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

CIVIL REVISION N0. 1181 of 2019

Mst. Minu Akter and others
...Petitioners
-Versus-
Sirajul Hoque Babu and others
....Opposite parties
Mr. Mohammad Shazzad Ali Chowdhur, Adv.
……for the petitioners
Mr. Lokman Karim, Advocate
… for opposite party No. 1
Heard on: 02.11.2022, 15.11.2022, 16.11.2022.
Judgment on: 17.11.2022.

Present:
Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon the opposite parties to show cause as to why order No. 87 dated 04.02.2019 passed by learned Additional District Judge, 2nd Court, Chattogram in Arbitration Miscellaneous Case No. 214 of 2006 rejecting an application of the petitioners filed under Order I rule 10(2) read with section 151 of the Code of Civil Procedure for being added as parties to the miscellaneous case.

At the time of issuance of Rule, this Court vide *ad-interim* order dated 16.04.2019 stayed further proceeding of Arbitration Miscellaneous Case No. 214 of 2006 for a period of 6(six) months which was, subsequently, extended from time to time.

Facts, relevant for the purpose of disposal of this Rule, are that opposite party No.7 herein as petitioner filed Arbitration Miscellaneous Case No. 214 of 2006 before the learned District Judge, Chottagram under section 42 of the Arbitration Act, 2001 for

setting aside an arbitral award dated 25.07.2005 stating, *inter alia,* that 2.14 acre land was originally belonged to Gura Miah and he died leaving behind two wives, three sons and four daughters to inherit said property. Opposite party No.1 forced the petitioner to enter into an arbitration agreement with him for partition of the ejmali property left by Gura Mia through arbitration and the arbitrators were appointed in his choice who passed illegal arbitral award on 25.5.2005 against the petitioner. Accordingly, he filed the case for setting aside the award.

Opposite party No.1 of the miscellaneous case (opposite party No.1 herein) filed written objection on 23.5.2007 denying the material allegations, as stated in the miscellaneous case contending that there was valid agreement and that the arbitrators validly passed the arbitral award.

The present petitioners, who are daughters and legal heirs of Gura Miah, filed an application under Order I rule 10(2) read with section 151 of the Code of Civil Procedure for being added as opposite parties to the miscellaneous case stating, *inter alia*, that the suit property was originally belonged to Gura Miah who died leaving behind two wives, three sons including the petitioner and opposite party No.1 and three daughters, Ms. Minu Akter, Ms. Nilu Akter and Ms. Jhinu Akter, the 3rd party applicants, and after his death said wives, sons and daughters have been owning and possessing the suit property in ejmali as per their share under Mahommedan Law but the petitioner and opposite party No.1 in collusion with each other entered into an illegal arbitration agreement behind their back for partition of the ejmali property and appointed opposite party Nos. 2-6 as arbitrators to grab their property and managed to have obtained

an illegal arbitral award from the arbitrators and as such, they are necessary parties to the miscellaneous case and if the case is disposed of in their absence, they would be highly prejudiced and shall suffer an irreparable loss and injury. The application was opposed by opposite party No.1 by filing written objection stating that the 3rd party applicants, being not parties to the arbitration agreement, are not necessary parties; that opposite party No. 1 is the son of first wife of Gura Miah and the petitioner and 3rd party applicants are the son and daughters of another wife of Gura Miah; that the 3rd party applicants were aware of the arbitration proceeding and the arbitrators partitioned the ejmali property by allotting proper saham in their favour and that they shall not be prejudiced by the arbitral award.

The learned 2nd Court of Additional District Judge, Chattogram, upon hearing, vide order dated 04.02.2019 rejected the application for addition of party. Challenging the legality of said order dated 04.02.2019 the 3rd party applicants as petitioners have preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained Rule and order of stay, as stated above.

Opposite party No.1 has entered appearance by filing vokalatnama to contest the Rule.

