

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

CIVIL REVISION NO. 5705 OF 2024

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Ariful Islam, son of late Md. Badiul Alam, Address:
C/586/A, Khilgaon Punarbashan Zone, Khilgaon,
Dhaka and others.

.... Petitioners

-Versus-

Nagar Homes Limited represented by its Senior
Executive, Md. Omar Faruk Majumder, son of Alkas
Mia Majumder, House No. 4/B, Road No. 62,
Gulshan-2, Dhaka-1212.

....Opposite party

Mr. Rafi Ahmed, Advocate

... For the petitioners

Mr. Md. Wahiduzzaman Sohel, Advocate

....For the opposite party

Heard on 30.06.2025 and 01.07.2025.

Judgment on 01.07.2025.

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

At the instance of the opposite party nos. 1-3 (land owners) in Arbitration Miscellaneous Case No. 497 of 2023, this rule was issued calling upon the opposite party to show cause as to why the order no. 10 dated 23.10.2024 passed by the learned District Judge, Dhaka in the said Miscellaneous Case allowing the case filed under section 12 of the Arbitration Act, 2001 and thereby appointing arbitrators for the respective parties to form the arbitral tribunal and resolve the dispute through arbitration should not be set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, this court also stayed the operation of the impugned judgment and order for a period of 3(three) months which was lastly extended on 27.05.2025 for another 3(three) months.

The short facts leading to issuance of the rule are:

The present opposite party (a developer company) as applicant filed the aforesaid Miscellaneous Case under section 12 of the Arbitration Act, 2001 stating *inter alia* that the said applicant as well as the opposite parties herein the petitioner on 15.02.2011 entered into an agreement to construct a 13-storey building over the property described in the schedule to the said agreement. It has been stipulated in the agreement that the developer will complete constructing the building within a period of 42 months with a grace period of another 6 months. As per the said agreement, the opposite party (developer) took steps obtaining plan from Rajdhani Unnayan Kartipakkha (shortly, RAJUK)

and ultimately got the plan approved on 17.09.2014. But fact remains, the petitioners failed to hand over the vacant possession of the property in favour of the opposite party and then dispute arose among them though in the meantime, the opposite party invested huge amount of money to accomplish the work. It has further been stated in the application that though in clause no. 31 to the agreement dated 15.02.2011, there has been a condition to settle the dispute among themselves if arises, by appointing a sole arbitrator but it has not been entertained even though the opposite party took several steps by arranging meeting with the petitioners to resolve the dispute but due to non-cooperation of the petitioners, it was not materialized. Ultimately, the opposite party issued a notice of arbitration on 11.07.2023 by appointing its own arbitrator namely, Mr. Md. Masdar Hossain, Senior District and Sessions Judge (Retired) and Advocate, Supreme Court of Bangladesh asking the petitioners to appoint their own arbitrator within 30(thirty) days from the date of receipt of the copy of the said notice. But as the petitioners did not receive the said notice, the opposite party thus compelled to file the Miscellaneous Case under section 12 of the Arbitration Act, 2001.

The present petitioners who are the opposite parties to the Miscellaneous Case entered appearance in the Miscellaneous Case and filed an application for rejection of the case contending *inter alia* that since the opposite party did not take any initiative to resolve the dispute amicably among themselves, the case cannot be sustained. It has further been asserted that in the agreement dated 15.02.2011, there has been

specific clause being clause no. 31 where it has been agreed by the parties to resolve the dispute by appointing a sole arbitrator and if failed then to refer it to three arbitrators but without taking resort to that very condition since the Arbitration Miscellaneous Case was filed it cannot be proceeded and finally prays for dismissing the case.

The learned District Judge, Dhaka after taking into consideration of the materials on record vide impugned judgment and order dated 23.10.2024 allowed the Miscellaneous Case appointing arbitrator for the petitioners and the opposite parties.

