

**6 SCOB [2016] AD 54**

**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Md. Abdul Wahhab Miah**

**Mr. Justice Muhammad Imman Ali**

**Mr. Justice A.H.M. Shamsuddin Choudhury**

CIVIL PETITION FOR LEAVE TO APPEAL NO.329 OF 2014

(From the judgment and order dated the 29<sup>th</sup> day of July, 2013 passed by the High Court Division in First Appeal No.105 of 2005)

**Md. Nurul Abser** : . . . . Petitioner

-Versus-

**Alhaj Golam Rabbani and others** : . . . Respondents

For the Petitioner : Mr. A. F. Hasan Arif, Senior Advocate with  
Mr. Kamal-Ul-Alam, Advocate instructed by  
Mr. Zainul Abedin, Advocate-on-Record

For Respondent Nos.2-4 : Mr. Mahmudul Islam, Senior Advocate with  
Zulfiker Bulbul Chowdhury, Advocate  
instructed by Mr. Zahirul Islam, Advocate-on-Record

For Respondent Nos.1 and 5-8 : None represented

Date of Hearing : The 31<sup>st</sup> day of May, 2015

**Arbitration Act, 2001:**

**Sections 39, 42, 43 and 44:**

**A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted.**

**...(Para 18)**

**The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration**

**proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaintiff.** ... (Para 19)

## JUDGMENT

**Md. Abdul Wahhab Miah, J:**

1. This petition for leave to appeal has been filed by the plaintiff against the judgment and decree dated the 29<sup>th</sup> day of July, 2013 passed by a Division Bench of the High Court Division in First Appeal No.105 of 2005 dismissing the same.

2. Facts necessary for disposal of this petition are that the petitioner as plaintiff filed Other Suit No.193 of 2004 in the Court of Joint District Judge, 1<sup>st</sup> Court, Chittagong on 22.09.2004 impleading the predecessor-in-interest of respondent Nos.1(a)-1(e) and respondent Nos.2-4 as the first party-defendants and respondent Nos.5-7 as the second party-defendants (as described in the cause title of the plaint) and respondent No.8, Bangladesh, represented by the Deputy Commissioner, Chittagong as proforma-defendant for a declaration that the arbitration agreement dated 15.03.2002 executed between him and defendant No.1 and the award given by Alhaj Dostagir Chowdhury on the said date (15.03.2002) as the sole Arbitrator, was illegal, without jurisdiction and was of no legal effect and the same was “ipso facto void illegal”; for further declaration that the award dated 15.03.2002 given by Alhaj Dostagir Chowdhury in respect of the suit property, did not, in any way, affect the tenancy right of the plaintiff in the suit property and his ownership therein (in Bangla, the prayer has been couched as “... রোয়েদাদ দ্বারা তপশীলোক সম্পত্তিতে হিচেলি ইসিউবি উআই Hhw j jomLje; üAকোন ভাবেই খর্ব হয় নাই মর্মে উচ্চারণের ডিফেণ্ডে কুজ”) and the third declaration sought in the suit was that the first party principal defendants had no legal right to evict the plaintiff from the suit property through Other Execution Case No.4 of 2004 levied in the Court of Assistant Judge, Second Court, Chittagong for execution of the award dated 15.03.2002 given by Alhaj Dostagir Chowdhury or in any other way.

3. After the service of summonses of the suit, defendant Nos.1-4 entered appearance therein and filed an application under Order VII, rule 11 read with section 151 of the Code of Civil Procedure (the Code) for rejection of the plaint on the ground that there was no cause of action to file the suit and the same was barred under the provisions of the Arbitration Act, 2001(the Act, 2001), as the plaintiff did not file any application for setting aside the arbitral award within sixty days from the receipt of the award as provided thereof.

4. In the application, it was stated, *inter alia*, that the plaintiff was inducted into the possession of the suit property as a temporary monthly tenant under late Alhaj Abul Khair, predecessor of defendant Nos.1-7 and in that connection, a tenancy agreement was executed on 17.04.1995 between the plaintiff on one side and late Alhaj Abul Khair on other side. On 15.03.2002, an arbitration agreement was entered into between the plaintiff and the defendants and in the said arbitration agreement, there was a stipulation that Alhaj Dostagir Chowdhury would be appointed as an Arbitrator with a view to resolve the dispute between the parties expeditiously. Thereafter, said Arbitrator, Alhaj Dostagir Chowdhury, gave an award on 15.03.2002, copy whereof was duly served upon both the parties. Thereafter, the plaintiff did not take any step against the said award within sixty days as contemplated in section 42 of the Act, 2001 and after the expiry of the said statutory period, defendant No.1 levied Other Execution Case No.4 of 2004 under section 44 thereof and Order XXI, rule 15

