

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 5193 of 2023**In the matter of:**

Executive Engineer, Roads and Highways
Department (RHD), Road Division Patuakhali
represented by Mr. A.M. Atiq Ullah.

...Petitioner.

Versus

The Rupsha Engineers Limited represented by its
Managing Director, House No. 3, Road No. 81,
Gulshan-2, Dhaka-1212, 1st Class Contractor, Roads
and Highways Department represented by its
Director Md. Rashedur Rahman, The Rupsha
Engineers Limited, Gulshan, Dhaka and others.

....Opposite parties.

Mr. Khaled Hamid Chowdhury, Adv. with
Mr. S.M. Zahurul Islam, Adv.

Mr. Khan Md. Peer-E-Azam Akmal, DAG with
Mr. A.K.M. Mukhter Hossain, AAG

Ms. Sonia Tamanna, AAG

Mr. Md. Uzzal Hossain, AAG

...For the petitioner.

Mr. Shaharia Kabir, Adv. with

Mr. Enamul Hossain, Adv.

...For the opposite parties.

Mr. A.M. Masum, Senior Adv.

Amicus Curie.

Present

Mr. Justice Mamnoon Rahman

The 4th February, 2025

In this rule under section 115(1) of the Code of Civil Procedure,
1908 the petitioner has challenged the legality and propriety of the
order dated 10.08.2023 passed by the learned District Judge, Patuakhali
in Arbitration Case No. 1 of 2018 appointing Arbitrator by allowing the
application under section 12 of the Arbitration Act, 2001.

The short facts relevant for the disposal of the instant rule, are that, the present opposite parties instituted Arbitration Miscellaneous Case No. 1 of 2018 impleading the present petitioner under section 12 of the Arbitration Act, 2001 for appointment of arbitrator to resolve the dispute in question arising out of deed of agreement executed in between the parties dated 29.12.2016. It transpires that the court below, namely the District Judge, Patuakhali registered the case as Arbitration Misc. Case No. 1 of 2018 and proceeded. Subsequently, on perusal of the order dated 19.08.2018 it transpires that the petitioner who is the opposite party entered appearance in the said miscellaneous proceeding and contested the same. On meticulous perusal of the order sheet, it transpires that both the parties contested the same and ultimately the court below vide order dated 10.08.2023 allowed the miscellaneous case under section 12 of the Arbitration Act, 2001 by appointing two arbitrators. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the District Judge, Patuakhali the petitioner moved before this court and obtained the present rule.

The opposite party (petitioner in the miscellaneous case) before the court below contested the rule by filing application for discharging the rule.

In course of hearing, it transpires that an important question of law has been raised by both the parties for which this court appointed Mr. A.M. Masum, the learned Senior Advocate to act as Amicus Curie.

Mr. Khaled Hamid Chowdhury along with Mr. S.M. Zahurul Islam, the learned Advocates appearing on behalf of the petitioner

submits that in the present case in hand the impugned judgment and order passed by the trial court is not in accordance with law and the same is being passed without having jurisdiction. He further submits that the main contention as raised by the present petitioner is that admittedly it transpires that earlier the opposite party as petitioner instituted miscellaneous case for appointment of arbitrator being Arbitration Case No. 01 of 2015 in the court of Joint District Judge, 1st Court, Patuakhali wherein the present petitioner contested. The learned Advocate placed the order sheet as evident in Annexure-B and submits that in the court below, namely in the court of Joint District Judge, 1st Court, Patuakhali the present petitioner entered appearance and eventually the court below appointed arbitrator as both the parties agreed unanimously and on the basis of such agreement an order passed by the court below the arbitration tribunal proceeded and passed an Award since on the consensus the tribunal was constituted and proceeded; that the Award passed in the said miscellaneous case being Arbitration Case No. 1 of 2015 is final in view of the provision as laid down in Arbitration Act of 2001, hence, the subsequent proceeding being Misc. Case No. 1 of 2018 itself is a nullity. He placed the entire order sheet of the Arbitration Case No. 1 of 2015 and submits that the parties agreed appointment of arbitrator and on the basis of the same the tribunal was constituted and eventually it passed the Award and as such the present opposite party has no legal right or standing to file the subsequent proceeding, namely Arbitration Misc. Case No. 01 of 2018 as much as the court below, namely the District Judge has no

jurisdiction or any legal authority to adjudicate the matter already settled in between the parties. The learned Advocate categorically placed the relevant provisions of the Arbitration Act of 2001 and submits that if the opposite party was being aggrieved by the initial appointment in Misc. Case No. 1 of 2015 or even aggrieved by the Award passed by the arbitral tribunal it had sufficient remedy as prescribed in the Act of 2001. But since the present opposite party has not invoked any such provisions of law cannot institute the instant proceeding which is absolutely an abuse of the process of the court and liable to be interfered by this court.

