District-Naogaon.

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

Present:

Mr. Justice Md. Toufiq Inam

Civil Revision No. 727 of 2025.

Md. Saklain Mahmud.
------ Petitioner.
-Versus-
Doc. S M Bazlul Hossain.
------ Opposite Party.

Mr. Md. Mahabub Hasan Chowdhury, Advocate
------ For the Petitioner.

Mr. Md. Rabiul Hasan , Advocate
------ For the Opposite Party.

Heard On: 24.08.2025.
And
Judgment Delivered On: 26th August 2025.

Md. Toufiq Inam, J.

The Applicant-Petitioner has filed this revisional application challenging the propriety of the judgment and order dated 12.11.2024 passed by the learned District Judge, Naogaon, in Arbitration Case No. 01 of 2023, whereby the learned Court disallowed the application filed by the Applicant-Petitioner under section 12 of the Arbitration Act, 2001 for appointment of an arbitrator on behalf of the Respondent-Opposite Party.

The Applicant-Petitioner instituted Arbitration Case No. 01 of 2023 stating, inter alia, that in the course of its business it develops landed properties at various locations in the country, including Naogaon district, and sells those properties through public advertisement. A registered Deed of Agreement being No. 5913/17 dated 06.08.2017

was executed between the Applicant-Petitioner and the Respondent-Opposite Party for development of the scheduled property by the Applicant-Petitioner. On the same date, the Respondent-Opposite Party executed a registered Irrevocable Power of Attorney being No. 5912/17 dated 06.08.2017 in favour of the Applicant-Petitioner, authorizing it to develop and sell flats/spaces to be constructed over the scheduled land.

Under the said Agreement, a nine-storied commercial-cum-residential building (Ground + 8 floors) was to be constructed over the scheduled land as per approval of Naogaon Pourashava, where the Applicant-Petitioner would get 70% and the Respondent-Opposite Party 30% of the developed property along with proportionate undemarcated and undivided share in the land. The Respondent-Opposite Party was contractually bound to hand over the scheduled land in vacant possession, and thereafter the Applicant-Petitioner was to complete the project within 24 months, with a grace period of six months. Despite repeated requests, the Respondent-Opposite Party failed to hand over vacant possession of the scheduled land, thereby preventing commencement of development work. Had the Applicant-Petitioner been able to develop the property, it would have made a profit of approximately Tk. 10,00,00,000/- (Taka Ten Crore).

Clause 30 of the Agreement provided that in case of disputes, the parties would attempt amicable settlement, failing which the dispute would be referred to arbitration, each party to appoint one arbitrator. Despite repeated reminders, the Respondent-Opposite Party failed to hand over vacant possession. Consequently, the Applicant-Petitioner issued a legal notice dated 28.02.2023 calling upon the Respondent-Opposite Party to appoint his arbitrator within 30 days, while also nominating its own arbitrator, namely, Mr. Md. Mustafizur Rahman (Tunu). The Respondent-Opposite Party duly received the notice on 14.09.2023 but failed to nominate any arbitrator. In these

circumstances, the Applicant-Petitioner was constrained to file Arbitration Case No. 01 of 2023 before the learned District Judge seeking appointment of an arbitrator on behalf of the Respondent-Opposite Party under section 12 of the Arbitration Act, 2001.

The Respondent-Opposite Party contested the case by filing a written statement dated 28.03.2023 denying the material assertions and alleging that the Applicant-Petitioner had failed to develop the project within the stipulated time (copy annexed as Annexure “B”). Upon hearing both sides, the learned Court below disallowed Arbitration Case No. 01 of 2023 by its judgment and order dated 12.11.2024.