Mr. Md. Shazzad Ali Chowdhury, learned Advocate appearing for the petitioners submitted that admittedly, the petitioners are co-sharers in the suit property they were necessary parties to the arbitration agreement entered into by other two co-sharers (2 brothers of the petitioners) for partition of their ejmali property through arbitration and accordingly, the arbitration agreement itself was illegal for defect of parties leading to arbitral award illegal and

voidable and as such, the petitioners are necessary and proper parties to the arbitration miscellaneous proceeding to agitate their grievance but the Court below, without considering such legal aspect of the matter, illegally rejected the application on a misconception of law that the petitioners are not necessary parties and that the provisions of the Code of Civil Procedure is not applicable in a proceeding under Arbitration Act. Learned Advocate further submitted that the Arbitration Act, 2001 does not provide any specific provision excluding the Code of Civil Procedure to be followed by the Court in disposing of miscellaneous case filed under section 42 of the Arbitration Act for setting aside arbitral award. Since, admittedly, the petitioners are co-sharers in the suit land and their interest has been affected by the arbitral award, they should have been added as parties to the proceeding. In support of his submission learned Advocate has referred to the case of One Bank Ltd. vs Chaya Developer (Pvt) Ltd., reported in 21 BLC (AD) 203.

As against the above contention, Mr. Lokman Karim learned Advocate appearing for opposite party No.1 submitted that though the ejmali property of the heirs of Gura Miah has been referred to arbitration by two brothers of the petitioners but the arbitrators properly distributed the share of the parties including the petitioners and they were not deprived of their legal right in the ejmali property. Learned Advocate further submitted that since the petitioners are not parties to the arbitration agreement they are not necessary parties to the arbitration proceeding. Learned Advocate finally submitted that there is no provision in the Arbitration Act empowering the Court to follow the provisions of the Code of Civil Procedure and to implead any 3rd party to an arbitration proceeding

and as such, the Court below rightly rejected the application of the petitioners and accordingly, no interference is called for by this Court.

I have heard the learned Advocates, perused the revisional application, application for setting aside the arbitral award, written objection, application for addition of party, written objection filed by opposite party No.1 and other materials available on record.

On the face of conflicting submissions made by the learned Advocates, question arises whether in a proceeding under section 42 of the Arbitration Act, 2001 the petitioners, who are 3rd parties, are necessary and proper parties and whether, the Court has power to implead a 3rd party in such proceeding under Order I rule 10 of the Code of Civil Procedure.

In deciding these issues interpretation of some provisions under the Arbitration Act, 2001 is involved.

Section 17 of the Arbitration Act, 2001 stipulates competence of arbitral tribunal to rule on its jurisdiction providing as follows:

> " 17. **Competence of arbitral tribunal to rule on its own jurisdiction**- Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely-
>
> (a) Whether there is existence of a valid arbitration agreement;
>
> (b) Whether the arbitral tribunal is properly constituted;
>
> (c) Whether the arbitration agreement is against the public policy;

(d) Whether the arbitration agreement is incapable of being performed, and,

(e) What matters have been submitted to arbitration in accordance with the arbitration of agreement.

As per clause (a) of section 17 of the Arbitration Act, the arbitral tribunal is empowered to rule on its own jurisdiction when there is existence of a valid arbitration agreement.

Section 42 of the Arbitration Act, 2001 empowers the "Court" or "High Court Division", as the case may be, to set aside an arbitral award on the grounds set forth in section 43 of the Act.

Section 43 (1)(a)(ii) of the Arbitration Act, 2001 empowers the Court to set aside an arbitral award on the ground that the arbitration agreement was not valid under law to which the parties have subjected to.

Now another question arises whether there was a valid arbitration agreement to settle the dispute through arbitral tribunal.

It is not denial of the fact that Gura Miah was the original owner of 107 ganda equivalent to 2.14 acre land and while he was thus owning and possessing the same, died leaving behind two wives, three sons (opposite party Nos. 1, 7 and another) and three daughters (3rd party applicant-petitioners). It is also admitted that opposite party No.1 and 7 entered into an arbitration agreement for partition of the ejmali property left by their father through arbitration and as per said agreement arbitrators were appointed who, passed arbitral award on 25.07.2005. For setting aside the arbitral award dated 25.07.2005, opposite party No. 7 herein filed an application under section 42 of the Arbitration Act, 2001 being

Arbitration Miscellaneous Case No. 214 of 2006 before the learned District Judge (the Court) in which opposite party No.1 filed written objection. Admittedly, the present petitioners and other heirs of Gura Mia were not made parties to the arbitration agreement but their ejmali property has been partitioned by the arbitrators.