Mr. Khaled Hamid Chowdhury admitted that there is an agreement in between the parties containing a clause for arbitration and also admitted that the court below wherein the Misc. Case No. 1 of 2015 was initiated has no jurisdiction to hear and dispose of any application under section 12 of Arbitration Act, 2001 but vigorously argued that in the spirit of the law and the intention of the legislature in enacting the Act 2001 the appointment of Arbitrator constitution of the tribunal and Award suffers no illegality or infirmity and as such the impugned order in the present revisional application is a nullity in the eye of law.

Mr. Khaled Hamid Chowdhury the learned Advocate referred the relevant provisions of the Arbitration Act of 2001 and submits that the matter involves a domestic arbitration hence the applicable law of the process is the Act of 2001. By referring the provision of the section 6 of the Act of 2001 he submits that the essence of the aforesaid provision is

that a party must raise objection to the procedural irregularity including jurisdictional challenges or improper constitution of the tribunal at an appropriate stage and if such party failed to do so they would be deemed to have waived their right to object which is being applicable in the present case in hand. He further submits that the aforesaid provision has similarity with the Article 4 of the UNCITRAL MODEL LAW on International Commercial Arbitration. He further submits that in the present miscellaneous case the opposite party is actually challenging the Award in a different ways though no objection has been raised at any stage of such proceedings which would have been most appropriate and in accordance with law. He also referred the provisions of section 17 as well as section 18 of the Act of 2001. By referring the provisions of section 20 of the Act of 2001 he submits that the opposite party also have approached the appropriate jurisdiction under the said provision but failed to do so under the aforesaid provisions of section 20 this court is fully authorized to determine even the question of jurisdiction of arbitration. Referring the provisions of section 39 of the Act of 2001 he submits that a salient feature of any award is that of finality and its binding nature on the parties and as per the provisions of section 42 there is a limited right to challenge the award, obviously on the satisfaction of the court on specific grounds. The learned Advocate also referred the non-obstantive clause as stated in section 53 of the Arbitration Act, 2001 and submits that this is an unique feature of the arbitration law which authorizes to court to proceed in accordance with law and in the present case in hand when the parties voluntarily and

consensually submit to the jurisdiction of a court that may not ordinarily have jurisdiction their actions effectively confer jurisdiction for the arbitral matter on that court, given the exclusivity authority by the provisions as laid down in section 53 of the Arbitration Act. He further referred to the definition of court in section 2(b) of the Act that reads: "court" means the District Judge's Court and includes Additional Judge's Court appointed by the Government for discharging the functions of District Judge's Court under the Act through gazette notification. This does not include the Appellate Division or the High Court Division of the Supreme Court of Bangladesh. Section 53 states that notwithstanding anything contained elsewhere in this Act, or in any other law for the time being in force, where in respect to an arbitration agreement any application has been made in a court under this Act, that court alone shall have the jurisdiction over the arbitral proceeding and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made to that court and in no other court. He submitted that by omitting the High Court Division of the Supreme Court of Bangladesh from the definition of "court" under s. 2(b), the legislature has exhibited its intention to repose specific and additional jurisdictional parameters on the High Court Division. The word "includes" in s. 2(b) indicates an enlargement of the word "court" in the context of the expression "discharging the functions of District Judge's Court under the Act". In other words, any court, as appointed by the government through gazette notification, that discharges the "functions of District Judge's Court under the Act" will be a "court" as defined in

s. 2(b). The learned counsel also referred the decision in *Khaled Rab v. Bangladesh Jute Mills* 23 BLC (2018) 793, where an argument was raised in the context of s. 10 of the Act to the effect that the word সংশ্লিষ্ট আদালত in s. 10 exclusively means the court of District Judge and includes a court of Additional District Judge as stipulated in s. 2(b) but does not include the court of Joint District Judge. This argument was rejected on another ground. But on another angle the conclusion should be the same. Accordingly, the civil court administration is governed under the Civil Courts Act 1887. Under section 3 of the Civil Courts Act 1887, there are five classes of civil courts, which include the court of the Joint District Judge. As per s. 10(1) of the Civil Courts Act 1887, in the event of the death, resignation or removal of the District Judge, or if he is ill or otherwise incapacitated and unable to perform his duties, or if he is absent from the place at which his court is held, then the Additional District Judge, or, if an Additional District Judge is not present at that place, then the senior Joint District Judge present at that place, shall, in addition to his ordinary duties, assume charge of the office of the District Judge, and shall continue in that charge until the office is resumed by the District Judge or assumed by an officer appointed to the post. Furthermore, s. 10(2) of the Civil Courts Act 1887 states that while in charge of the office of the District Judge under s. 10(1), the Additional District Judge or the Joint District Judge (as the case may be), may, subject to any rules which the High Court Division may make, exercise any of the powers of the District

Judge. Thus, if a Joint District Judge performs the functions of the District Judge under s. 10 of the Civil Courts Act 1887, then during the period of such activities, the court of the Joint District Judge shall be regarded as the “court” as defined in s. 2(b) of the Act. Ultimately he submits that in the given facts and circumstances the earlier case has reached its finality there is no scope to challenge the earlier award in a different manner which has been done in the present case in hand as much as the entire exercise of the trial court, namely the District Judge, Patuakhali under section 12 is absolutely without any legal authority.