Earlier, on 07.07.2017, the Applicant-Petitioner and the Respondent-Opposite Party executed a Working Deed under which the Respondent-Opposite Party borrowed Tk. 20,00,000/- from the Applicant-Petitioner in three instalments (Tk. 10,00,000/- on 14.09.2017, Tk. 5,00,000/- on 20.09.2017, and Tk. 5,00,000/- on 28.09.2017), all through cheques drawn on Rupali Bank Limited, Naogaon Branch. As per clause 3 of the Working Deed, the Respondent-Opposite Party was obliged to repay the loan, failing which the Applicant-Petitioner would be entitled to realize the same by taking possession of a sixth-floor flat in the building to be constructed on the scheduled land. The said Deed further signified the Respondent-Opposite Party’s assurance to deliver possession of the land for development. Despite such undertakings, the Respondent-Opposite Party has not delivered vacant possession till date.

Meanwhile, the Respondent-Opposite Party rented out shops on the scheduled land, resulting in litigation by shopkeepers under section 19(2) of the Premises Rent Control Act, 1991 (R.C. Cases Nos. 49–55 of 2017), wherein injunctions were also issued. Those cases are still pending. The Applicant-Petitioner repeatedly requested vacant possession of the land, including through notices dated 12.11.2020,

27.06.2022, 23.08.2022, and 02.10.2022. Finally, vide notice dated 28.02.2023, the Applicant-Petitioner invoked Clause 30 of the Agreement to initiate arbitration.

Subsequently, the Applicant-Petitioner discovered that the Respondent-Opposite Party had executed a registered Baina Deed No. 7592 dated 08.10.2023 in favour of third parties to sell the property in question, in violation of the Agreement and Power of Attorney of 06.08.2017. As a result, the Applicant-Petitioner filed Declaration Suit No. 30 of 2023 seeking declaration of the said Baina Deed as void, along with an application for temporary injunction, which was allowed on 11.07.2024 and is still in force. In light of the above, the Applicant-Petitioner submits that the learned Court below failed to properly appreciate that Clause 30 of the Agreement contained a valid arbitration clause, and that the Respondent-Opposite Party, by failing to nominate his arbitrator despite due notice, necessitated appointment of an arbitrator under section 12 of the Arbitration Act, 2001.

Upon overall discussion and consideration, the learned District Judge held that under the terms of the Deed of Agreement executed between the Applicant-Petitioner and the Respondent-Opposite Party, the scheduled land was to be handed over in vacant and peaceful possession within the stipulated time. However, before delivery of such possession, a tenant of a shop situated on the said land filed a case under the House Rent Control Act and obtained an order of temporary injunction. Because of the said court order, the Respondent-Opposite Party could not hand over possession of the land. Subsequently, in compromise between the parties, a cheque of Tk. 20,00,000/- was given as compensation for enforcement of the agreement. That cheque, however, was dishonoured by the concerned bank. As a result, the Court below concluded that the Deed of Agreement executed between the Applicant-Petitioner and the Respondent-Opposite Party was no longer legally valid. In the

absence of a valid contract, there remained no legal scope under section 10 of the Arbitration Act to settle the dispute between the Applicant-Petitioner and the Respondent-Opposite Party through arbitration. Therefore, under Clause 30 of the said Deed of Agreement, the prayer for appointment of arbitrator was held not maintainable. Against this decision, the Applicant-Petitioner moved this Court and obtained the present Rule.

Mr. Md. Mahabub Hasan Chowdhury, learned counsel for the Applicant-Petitioner submits that the Court below committed serious illegality in refusing to appoint an arbitrator under section 12 of the Arbitration Act, 2001. It is argued that the Agreement dated 06.08.2017 expressly contains an arbitration clause, and once such a clause exists, the Court is statutorily bound to intervene when a party defaults in nominating its arbitrator. Despite repeated notices, the Respondent-Opposite Party failed to nominate his arbitrator, thereby entitling the Applicant-Petitioner to seek Court assistance under section 12(3).

He further contends that the learned Court below erred in holding the Agreement invalid merely because a cheque issued by the Respondent-Opposite Party was dishonoured. Such dishonour, it is argued, does not render the Agreement void but rather gives rise to separate liabilities under the Negotiable Instruments Act. The arbitration clause is severable and survives even if performance of other parts of the contract is in dispute. The Applicant-Petitioner asserts that vacant possession of the property was never delivered by the Respondent-Opposite Party, which in turn prevented commencement of the construction project and caused severe financial loss.