Being aggrieved by and dissatisfied with the said judgment and order, the opposite parties to the Miscellaneous Case as petitioners filed this revisional application and obtained instant rule and order of stay.

Mr. Rafi Ahmed, the learned counsel with the permission of this court appearing for the petitioner upon taking us to the impugned judgment and order at the very outset made two-fold submissions. *Firstly*, the learned counsel by referring to clause no. 31 to the agreement contends that since in the agreement dated 15.02.2011, it has been agreed that if any dispute arises, it has to be referred to a sole arbitrator whose decision will be conclusive upon the parties and since without exhausting that condition, the Miscellaneous Case was filed, the learned District Judge ought to have dismissed the case.

The learned counsel in his second leg of submission contends that under section 36(1) of the Real Estate Development and Management Act, 2010 since there has been a provision to settle the dispute arose among the land owner and developer through amicable settlement which

is akin to what has been provided in clause no. 31 to the agreement so even under the provision of section 36(1) of the said Act, the Miscellaneous Case can in no way be sustained.

The learned counsel wrapped up his submission contending that though both the legal grounds have clearly been asserted before the learned District Judge by filing application for rejection of the Miscellaneous Case, yet the learned District Judge has sidetracked so and thus prays for making the rule absolute.

By contrast, Mr. Md. Wahiduzzaman Sohel, learned counsel appearing for the opposite party by filing a counter-affidavit at the very outset submits that after passing the impugned order since an arbitral tribunal has already been formed so the petitioners has got no scope to file any revision challenging the impugned judgment and order.

To supplement the said submission, the learned counsel by referring to the provision laid down in sections 13 and 14 of the Arbitration Act also contends that the reason for challenging the appointment of an arbitrator has clearly been stated in section 13 and those of the procedure in section 14 of the Act, so without exhausting those provisions, the instant revisional application is totally unsustainable in law.

Insofar as regards to the submission of the learned counsel with regard to the application of section 36(1) of the Real Estate Development and Management Act in resolving the dispute amicably, the learned counsel then contends that section 7 of the Arbitration Act clearly put a bar to take resort to section 36 of the Real Estate Development and

Management Act, 2010 for having an overriding clause in section 7 of the Act as the Real Estate Development and Management Act is a subsequent statute to the Arbitration Act, 2001, so the provision provided in section 36(1) is not applicable here.

The learned counsel also submits that since there has been no provision in the Arbitration Act, 2001 to take resort to a sole arbitrator for resolving any dispute, the opposite party has thus rightly invoked the provision of section 12 of the Arbitration Act for appointment arbitrator to resolve the dispute and the learned District Judge has rightly allowed the Miscellaneous Case.

When we pose a question to the learned counsel for not taking resort to clause 31 of the agreement dated 15.02.2011 by the opposite party before invoke section 12 of the Arbitration Act, 2001, the learned counsel then contends that the opposite party had taken various initiative issuing several letters to the petitioners requesting it to settle the dispute amicably yet the petitioners did not pay any heed to such request which construe that, the opposite party has got no laches to resolve the dispute amicably though finally prays for discharging the rule.

Be that as it may, we have considered the submissions so advanced by the learned counsels for the petitioners and that of the opposite party, perused the impugned judgment and order including the application of Miscellaneous Case vis-à-vis the application filed by the petitioners for rejection of the Miscellaneous Case. On our query, the learned counsel for the opposite party also supplied us the photocopy of the agreement furnished between the petitioners and the opposite party

as well as the notice of arbitration dated 11.07.2023 issued by the opposite party before filing of the Miscellaneous Case. Aside from that, we have also gone through the counter-affidavit so filed by the opposite party.

