from the RAJUK, the opposite party No. 1 started construction. It was also asserted that the petitioner and added opposite party Nos. 2 and 3 together with their father consented to the plan approved by the RAJUK at the instance of opposite party No. 1. Thereafter, the developer completed the project successfully and handed over the possession of the shares to the added opposite party Nos. 2 and 3 and it was also asserted that the developer also sold out most of flats of it's share to different persons and delivered possession. It is further stated that petitioner and the added opposite parties, who are full sisters jointly entered into the agreement with the developer i.e. opposite party No.1 and received first installment of the signing money and because of non-cooperation of the petitioner rest amount of the signing money could not be received from developer,

though developer offered the same several times to the petitioner and added opposite parties.

It is further stated that though these opposite parties are joint executants of the agreement and power of attorney and the project has been almost completed as per agreement without any objection. Petitioner is trying to get the rest amount of the singing money from the Developer by depriving these opposite parties and for creating pressure on opposite parties filed the miscellaneous proceeding. It is asserted that there is no dispute between the parties and as such there is no need to appoint arbitrator. Moreover, as the project is completed there is no need for appointing arbitrator. It is also stated that petitioner filed the case in order to get illegal gain by creating pressure on the opposite parties, hence application filed by petitioner under Section 12(3) of the Arbitration Act is liable to be rejected.

Learned District Judge, on 26.10.2023 taken up the matter of injunction application filed by the petitioner for hearing together

with the written objection. In its order learned District Judge although asserted that both the parties proposed the name of 3(three) arbitrators, but the fact remains otherwise; the opposite party Nos. 2 and 3 filed written objection against the arbitration miscellaneous case filed under section 12 of the Arbitration Act, 2001. It was also mentioned in the order that the opposite party No. 1 filed an application for holding local inspection into the scheduled property, learned District Judge by his judgment and order found that the developer failed to construct the building in accordance with the agreement and as such, the petitioner was constrained to file this proceeding to appoint arbitrator under section 12 of the Arbitration Act, 2001, and with the aforesaid findings he disposed of the arbitration miscellaneous case appointing arbitrators, without even taken into consideration the objection filed by the added opposite party Nos. 2 and 3. At the same time, an order of injunction has been passed restraining the opposite parties from any type of construction work to the scheduled building till first sitting of the Arbitral Tribunal.

Interestingly, although learned District Judge disposed of the arbitration miscellaneous case appointing 2(two) arbitrators but at the same time kept the application for local inspection pending without disposing of the same.

Having been aggrieved by the said order of the District Judge, Dhaka, both the revisional applications have been preferred and obtained the Rules.

Mr. Abul Kalam Chowdhury, learned Senior Advocate appearing for the petitioner of Civil Revision No. 6042 of 2023 and opposite party Nos. 2 and 3 of the Civil Revision No. 102 of 2024 submits that learned District Judge, Dhaka at the time of disposing of the arbitration miscellaneous case, appointing arbitrators failed to consider that the arbitration miscellaneous case is not at all maintainable in view of the provision of the Arbitration Act, 2001 as well as the terms and conditions of the agreement dated 22.07.2019, entered between the land owners, 3(three) daughters of A.B.M. Zakaria Alamgir and Promote Holdings Limited, the

developer company and as such, the judgment and order dated 26.10.2023 passed by the District Judge, Dhaka is not sustainable in law. He next submits that under clause 13 of the agreement dated 22.07.2019, it is stipulated that if there is any difference of opinion or dispute arose, then the first parties to the agreement amicably settled the dispute among themselves first and thereafter both the parties i.e. first party and second party shall appoint their own representatives to resolve the dispute amicably and if the amicable settlement is failed for any reason, then they may take recourse of law under the authority of the Arbitration Act, 2001, but in the instant case, the petitioner of the arbitration miscellaneous case without informing her sisters (co-first party) or settling the dispute among themselves or took any initiative to settle the dispute amicably between the parties directly rushed to the Court with an application under section 12(3) of the Arbitration Act, 2001, which in the eye of law is not at all maintainable, despite learned District Judge failing to consider the purports and purpose of the agreement as well as the contemplation of the relevant provisions of the

Arbitration Act, 2001, misdirected himself by entertaining arbitration miscellaneous case and appointing arbitrators and as such, the impugned order is liable to be set aside.

He further submits that there is almost no dispute between the parties, because the construction work has been completed and the share of the constructed flats having been distributed to the concerned parties to the agreement and due to non-cooperation of the petitioner of arbitration miscellaneous case the rest amount of the signing money could not be received.

Mr. Md. Omar Faruk, learned Advocate for the petitioner of Civil Revision No. 102 of 2024 upon adopting the submissions of learned Senior Advocate, Mr. Abul Kalam Chowdhury further submits that learned District Judge failed to consider that the arbitration miscellaneous proceeding initiated under section 12(3) is not a bonafide one, rather it was filed only to harass the developer company in order to get illegal gain, which has been admitted by the full sisters of the petitioner. He further submits that the

petitioner of the arbitration miscellaneous case filed an application for injunction sought for an order of restraintment upon the developers as well as the other opposite parties restraining them from further construction work. Against which the developer company filed a written objection. At the same time, they also filed an application for local inspection for ascertaining that whether the allegation brought by the petitioner of the arbitration miscellaneous case is true or false and application has at all any merit or not. But learned District Judge, Dhaka without considering the aforesaid objection or disposing of the application for local inspection arbitrarily with a slipshod manner disposed of the arbitration miscellaneous case together with the order of injunction, which cannot be sustainable under the law of arbitration as well as according to the agreement between the parties.