Mr. Shahria Kabir Biplob, the learned Advocate appearing on behalf of the opposite party vehemently opposes the rule. He submits that admittedly the court below, namely the District Judge, Patuakhali acted in accordance with law as authorized by the Act of 2001 and has rightly disposed of the matter by appointing Arbitrator which is liable to be sustained for ends of justice. The learned counsel referring the provisions of the Act of 2001 submits that when there is an arbitration clause incorporated in any contract and if there is a dispute admittedly the parties try to settle the matter as per the language embodied in the contract itself. By referring the provisions of section 12 of the Act of 2001 he submits that as per the said provisions when there is a dispute the parties will try to appoint arbitrator amicably by issuing notices and by exhausting the procedures as laid down in the relevant law and in case of failure on the part of the parties to appoint arbitrator the court has the authority to appoint arbitrator on the application made by either party. As per the said provisions of law if any party to the contract

approaches the court of law the court will proceed and appoint an arbitrator after giving opportunities to both the parties. If the case is being presented under section 12 of the Arbitration Act, 2001 it is the absolute authority of the court below to determine the appointment by its own motion but the court may consider the name of the arbitrator suggested by the parties. It is already settled in numerous decisions that while appointing arbitrators under section 12 of the Act of 2001 the court will only see whether there is a contract which contained an arbitration clause and whether the parties failed to appoint an arbitrator in the light of the provisions as laid down in section 12 of the Act of 2001 read with the relevant arbitration clause incorporated in the present contract. He further submits that in the present case in hand the question as raised by the present petitioner is not at all sustainable on the following counts, namely (a) the petitioner never raised the question, namely the question of appointment of arbitrator and passing of an award in an earlier proceeding at any stage of the instant proceeding though the proceeding took five years time, (b) that the appointment made under section 12 as well as passing of award is completely without jurisdiction as because the joint district judge has no authority or jurisdiction to do so in view of the provisions of the Arbitration Act, 2001 which is an special law, (c) that even if for the sake of argument it has been accepted that the Joint District Judge formed the tribunal and on the basis of the same an award was passed but the said Joint District Judge ultimately set aside the award and returned the plaint/application realizing that the court has lack of

jurisdiction to proceed under section 12 of the Act of 2001 and lastly (d) that since the earlier proceeding has no legal standing and suffers from lack of jurisdiction vigorously because of the specific clauses/provisions as well as the very nature of the Act of 2001, hence, the instant rule is liable to be discharged for ends of justice.

While contesting the present miscellaneous case in the written objection the petitioner raises the question of disposal of the matter in an earlier proceeding.

On invitation by this court the learned senior counsel Mr. A.M. Masum appeared as an Amicus Curie and submits that the concept of Arbitration is very familiar and effective phenomena either in national or international trade and commerce. It being a non adversarial process, plays very significant role to resolve dispute in short time outside court since the parties' choice on fixing of its procedures as well as setting up of terms and conditions are emphasized here. Overall it decreases overburden of judicial organs in legal arena. He further stated that the present opposite party no. 1 as a plaintiff earlier filed Arbitration Misc. Case No. 01 of 2015 in the Court of learned Joint District Judge, Patuakhali praying for appointment of arbitrators invoking section 12 of the Arbitration Act, 2001 and on contest, obtained order and the learned court appointed a chairman and two co-arbitrators to resolve the dispute occurred between the parties. Accordingly, both the parties by executing contracts dated 04.02.2010 setting out specific terms and conditions, fixed up their conduct to resolve dispute by way of Arbitration and ultimately by admitting mandate of Arbitration Act,

2001 and within the purview of Public Procurement Act, 2006 as well as Public Procurement Rules, 2008, excluded or curtailed jurisdiction of Civil Court. On the other hand, section 9 of the Code of Civil Procedure', curtailed jurisdiction of civil court to try the matter which is impliedly or expressly barred by law. The plaintiff however invoked section 12 of the Arbitration Act, 2001 but drawn Arbitration Proceeding being No. 1 of 2015 in the learned Court of Joint District Judge, Patuakhali praying for appointment of arbitrators.

Now the moot question whether the learned Court of Joint District Judge, Patuakhali *i.e.* the civil court had jurisdiction to try the matter is required to be justified under the concept developed in the legal arena. Admittedly the dispute occurred between the parties is domestic nature. In that event, the arbitrators if needed in order to resolve dispute, is required to be appointed by interference of the learned Adalat (Court). Section 2(b) of the Act, 2001 clarifies the term of court as mainly the Court of District Judge of concerned District having local jurisdiction and in certain cases, the court of additional district judge also shall be regarded as court under this section when it will be empowered to perform function of the Adalat. The learned court of Joint district judge may be treated as District Judge in performing function when it is empowered. When parties cannot agree on appointments of Arbitrator, then under Section 12 of the Arbitration Act, 2001, the proper "Court" (*i.e.*, the District Judge) is responsible for making the appointment.