Finally, learned counsel submits that the Respondent-Opposite Party aggravated matters by renting out shops on the property, allowing

litigation to proliferate, and subsequently executing a Baina Deed in favour of third parties, which evince bad faith and breach of trust. Since an injunction has already been granted in Declaration Suit No. 30 of 2023 restraining transfer of the property, the disputes are undeniably sub judice. In such circumstances, refusal of the Court below to give effect to the arbitration clause constitutes non-exercise of jurisdiction, warranting interference in revision.

Conversely, Mr. Md. Moinul Islam, learned counsel for the Respondent-Opposite Party submits that the impugned order is lawful and does not call for interference. It is argued that the Applicant-Petitioner himself defaulted in performing its contractual obligation to complete the construction project within the agreed 24-month period. As such, it cannot take advantage of its own failure to enforce the arbitration clause. Moreover, due to pending cases filed by tenants under the Premises Rent Control Act, vacant possession could not be delivered, and the delay is not attributable to the Respondent-Opposite Party.

He argues that in compromise of disputes, the Respondent-Opposite Party issued a cheque of Tk. 20,00,000/- as compensation. Upon dishonour of that cheque, the contractual relationship stood frustrated and the Agreement ceased to have binding effect. Since arbitration presupposes a valid and subsisting agreement, once the contract is treated as frustrated, the arbitration clause cannot survive independently. In this view, the learned District Judge rightly held that the arbitration clause was inoperative.

Lastly, learned counsel submits that the Applicant-Petitioner has already filed Declaration Suit No. 30 of 2023 challenging the subsequent Baina Deed, which indicates that it has itself treated the Agreement as frustrated and sought remedies through ordinary civil litigation. Resort to arbitration in parallel amounts to forum shopping

and is not maintainable. Accordingly, the refusal of the learned District Judge to appoint an arbitrator is justified, and the revisional application is liable to be dismissed.

At the outset, the opposite party has raised an objection as to the maintainability of the instant civil revision. It has been argued that since the proceeding arose under the Arbitration Act, 2001, the Code of Civil Procedure has no application and therefore revisional jurisdiction under section 115(1) of the Code cannot be invoked.

This Court has already addressed such question in light of Section 2(ঋ) of the Arbitration Act, 2001, which defines "Court" as the Court of District Judge, and were empowered by notification, the Court of Additional District Judge. Further, Section 3(15) of the General Clauses Act, 1897 defines "District Judge" as the Judge of a principal Civil Court of original jurisdiction. The expression "*persona designata*," in contrast, refers to an individual identified by designation rather than a Court of law.

Applying the above statutory provisions, it is manifest that the Court of District Judge as referred to in the Arbitration Act functions as a Civil Court, not as a *persona designata*. This view has been consistently endorsed in *A.K.M. Ruhul Amin vs. District Judge and Appellate Election Tribunal, Bhola* (38 DLR AD 172), *17 BLC (AD) 50*, *42 DLR 311*, *42 DLR 483* and *7 BLT 241*. More recently, a larger bench of this Division, reported in *18 SCOB (HCD) 257*, has reiterated that where an appeal lies to the District Judge under special law, such Judge exercises judicial power as a Civil Court, and his decision is amenable to revision under section 115(1) of the Code of Civil Procedure.

In the present case, the petitioner filed an application under section 12 of the Arbitration Act, 2001 before the District Judge, Dhaka seeking appointment of an arbitrator. The learned District Judge, however, rejected the application, giving rise to the instant revisional application. Since the proceeding originates from the Court of District Judge acting as a Civil Court, and not a *persona designata*, any order passed therein is revisable under section 115(1) CPC. Therefore, the preliminary objection fails, and this revision is maintainable.