of the Code for recovery of possession of the suit property. An order was passed in the execution case on 18.03.2004 vide order No.1 for issuing notices upon the judgment-debtor fixing 15.04.2003 for its service return. The judgment-debtor-plaintiff appeared in the execution case and filed written objection on 24.05.2004. On 04.08.2004, the judgment-debtor filed an application under section 151 of the Code for dismissing the execution case by setting aside order No.1 dated 18.03.2004. The learned Assistant Judge by his order dated 11.08.2004 rejected the application. Against the order dated 11.08.2004 of the learned Assistant Judge, the judgment-debtor filed Civil Revision No.197 of 2004 before the District Judge, Chittagong which was pending in the Court of Nari-0-Shishu Nirjatan Daman Tribunal No.1 (Special District Judge, Chittagong) for disposal. The judgment-debtor-plaintiff without praying for any relief against the award within time under the provisions of the Act, 2001, filed the illegal suit just to create obstruction to get possession of the suit property. The plaint was liable to be rejected under clauses (a) and (d) of rule 11 of Order VII of the Code.

5. The application for rejection of the plaint (hereinafter referred to as the application) was contested by the plaintiff by filing written objection contending, *inter alia*, that the application was liable to be rejected as none of the clauses of rule 11 of Order VII of the Code was attracted in the instant suit, particularly, in view of the fact that the plaintiff specifically averred in the plaint that there was no agreement between the parties on 15.03.2002 as alleged by the defendants and the award was not pronounced as per the agreement; that on a plain reading of the plaint, it could not be said that it was either barred by law or the averment made in the plaint did not disclose cause of action to file the suit.

6. The learned Joint District Judge by the order dated 05.04.2005 rejected the plaint. Being aggrieved by the order (the order rejecting the plaint is a decree within the meaning of section 2(2) of the Code), the plaintiff filed First Appeal No.105 of 2005 before the High Court Division. A Division Bench of the High Court Division by the impugned judgment and decree dismissed the appeal; hence this petition.

7. Mr. A. F. Hasan Arif, learned Counsel for the petitioner has, in fact, re-argued the points urged before the High Court Division and has further argued that the High Court Division misconceived the provisions of section 42 of the Act, 2001 vis-a-vis the facts and circumstances of the case as averred in the plaint and thus erred in law in dismissing the appeal on the erroneous view that the plaint could be rejected "*on both the counts i.e. under rule 11 of Order 7 of the Code of Civil Procedure as also under section 151 of the Code of Civil Procedure*" as the plaintiff could not be allowed to re-open the question of validity of an award keeping himself silent without taking recourse to section 42 of the Act, 2001. Therefore, the impugned judgment and decree calls for interference.

8. Mr. Mahmudul Islam, learned Counsel who entered caveat on behalf of respondent Nos.2-4, on the other hand, has supported the impugned judgment and decree. He has argued that section 43 of the Act, 2001 has spelt out the grounds on which an arbitral award may be set aside and the plaintiff could take all the objections in respect of the arbitration agreement and the arbitral award as alleged in the plaint by filing an application under section 42 of the Act within sixty days from the receipt of the award, but he without taking recourse to the said provision of law filed the suit for knocking down the arbitral award, the High Court Division did not commit any error of law in dismissing the appeal and as such, no interference is called for with the impugned judgment and decree and the petition be dismissed.



শালিশী কার্যক্রমের মাধ্যমে নিষ্পত্তির সিদ্ধান্ত হওয়ার কালে কিন্তু ১৫/০৩/০২ইং তারিখে বাদী এবং ১নং বিবাদীর স্বাক্ষরে কথিত শালিশী এগ্রিমেন্ট সৃষ্ট কালে এবং ১৫/০৩/০২ইং তারিখে কথিত একক বিচারক হিসাবে জনাব আলহাজ্ব দস্তগীর চৌধুরী LaL H-BCeF, HMcaujl hqji Hhw শালিশী আইন ২০০১ইং এর পরপন্থী মতে রোয়েদান প্রচার করার কালে এবং সর্বশেষে কথিত রোয়েদাদের বরাতে অপর জারী ৪/০৪ইং মামলা পরিচালনে বাদীকে তপশীলোক্ত দোকানগৃহ হইতে উচ্ছেদের প্রক্রিয়া গ্রহণ করা কালে আদালতের এলাকাধীন খুলশী থানার লালখান বাজার মৌজায় উদ্ভব হইয়াছে।”