However, as the senior counsel observed, the plaintiff filed Arbitration Misc. Case No. 1 of 2015 in the learned Court of Joint District Judge, Patuakhali without addressing the learned Court of District Judge and no power of District Judge was given by the authority to the learned Court of Joint District Judge. For this reason the Court of learned Joint District Judge has no jurisdiction to try the issue of the plaintiff rendering its order dated 22.02.2017 in Arbitration Misc. Case No. 1 of 2015 resulting appointment of arbitrators illegal. In a leading case, Golam Rabbani Khandaker vs. Hamida Bawa Shamsul Sheikh and others it was decided that the subordinate judge in proceeding with the title is not the court within the meaning of order 21, rule 29 of the Code. He acted beyond his jurisdiction in granting stay of further proceeding of the execution case pending before the Senior Assistant Judge. Subsequently the arbitral tribunal formed pursuant to the said illegal order passed an award or prepared report dated 05.11.2017 in favor of the defendant without following procedures of arbitration mandated in Arbitration Act, 2001"amongst other having no formal exchange of pleadings and no meaningful hearing. In Public Procurement Act, 2006 and the rules made there under in 2008, there are no specific procedures for initiation of arbitration process but it incorporated some pre arbitration steps and in failure, referred to conduct arbitration as per contracts as well as Arbitration Act, 2001. Dispute resolution under Bangladesh's Public Procurement framework involves two main stages. Before a contract is awarded (pre-award), dissatisfied bidders can file complaints with the

procuring entity's administrative authority, and if unsatisfied, appeal to a Review Panel as per Sections 29 to 30 of the Public Procurement Act, 2006. After a contract is signed (post-award), disagreements over performance or contractual terms are typically managed through clauses in the Standard Bidding Documents (SBDs) under the Public Procurement Rules, 2008, which mandate negotiation, and if needed, arbitration (often under the Arbitration Act, 2001). Only after these administrative and contractual mechanisms are exhausted do parties typically seek court intervention. This structured approach promotes fairness, quick dispute settlement, and efficient project implementation. Ultimately the award/report dated 05.11.2017 was passed by the said arbitral tribunal on signature of two members in favor of the defendant. In presence of both the parties without having any objection from either side regarding jurisdiction. Generally after passing arbitral award, one side may take initiative for setting aside the award on reasoning mentioned in sections 42 and 43 of the Arbitration Act, 2001. Similar provision has been incorporated in international arena. In UK, section 46 of the Arbitration Act, 1996 allows challenges based on substantive jurisdiction, including where the tribunal was not properly constituted. In USA, sections 9 and 10 of the Federal Arbitration Act, enumerates grounds for vacating an award, including when the arbitrators exceed their powers. In India, section 34(2)(a)(v) of the Arbitration and Conciliation Act, 1996, allows setting aside if the composition of the arbitral tribunal was not in accordance with this Part. In Singapore the International Arbitration Act incorporates the UNCITRAL Model Law;

thus, Article 34 the UNCITRAL Model Law applies. The courts have been strict about compliance with mandatory appointment provisions.

On the other hand, the other side will take step for executing the award under sections 44 in domestic arbitration and section 45 of the Act in international arbitration since it becomes a decree of the civil court but neither side took steps for that. Unfortunately the said award was set aside by the learned Court of Joint District Judge, Patuakhali vide its order dated 05.03.2018 in Arbitration Misc. Case No. 1 of 2015. Now the question is whether the concerned court being an appointing authority in exercising of power conferred under section 12 of the Arbitration Act, 2001 can set aside the arbitral award. Answer of the issue varies considering different facts and circumstances in domestic and international arena. In general, arbitration proceedings may be conducted on adhoc, institutional or statutory basis. Ad-hoc arbitration refers to an arbitration process not administered by an established institution such as the ICC, LCIA, SIAC, BIAC etc. Rather, the parties themselves or with help from their counsel agree upon the procedures, or they adopt a set of rules like the UNCITRAL Arbitration Rules. They also designate the seat of arbitration and decide on the method of constituting the tribunal.

Institutional arbitration, on the other hand, is administered by an arbitral institution under its own set of rules including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the

Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), and so on.

The role of waiver or estoppels also plays an important role in arbitration by preventing parties from later contesting procedural irregularities or issues they knowingly accepted. These doctrines ensure that if a party is aware of a procedural lapse or non-compliance but proceeds without timely objection, they may forfeit the right to later challenge that matter. This promotes efficiency and certainty in the arbitration process, as parties are encouraged to raise objections promptly rather than delaying disputes over settled procedural issues. However, while waiver and estoppel bar challenges to less critical procedural defaults, they typically do not apply to fundamental jurisdictional flaws such as the improper constitution of the tribunal- which remain subject to challenge despite prior silence or participation. Under Article 4 of the UNCITRAL Model Law, if a party proceeds without raising an objection to a known procedural lapse provided the law allows derogation they waive their right to later contest it. However, fundamental issues affecting the tribunal's jurisdiction, such as improper appointment of arbitrators, are typically not subject to waiver.