On the other hand, Mr. M. Tashdid Anwar, learned Advocate for opposite party No. 1 submits that according to the Arbitration Act, 2001 as well as clause 13 of the agreement dated 22.07.2019, a provision for appointing arbitrators has been provided to settle any

dispute between the parties and since, there is difference of opinion and dispute arose between the parties, thus, the present opposite party No. 1 justly and legally invoked the jurisdiction provided under section 12 of the Arbitration Act, 2001 by filing the arbitration miscellaneous case and learned District Judge after considering the submissions as well as the facts and circumstances of the case disposed of the miscellaneous case appointing 2(two) arbitrators for each of the parties together with an ad-interim order of restraintment, restraining the opposite parties from proceeding with the further construction work till first sitting of the Arbitration Tribunal.

Heard learned Advocates of all the parties, perused the revisional applications together with the annexures, the supplementary affidavit, counter affidavit and the provisions of law.

It appears that the opposite party No. 1 together with her 2(two) full sisters, the owners of 0746 ojutangsha of land property

situated within the RAJUK area under police station- Mughda, Dhaka entered into an agreement with a developer company namely, Promote Holdings Limited for construction of a 9(nine) storied building thereon. According to the contention of opposite party No. 1 (petitioner of arbitration miscellaneous case), the developer company in violation of the terms and condition of the agreement constructed the building turning it to a residential-cum-commercial building. Further contention of the opposite party is that the promoter proceeded with the construction work with low graded materials ignoring the objection of the petitioner and thereby violating the terms and conditions of the deed of agreement.

On the other hand, the added opposite party Nos. 2 and 3 of the Arbitration Miscellaneous Case No. 70 of 2023 by filing a written objection dated 26.10.2023 denied the aforesaid averments of the petitioner-opposite party No. 1 asserting that the developer-company proceeded with the construction work with the full consent of the first party, 3(three) sisters together with their father

and husband of opposite party No. 1 and thus, the allegation of violation of the terms and conditions of the agreement does not arise at all; further contention of the 2(two) sisters is that the developer-company completed the project successfully and handed over the possession of the shares to the concerned parties and due to the non-co-operation of the petitioner-opposite party No. 1, the rest of the signing money could not be received.

From the aforesaid averments, it is crystal clear that there is a difference of opinion and dispute among the members of the first party and according to the stipulation of clause 13 of the deed of agreement dated 22.07.2019, if any difference of opinion or dispute arose among the members of the first party, then they shall resolve the same amicably by mutual discussion.

It is pertinent to mention here that the petitioner-added-opposite party Nos. 2 and 3 specifically asserted that without informing them or notifying formally and beyond their back, their sister, Sharmina Zakaria with an ulterior motive and for her

personal benefit initiated the arbitration miscellaneous proceeding without observing the due process of law.

I have gone through the agreement dated 22.07.2019, in clause 13 of the agreement, it is stipulated that if any difference of opinion or dispute arose regarding the project or deed of construction among the members of the first party, then they shall first resolve the same amicably. From the assertion of the sisters, members of the first party, it is crystal clear that there is difference of opinion and dispute among them, but Sharmina Jakaria, petitioner of the arbitration miscellaneous case, one of the sisters without taking resort to the process as has been stipulated in the deed of agreement and thereby ignoring the stipulation of the agreement directly rushed to the Court for appointing arbitrators under section 12 of the Arbitration Act, 2001. Moreover, before invoking the jurisdiction of the Court, it is the contemplation of section 12 of the Arbitration Act, 2001 that the party concerned shall notify formally to the all interested party to settle the dispute amicably, but in the instant case, the petitioner of the arbitration

miscellaneous case did not serve any notice upon her sisters who are the members of the first party to the agreement and as such, the cause of action to invoke the jurisdiction of the District Judge as has been provided under section 12 of the Arbitration Act, 2001 did not arise.

In the case of Genesis System Limited Vs. Clapp and Mayne Inc., reported in 9 BLC 636, it is held that:

“The legal position is that subject to provisions of the Act the parties are free to agree on a procedure for appointing an Arbitrator or Arbitrators. In the instant case, there is an arbitration clause in the agreement which provides for friendly discussion to resolve any dispute between the parties and in the event of failure to resolve the dispute amicably through friendly discussion the dispute will be first referred, for resolution, to a third party that is mutually acceptable to both the parties.

11. *The admitted position is that both the arbitration clauses as well as the provisions of section 12 of the Act set a pre-condition for resorting to arbitration and the pre-requisite is that before resorting to any such proceeding an attempt must be made by the parties to settle the dispute between them amicably and only on their failure to resolve the dispute amicably the aggrieved party can initiate a proceeding for arbitration. On a close reading of sub-section (1) of section 12 of the Act read with clause 19 of the agreement it appears that in the instant case if either of the parties fail to fulfill their responsibilities under the terms of the agreement, an attempt must be made to resolve the dispute by friendly discussion. In the present case no friendly discussions took place. So, this vital element is missing. I have already indicated that the alleged notice is no notice in the eye of law. Thus the second material requirement of law is also*

*missing. Without fulfilling the aforesaid requirements
neither of the parties is entitled to resort to section 12
of the Act.”*

In the premise above, this Court is of the view that the proceeding of Arbitration Miscellaneous Case No. 70 of 2023 is suffered from legal infirmity and thus, the proceeding was not a competent one. Resultantly, the judgment and order passed in the arbitration miscellaneous case cannot be sustainable. Therefore, this Court does find merit in both the Rules.

Accordingly, the Rules are made absolute.

The judgment and order dated 26.10.2023 passed by the Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 70 of 2023 is hereby set aside.

No order as to cost.

Communicate the order at once.