As per partition law, co-sharers have absolute right to divide their ejmali property either privately, by deed of partition or arbitration, or through Court in a partition suit. A suit for partition is incompetent if all co-sharers of the ejmali property are not made parties thereto. Similarly, a partition in private arrangement through partition deed or by arbitration agreement through arbitration is invalid unless all co-sharers of the ejmali property are made parties thereto because of the fact that a co-sharer's right in a undivided joint property extends over every inch of said property.

In the instant case, only two co-sharers entered into arbitration agreement for partition of ejmali property through arbitral tribunal leaving the petitioners and others, who are admitted co-sharers of the ejmali property. On the face of it, the arbitration agreement was not a valid one because of bad for defect of parties and as such, the arbitral tribunal was not competent to rule upon that agreement as per section 17 of the Act. Accordingly, the petitioners were necessary parties to the arbitral proceeding before the tribunal as well as they are necessary parties to the present proceeding initiated under section 42 of the Arbitration Act to agitate their grievance before the Court.

In the case of One Bank Ltd. vs. Chaya Developer (Pvt) Ltd., reported in 21 BLC (AD) 203 applicability of Order I rule 10 of the Code of Civil Procedure in an Artha Rin Suit arose before the

Appellate Division who took the view that the provisions under Order I rule 10 of the Code of Civil Procedure are not in conflict with those of Artha Rin Adalat Ain, 2003 inasmuch as the former is very much in conformity with the provisions of section 6(5) of the Ain and came to the conclusion that there is no provision in the Artha Rin Adalat Ain, 2003 which debars a person adversely affected by the decision in an Artha Rin Suit from being added as party to the suit.

The arbitration proceeding is civil in nature. Moreover, as per section 44 of Arbitration Act, if the arbitral award is not set aside, the award shall be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the Court. This means that an arbitral award will be executed by following the provisions under the Code of Civil Procedure.

Though the Arbitration Act, 2001 is silent about applicability of the Code of Civil Procedure in disposing of application filed under section 42 of the Act for setting aside arbitral award but there is no provision in the Act debarring a person, adversely affected by the arbitral award, from being added as party to that proceeding. The provisions under Order I rule 10 of the Code of Civil Procedure are not in conflict with those of the Arbitration Act, 2001. Accordingly, I am of the view that, in an appropriate case, the Court is not powerless to apply the provisions under the Code of Civil Procedure in a proceeding under Arbitration Act, 2001. This means that the Court may allow 3rd party to be added in an arbitration proceeding who's interest is adversely affected by the decision of the arbitral tribunal by applying the provisions under Order I rule 10 of the Code of Civil Procedure.

In the instant case, since the arbitration agreement was reached into only two co-sharers (opposite party Nos. 1 and 7) leaving the present petitioners and other co-sharers for partition of their ejmali property and got an arbitral award in their absence, the left out co-sharers' interest in the property has adversely affected by the decision of the arbitral tribunal and accordingly, the Court below should have pass an order to add the petitioners parties to the proceeding following the provisions under Order I rule 10 of the Code of Civil Procedure.

Accordingly, I am of the view that the learned Additional District Judge, upon misconception of law, erroneously came to the conclusion that the petitioners are not necessary parties to the proceeding and that the provisions of the Code of Civil Procedure is not applicable under Arbitration Act.

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

In the result, the Rule is made absolute, however, without any order as to costs.

The impugned order dated 04.02.2019 passed by learned Additional District Judge, 2nd Court, Chattogram in Arbitration Miscellaneous Case No. 214 of 2006 is set aside.

The application for addition of parties be allowed.

The Court below is directed to pass necessary order adding the petitioners as opposite parties to the miscellaneous case and give them an opportunity to file written objection against the arbitral award and dispose of the case in accordance with law.

(Md. Badruzzaman, J)