In Bangladesh perspective arbitration tribunal may be constituted on intervention of court under section 12 of the Arbitration Act, which includes quasi court process. In Bangladesh under section 12 of the Arbitration Act, 2001 learned Court of Joint District Judge, Patuakhali being appointing authority has no power to set aside the award without

getting Arbitration Proceeding drawn separately under sections 42 and 43 of the Arbitration Act, 2001. Similar practice appeared in international arena. Under Article 34 of the ICC Arbitration Rules (most recently amended 2021), an ICC award is finalized and signed by the arbitrators, the ICC Court scrutinizes the draft award. The Court may "lay down modifications as to the form" of the award and "draw attention to points of substance," but it does not have the power to force changes to the tribunal's merits-based decisions. This scrutiny process is meant to correct obvious errors and ensure the award meets formal requirements, thus reducing the risk of set-aside later. Even though the ICC Court scrutinizes a draft award, it does not "cancel" or "annul" an award that has already been formally rendered by the arbitral tribunal. The final authority to invalidate the award (after the tribunal has signed it and the ICC Court has approved its notification to the parties) rests with the national courts at the seat of arbitration. After the ICC award is notified to the parties (Article 35), the arbitral institution's administrative role typically ends. If a party seeks to challenge the award, it must apply to the appropriate court at the seat of the arbitration to set aside or annul the award. Article 35(6) of the ICC Rules also clarifies that, unless otherwise agreed, all awards made are "final and binding on the parties." The ICC has no internal mechanism to "cancel" a final, notified award. Under the SIAC10 Rules (including the 2016 version or any subsequent updates) is outlined primarily in Rule 32 (Awards), Rule 33 (Additional Awards), Rule 34 (Correction and Interpretation), and Rule 35 (Costs), none of which empowers

SIAC to invalidate or cancel an award once it has been rendered. Similar to the ICC and SIAC, the LCIA (London Court of International Arbitration) has procedural rules (e.g., LCIA Rules 2020, Articles 26-27) for making awards, corrections, and additional awards. It does not provide for "cancellation" by the LCIA itself. Article 27 of the LCIA Rules allows for "corrections" but no internal annulment. Under the HKIAC Administered Arbitration Rules (2018), once an award is issued, the HKIAC similarly lacks the power to cancel it. The only recourse for invalidation remains a set-aside application to a court under Hong Kong's Arbitration Ordinance or whichever seat's law applies.

However, as the learned counsel observed, exceptional circumstances appeared under BERC jurisdiction. Upon receiving the award, Section 40(4)(a)-(c) of the BERC Act, 2003 endows BERC with three main options: (i) If the award is lawful and fair, BERC "approves" it (ii) If there is a fundamental error, misconduct, or violation of statutory requirements, BERC may nullify the award or modify certain provisions. (iii) BERC may send the award back to the arbitrator for further proceedings or additional clarification.

In the dispute before this court, the learned counsel Mr. A.M. Masum stated finally said arbitration proceeding was ended by returning of its petition to the plaintiff having liberty to file the same in proper court having jurisdiction vide its order dated 04.07.2018 passed in Arbitration Misc. Case No. 01 of 2015 when said court found itself beyond jurisdiction and acts done thereon *coram non judice*. Order VII,

Rule 10(1) of the Code provided option to the plaintiff to file suit in proper jurisdictional court by taking back its plaint and the learned court may exercise this power at any state of the suit. Moreover, Order VII, Rule 10(1) of the Code stipulated the process of said return requiring endorsement with specific date and reasoning. Thus if the plaint is filed in a court which has no pecuniary jurisdiction to entertain the claim, the court should not dismiss it, but return the plaint for presentation before the court which has the jurisdiction as decided in *R.S.D.V Finance Co.Pvt. Limited vs. Shree Vallabh Glass Works Ltd.* In that event, learned Joint District Judge, Patuakhali correctly returned the petition/plaint to the plaintiff.

In sum up, it is well settled principle of law that every act done by the authority beyond jurisdiction is illegal and carries no legal force in the eye of law. Since the learned Joint District Judge had no jurisdiction to try the issue under section 12 of the Arbitration Act, 2001, subsequent act i.e. appointment of arbitrators, award passed by the arbitrators, rescinding of award has no legal force and need not be challenged by later form. At last resort, the learned Joint District Judge confirmed all those activities null and void impliedly with return of petition. It is settled principle of law as set out in *Managing Director, Rupali Bank Limited and others vs. Tafazal Hossain and others* that the jurisdiction of the court goes in the very root of the matter brought before it and if the court got no jurisdiction everything shall fall through. The court which got no jurisdiction over a matter shall not go into merit of the matter. Identical principle was also enumerated in a

leading case Md. Arfan Uddin Akand and Ors. vs. Joint District Judge and Artha Rin Adalat No. 1., Gazipur and Ors that the jurisdiction of the court goes in the very root of the matter brought before it and if the court got no jurisdiction everything shall fall through. It was also decided in Esrarul Huq Chowdhury Vs. Government of the People's Republic of Bangladesh and Ors, Ditandra Bikash Bonik and others vs. Hamida Begum and others that Jurisdiction cuts the root of the matter and if the court got no jurisdiction everything shall fall through. Hence in my considered view- award/report dated 05.11.2017 passed by arbitrators pursuant to order of the learned Joint District, Patuakhali who has no jurisdiction, bear no legal force in the eye of law.