13. A reading of the above quoted statements of the plaintiff *prima facie* shows that the plaintiff, in fact, challenged the arbitration agreement dated 15.03.2002 as well as the arbitral award given by the Arbitrator, Alhaj Dastogir Chowdhury on the said date. Before the trial Court, the plaintiff made a grievance that no award was served upon him, in other words, he did not receive any award from the Arbitrator, but the statements made in the plaint (as quoted above) clearly show that he, in fact, received the award. The defendants also in the application under Order VII, rule 11 of the Code categorically stated that the copy of the award was served upon them and the plaintiff. The plea that the plaintiff did not receive the award *prima facie* does not appear to be *bonafide*, because had he not received the award how he could challenge the same in the suit with so many particulars. In the context, the trial Court rightly stated that “*the plaintiff has been demanding that he did not receive the copy of the award, but as soon as he received it he may apply to the proper Court, the learned District Judge Court, but instead the plaintiff has filed this suit here in this Court.*”

14. Whether the plaintiff could file the suit challenging the legality of the arbitration agreement and the arbitral award, we consider it relevant to see the provisions of sections 42 and 43 of the Act, 2001 which read as follows:

**“42 Application for setting aside arbitral award-** (1) The Court may set aside any arbitral award under this Act other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award.

(2) The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.

**43. Grounds for setting aside arbitral tribunal-** (1) An arbitral award may be set aside if-

- (a) the party making the application furnishes proof that-
  - (i) a party to the arbitration agreement was under some incapacity;
  - (ii) The arbitration agreement is not valid under the law to which the parties have subjected it;
  - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case.
  - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;  
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;
  - (v) the composition of the arbitral tribunal or the arbitral

procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

- (b) the court or the High Court Division, as the case may be, is satisfied that-
- (i) the subject matter of the dispute is not capable of settlement by the arbitration under the law for the time being in force in Bangladesh;
  - (ii) the arbitral award is *prima facie* opposed to the law for the time being in force in Bangladesh;
  - (iii) the arbitral award is in conflict with the public policy of Bangladesh or
  - (iv) the arbitral award is induced or affected by fraud or corruption.
- (2) Where an application is made to set aside an award, the court or the High Court Division, as the case may be, may order that any money payable by the award shall be deposited in the Court or the High Court Division, as the case may be, or otherwise secured pending the determination of the application.”

15. Sub-section (1) of section 42 has clearly spelt out that the Court may set aside any arbitral award under the Act, 2001 other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award and in section 43 thereof grounds have been enumerated on which an arbitral award may be set aside. And now, if we look at the prayers made in the plaint as stated earlier, it would appear that the plaintiff sought to set aside the arbitral award given by the Arbitrator by seeking declaration that the same was illegal, without jurisdiction, was of no legal effect and was *ipso facto void* and the grounds for seeking such declaration were that no arbitration agreement was entered into between the plaintiff and defendant No.1, and that on the basis of a so-called agreement, an award was given by one Alhaj Dostagir Chowdhury. The plaintiff also alleged that the so-called award was given in violation of the provisions of the Act, 2001; that Alhaj Dostagir Chowdhury was not appointed as the sole Arbitrator as per the provisions of the Act; that none of the parties or their representative signed the award and that the Arbitrator gave the award illegally, without jurisdiction and in violation of the provisions of the Act, 2001. And all these allegations clearly embrace the grounds, particularly, ground Nos.(ii), (iii), (iv) and (v) as enumerated in section 43 of the Act, 2001 quoted hereinbefore. But the plaintiff did not file any application before the District Judge within sixty days from the date of receipt of the award for setting aside the same.

16. In the context, section 39 of the Act, 2001 is also relevant. The section reads as follows:

**“39. Award to be final and binding-** (1) An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them.

(2) Notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected.”

17. A reading of sub-section (1) of section 39 shows that an arbitral award made by an

arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any persons claiming through or under them. Sub-section (2) thereof has further provided that notwithstanding anything contained in sub-section (1), the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected.

18. A combined reading of the provisions of sections 42, 43 and 39 of the Act, 2001 clearly shows that the only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred and therefore, in view of the provision of section 42 of the Act, 2001, clause (d) of rule 11, Order VII of the Code is attracted.

19. The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail. Therefore, the trial Court rightly rejected the plaint and the High Court Division did not commit any error of law affirming the same and as such, no interference is called for with the impugned judgment and decree.

20. Accordingly, this petition is dismissed.