It is not denying that the opposite party agreed to construct a 13-storey building over the property and in that regard both the parties entered into an agreement on 15.02.2011. It is also admitted position that dispute arose among the parties and if any dispute arose how it would be resolved has also been set out in the said agreement as well. Now let us take a glance of clause 31 to the agreement dated 15.02.2011 which runs as follows:

“31. That in case any disagreement, dispute or difference shall arise between the parties during the progress or at the time of construction touching or relating either to the said building or to any other matter or thing arising directly or indirectly under this contract the same shall be referred to arbitration and the final decision of a sole arbitrator mutually agreed between the parties who alone will conclusive upon the parties, (Otherwise, to three arbitrators, one to be appointed by each party who themselves will appoint an Umpire at the commencement of the proceeding) and this clause shall be deemed as submission within the meaning of the Arbitration Act, 2001.”

On going through clause 31, we find that if any dispute arises the same has to be resolved first by the parties to the agreement by appointing a sole arbitrator whose decision will be conclusive and on being conceded, the agreement was signed by both the parties.

Now let us examine whether the opposite party has taken any initiative to appoint a sole arbitrator to resolve the dispute with the petitioners. In that regard, we have also gone through the application of the Miscellaneous Case in particular, paragraph no. 4 thereof where we find that, though the opposite party who is the applicant in the Miscellaneous Case mentioned condition no. 31 but nothing has been described by the opposite party, whether it took any initiative by giving notice to the petitioners requesting them to appoint a sole arbitrator to resolve the dispute. Though it is the submission of the learned counsel for the opposite party that since an arbitral tribunal has already been constituted, so if the petitioners have any grievance they could place it before the arbitral tribunal taking resort to sections 13 and 14 of the Arbitration Act not by filing revision before this Hon'ble court. But on going through sections 13 and 14 of the Arbitration Act, we don't find that those very provisions ever put any bar to challenge the appointment of arbitrator made under section 12 of the Arbitration Act before this court.

In parallel, since the petitioners have challenged the propriety of the appointment of arbitrator made vide impugned order, so no question can arise to take resort to sections 13 and 14 of the Act by the petitioners. It is true, section 7 of the Arbitration Act provided an

overriding clause but the same will be applicable when any legal proceeding (আইনগত কার্যধারা) is initiated but clause 31 to the agreement clearly stipulates to resolve the dispute first through sole arbitrator mutually, so section 7 has got no manner of application here rather section 36(1) of the Act of 2010 fortifies the condition provided in clause 31 to the agreement. So until and unless, any initiative is taken to settle the dispute by the parties through appointing a sole arbitrator, neither of the parties reserve any authority to take resort to section 12 of the Arbitration Act set for appointing arbitrator. On top of that, from the entire application filed under section 12 of the Arbitration Act and that of the 'notice of arbitration' issued by the opposite party dated 11.07.2023, we don't find that the opposite party has taken any initiative to resolve the dispute through appointing a sole arbitrator as per clause 31 to the agreement. It is the contention of the learned counsel for the opposite party that this Hon'ble court can resolve the dispute by asking the learned District Judge to appoint arbitrator for the petitioners at their choice. But we don't find any substance to the said submission since the District Judge has got no authority to entertain any application under section 12 of the Arbitration Act until and unless, the parties to the dispute exhausts the first part of the condition no. 31 to the agreement. The learned District Judge ought to have taken into consideration of the application filed by the petitioners for rejection of the Miscellaneous Case because in that application, the petitioners in paragraph nos. 7 and 8 have clearly asserted how it has got no authority to entertain the application. Though the learned counsel for the petitioners has referred a

decision reported in 23 BLC (HCD) 561 but we don't find it to be relevant here.

Regard being had to the above facts, circumstances, discussion and observation made hereinabove, we don't find any substance in the impugned judgment and order which is liable to be set aside.

Accordingly, the rule is made absolute however without any order as to costs.

The impugned judgment and dated 23.10.2024 passed by the learned District Judge, Dhaka in Arbitration Miscellaneous Case No. 497 of 2023 is thus set aside and consequently, the case is dismissed.

However, the parties are at liberty to take initiative to resolve the dispute among themselves as per clause 31 to the agreement dated 15.02.2011.

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

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

Md. Bashir Ullah, J:

I agree.