Mr. A.M. Masum further submits that the instant respondent after returning back of the petition from the learned court of Joint District Judge, Patuakhali in Arbitration Misc. Case No. 01 of 2015 filed further Arbitration Misc. Case No. 01 of 2018 in the learned Court of District Judge, Patuakhali on the self same issue between the same parties. Moot question is whether the captioned subject barred by principle of res-judicata, estoppels and waiver. The provision of section 11 of CPC is mandatory and either party can avoid later decision by taking advantage of section 44 of the Evidence Act, 1872. The principles of res judicata are applicable in respect of Arbitration proceedings." A decree on an award given by the arbitrators operate as res judicata between the same parties. For instance, the Tribunal in Amco Asia Corporation and others v. Republic of Indonesia considered that if an ad hoc committee decides to annul only part of the award, the

parts of the award that are not annulled are res-judicata between the parties. When an award becomes final, it puts an end to all the controversies between the parties and the points which were taken, either in attack or in defence cannot be reagitated. A judgment under section 17 of the Arbitration Act, 1940 amounts to a judgment by consent and is intended to put a stop to litigation just as much as a decision of the Court after the matter has been fought to the end. The award dated 05.11.2017 has no legal force as viewed above and admittedly no parties took initiative either for challenging or executing the same. Rather the learned court of Joint District Judge, Patuakhali set aside the award and ended the arbitration proceeding by returning back the petition. When a plaint is returned and represented, the suit is not a continuation of the suit originally filed as principle set out in *Ram Dutt v. ED Sassoon & Co.* and for the purpose of limitation, the date of institution of the suit is the date of representation of the suit. In that event, principle of res-judicata is not applicable upon the parties. Order passed in Arbitration Misc. Case No. 01 of 2018 being final, the defendant correctly invoked revisional application before the Hon'ble Court challenging the same. It was decided in *Alhaj Dr. Chowdhury Mosaddequl Isdani Vs. Abdullah Al Munsur Chowdhury and others* that on this score since the revisional application lies against the final order of the District Judge under a special law, the respondents herein correctly invoked revisional jurisdiction of the High Court Division against the order of the District judge passed in appeal preferred against an order of eviction by the Deputy Commissioner pursuant to the

prayer of the waqf administrator. Hence on the question as to whether revisional is maintainable the court held the same in the affirmative. The principle set out in *Rajuk Karmachari Bahu-Mukhi Samabaya Samity and another vs. M/S. Al-Razib Traders* that as District Judge while he is acting in pursuance of the statute enabling him by section 12 of the Act as well as section 7(A) of the Act. He is performing duty as a judge of the civil jurisdiction and he is not a person designate but a court sub-ordinate to the High Court Division. The exercise of power under section 115 is supervisory and discretionary which should be exercised judicially. It is no function of the revisional court to sit in appeal over the findings of the appellate court. A revisional court will not, except on limited grounds, interfere with findings of fact arrived at by the trial and appellate court. It will not also decide a contested question of fact raised for the first time in revision. The High Court Division under its revisional jurisdiction can interfere for the purpose of rectifying error of the courts below which has occasioned a failure of justice. In a leading case *Dr. Chowdhury Mosaddequl Isdani vs. Abdullah Al Munsur Chowdhury*, it was held that the jurisdiction under section 115 of the Code is very limited. It has not empowered the revisional court to sit on appeal and take in to consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice. The instant civil revision is arising out of judgment and order passed in Arbitration Misc. Case No. 1 of 2018. Neither the proceeding of Title Suit No. 1 of 2015 nor the

award has been challenged in the instant revisional application. Under above backdrop, High Court Division unlike the Appellate Division exercising power conferred under article 104 of the Constitution; has no jurisdiction to interfere the proceeding of Title Suit No. 1 of 2015 and the award passed there under but the impugned judgment and order passed in Arbitration Misc. Case No. 01 of 2018. Parties have set out terms and conditions for settlement of dispute under Arbitration Act, 2001 and accordingly the learned District Judge, Patuakhali appointed arbitrators for settlement of disputes vide the impugned judgment and order in Arbitration Misc. Case No. 01 of 2018. Hence in the considered view of the learned counsel under above backdrop, no interference of impugned judgment and order enquired to be called for under purview of section 115 of the Code of Civil Procedure, 1908.

I have perused the impugned judgment and order passed by the court below, revisional application, grounds taken thereon, necessary papers and documents annexed herewith as well as the provisions of law. I have heard the learned counsels for both the parties as well as elaborate submissions made by the Amicus Curie.

On perusal of the same, it transpires that the present petitioner who is admitted a party to the contract has challenged the impugned order wherein the District Judge, Patuakhali proceeded with Misc. Case No. 01 of 2018 and after hearing both the parties and considering the facts and circumstances allowed the same by appointing two senior District Judges as arbitrators for the petitioner and opposite party.