Coming to the merits, it appears that the petitioner repeatedly requested the opposite party to appoint an arbitrator in terms of the agreement containing an arbitration clause. The petitioner also issued a legal notice and nominated an arbitrator, but the opposite party failed to act. The learned District Judge rejected the section 12 application, despite existence of arbitration clause, without considering the statutory duty of the Court to ensure the appointment of an arbitrator when one party refuses to cooperate, thereby frustrating the petitioner's right under the Arbitration Act.

Section 12(3) of the Arbitration Act, 2001 casts a clear statutory obligation upon the Court to intervene where one party defaults in nominating an arbitrator, in order to preserve and give effect to the arbitration agreement. The refusal by the Court below to exercise this duty constitutes a non-exercise of jurisdiction, warranting interference. Once an arbitration agreement exists, the Court is bound to invoke Section 12. Under Section 9 of the Arbitration Act, 2001, a valid arbitration agreement may be contained in a clause within a contract or in a separate writing, including exchange of written communications.

The Court below erred in law by treating the agreement as invalid on the ground of a dishonoured cheque and thereby dismissing the arbitration clause. Significantly, a dishonoured cheque, even under

section 138 of the Negotiable Instruments Act, 1881, does not affect the existence or enforceability of an arbitration clause in a contract. Indeed, Bangladeshi jurisprudence confirms that arbitration clauses are not ousted by parallel criminal or civil proceedings under the NI Act. Arbitration remains the exclusive forum for disputes as envisaged by the parties.

The Court below further failed to appreciate the contractual sequence. The stipulated 24-month construction period could not commence until the defendant delivered vacant possession of the land. The defendant's admitted failure to perform this primary obligation prevented the project from starting and rendered the construction timeline inoperative. The opposite party's conduct, renting out shops in the property, permitting litigation to ensue, and subsequently executing a *Baina Deed* transferring the property to third parties, constitutes clear breach of trust and bad faith, which courts of equity and good conscience cannot endorse.

The petitioner has also secured an injunction in Declaration Suit No. 30 of 2023 restraining further transfer of the property. This demonstrates that disputes over the property are already *sub judice*, reinforcing the necessity of arbitration as a consolidated dispute resolution mechanism rather than piecemeal litigation. In this context, the refusal of the Court below to appoint an arbitrator, despite the existence of a valid arbitration clause and service of due notice, amounts to material illegality. Revisional interference is therefore justified both on grounds of non-exercise and misapplication of jurisdiction.

This court holds that once the petitioner establishes (i) the existence of a valid arbitration clause and (ii) the respondent's failure to appoint its arbitrator within the prescribed time, it becomes a statutory obligation of the court under Section 12 of the Arbitration Act to allow the

application and appoint an arbitrator on behalf of the respondent. At this stage, the court is not required to examine the necessity of arbitration or whether the period of the substantive agreement has expired, since the arbitration clause is an independent and separable agreement that survives even after the expiry or even the unilateral termination of the contract. The validity or effect of such termination, as well as questions of limitation, discharge, or maintainability of claims, are matters to be determined by the arbitral tribunal itself.

For the reasons discussed above, this Court holds that the revisional application is maintainable. The impugned judgment and order dated 12.11.2024 suffer from material error of law, misapplication of arbitration principles, and failure to discharge the statutory obligation under Section 12 of the Arbitration Act, 2001.

Accordingly, the Rule is made absolute in the following terms:

1) The judgment and order dated 12.11.2024 passed by the learned District Judge, Naogaon, in Arbitration Case No. 01 of 2023 are hereby set aside.

2) The learned District Judge is directed to appoint an arbitrator on behalf of the Respondent-Opposite party under Section 12 of the Arbitration Act, 2001, and to dispose of the matter within two (2) months from the date of receipt of this judgment and order.

3) There shall be no order as to costs.

Let a copy of this judgment be communicated to the court concerned at once for information and urgent compliance.

(**Justice Md. Toufiq Inam)**

Ashraf /ABO.