The petitioner who contested the entire proceeding moved before this court challenging the impugned order, but on perusal of the grounds taken thereon and the submissions made by the petitioner clearly shows in the present revisional application the petitioner has actually challenged the entire proceeding of Arbitration Misc. Case No. 01 of 2018. There is no denial in between the parties regarding the execution of a contract as much as commencement of work by the respective parties. There is no further denial regarding the dispute in between the parties. The District Judge, Patuakhali proceeded with the Misc. Case No. 01 of 2018 which was filed on 15.07.2018 and the present petitioner contested the same since 19.08.2018. On perusal of the impugned order, it transpires that the trial court after hearing the parties and considering the facts and circumstances disposed of the miscellaneous case on satisfaction by appointing two arbitrators.

The main contention as raised by the petitioner in challenging the impugned order *vis-à-vis* the entire proceeding is that the present opposite party as petitioner invoked the jurisdiction of Joint District Judge, 1st Court, Patuakhali and filed Arbitration Case No. 01 of 2015 under section 12 of the Arbitration Act, 200. The said court, namely the Joint District Judge, 1st Court, Patuakhali proceeded with the case and ultimately appointed arbitrators and on the basis of the said order tribunal was formed and the said tribunal passed Award admittedly in the absence of the representative of the present opposite party. So, the main contention in challenging the present impugned order and the proceeding is that since there was arbitration wherein both the parties

unanimously supported the appointment, hence, the present proceeding cannot be maintained or sustained in the eye of law. The main contention as raised by the petitioner, is that, whether the court has jurisdiction or not. But the very spirit of the Arbitration Act clearly indicates that when there is a consensus decision or support by both the parties even if the court has no jurisdiction but the ultimate spirit goes in favour of the earlier appointment and Award and as such the subsequent proceeding is a nullity in the eye of law.

On meticulous perusal of the papers and documents, it transpires that actually there were two proceedings, namely Arbitration Case No. 01 of 2015 and Arbitration Misc. Case No. 01 of 2018. The case as it appears in Arbitration Proceeding being No. 01 of 2018 is very simple and a regular case wherein one of the parties invoked the jurisdiction of section 12 of the Arbitration Act, 2001 of the court of law and the court of law after hearing the parties, considering the facts and circumstances, provisions of law and materials on records made the appointment under challenged. A very important question is being raised that since the matter has already been adjudicated and settled in an earlier proceeding whether the subsequent proceeding at all sustainable or not. There is no denial about the filing of a case in the year 2015 by the opposite party in the court of Joint District Judge, 1st Court, Patuakhali and also there is no denial regarding the proceeding wherein both the parties made consensus prayer for appointment of arbitrator resulting which an Award was passed, however, in the

absence of the representative of the opposite party who is the petitioner in the present miscellaneous case.

On meticulous perusal of the entire record, it transpires that the Joint District Judge, Patuakhali registered the case as Arbitration Case No. 1 of 2015 and proceeded. It further transpires from the order sheet that the said court appointed arbitrators but amended the same twice for certain reasons stated in the said orders. It further transpires that the court below fixed date for submission of প্রতিবেদন which (the Award). It also transpires from the order sheet that after passing the Award the same was placed before the Joint District Judge, 1st Court, Patuakhali. On further perusal of the said order sheet, it transpires that eventually the Joint District Judge, 1st Court, Patuakhali set aside the said Award and ultimately the Joint District Judge, 1st Court, Patuakhali returned the plaint/application as per the provision of the Code of Civil Procedure, 1908 to be presented in an appropriate court of law vide order dated 04.07.2018. It further transpires that after receiving the said application which was returned by the said court, namely the Joint District Judge, 1st Court, Patuakhali the present opposite party filed the instant miscellaneous case which ended by appointment of Arbitrator.

Arbitration Act has been incorporated as the Act No. 1 of 2001. The very purpose of the legislature in enacting/incorporating the Arbitration Act is to resolve disputes, especially the commercial and business transaction in a speedy manner by settlement amicably or by alternative dispute resolution avoiding the interference of the court of law. The main intention of the legislature in enacting the Act is to avoid

the delay and multiplicity of the proceeding in the court of law in the country as well as keeping the mind the international transaction and resolving such international dispute effectively and speedy way. On perusal of the Act itself it transpires that the law provides interference of the court of law in very limited places, namely passing an interim order under section 7Ka of the Arbitration Act, 2001 for securing the subject matter of the arbitration in question, appointment of arbitrator in section 12 in case the parties failed to do so consensually and section 42 to see the legality and propriety of the Award but also on very strict and limited grounds. So it is clear from the language of the Act that the legislature discourages the interference of the court of law in an arbitration proceeding.

Section 2(b) of the Arbitration Act, 2001 runs as follows;

“Court” means District Judge’s Court and includes Additional District Judge’s Court appointed by the Government for discharging the functions of District Judge’s Court under this Act through Gazette notification”

So, on meticulous perusal of the aforesaid provisions of law, it clearly shows the court for the purpose of this Act is solely the court of the District Judge though the Code of Civil Procedure provides the inclusion of the court of Additional District Judge along with the court of District Judge but in the instant law the pure intention of the legislature is that the court of the District Judge shall be the sole court for the purpose of this Act only. While incorporating the section 2 sub-

section (b) the legislature further prescribed that the court of the Additional District Judge can be included as court but in that case the government has to issue a gazette notification to that effect which clearly shows that only an Additional District Judge can act as a court for the purpose of this Act if authorized by gazette notification. While enacting the provisions of section 3 of the Act the legislature described the court of the present Act where by non-obstantive clause it has been asserted that the Act shall not affect any other law for the time being in force and if there is a dispute there has to be settled by following the provision as laid down in the Act of 2001. On meticulous perusal of the Act especially section 7 of the Arbitration Act which runs as follows;

“Jurisdiction of Court in respect of matters covered by arbitration agreement:-- Notwithstanding anything contain in any other law for the time being in force, where any of the parties to the arbitration agreement files a legal proceedings in a court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act”.

Section 12 of the Act of 2001 elaborately described the provision of appointment of arbitrator. In a simple way the parties are fit to agree on a procedure for appointment of arbitrator or arbitrators. But as per the said provisions of law, failing any agreement to do so the District Judge in case of domestic arbitration and the High Court Division in case of international arbitration shall appoint the arbitrator. In practice a miscellaneous proceeding is being initiated and such proceeding be

ended by appointing arbitrator either by the court itself or on the basis of the suggestion made by the parties which is the absolute discretion of the court of law.

Section 17 of the Act of 2001 also authorizes the arbitral tribunal to rule on its own jurisdiction even if there is a provision in section 17 but section 20 also authorizes the High Court Division to resolve a question of jurisdiction of the tribunal on the basis of an application made by the parties. Section 42 authorizes the court of law to setting aside arbitral tribunal only on the ground as stipulated in section 43 which is a very limited one. So on perusal of the aforesaid provisions of law it is very much clear that Arbitration Act 2001 is a special law enacted for the purpose stated therein and also the purpose as decided by the legislature. The Act initially the legislature enacted Arbitration Act 1940 but ultimately the same was repealed and the Act 2001 came in more modern detailed way following the Model Law and for effective resolution of the dispute in between the parties through an Alternative Dispute Resolution method. Being a special law it has been mentioned earlier that the main and very purpose and intention of the legislature is that to avoid the interference of the court in Alternative Dispute Resolution. While enacting the Act of 2001 the legislature authorizes the court to interfere in a very selective way and selective matters and in a summary way. The language of section 7A and 12 clearly speaks about the jurisdiction of the court of law wherein the court has no authority to see the subject matter or dispute in question rather the court of law while exercising the power under section 7A and

12 passed a limited order solely based on the primary issues, namely just to protect the subject matter of the arbitration in question or assisting the parties to appoint arbitrator when they failed to do so in a consensus way. Even on perusal of the section 42 of the Act of 2001 it clearly speaks about the jurisdiction which can be done as an appeal against the Award but the very language of section 43 clearly stipulates that the power of the court while setting aside the Award of the arbitral tribunal is very much limited and confined to four grounds, stipulated in section 43 1(a) (i-iv).

In the present case in hand, it transpires that the legal question is being raised that whether the order passed by the Joint District Judge in Arbitration Case No. 01 of 2015 is conclusive and within jurisdiction and also even if the same is without jurisdiction the consensus in between the parties gave a waiver to the question of jurisdiction. In the present case in hand I have discussed the very nature of the Arbitration Act of 2001 with a reference to section 2(c) it clearly transpires that only the sole authority is being given to the District Judge to deal with the dispute relates to the Arbitration Act. The law further clarified that even if the Additional District Judge includes District Judges as per the Code of Civil Procedure but in case of Arbitration Act a special authorization is required by way of issuance of gazette notification if any Additional District Judge intends to deal with any provisions of the Arbitration Act, 2001. So, it clearly transpires from the language and the other non-obstantive clause and the very nature that the jurisdiction is exclusive and cannot be delegated without the specific sanction is

given by the law itself. When the law itself clarified that even if an Additional District Judge intends to invoke the provisions of the Arbitration Act of 2001 a special authorization is being required by issuance of a gazette notification which clearly shows the exclusive nature of jurisdiction by the District Judge in case of Arbitration Act of 2001.

It transpires that there is a provision for raising objection, challenging the jurisdiction of the arbitral tribunal as much as challenging the Award passed by the arbitral tribunal. But it transpires that the same is very much limited and must be applied and decided by the appropriate court of law. In the present case in hand both the parties including the petitioner admits that the Joint District Judge, Patuakhali has no jurisdiction to adjudicate an application under section 12 of the Arbitration Act, 2001 but as the parties consensually agreed for the appointment the question of jurisdiction can be waived enabling the implementation of the very purpose of the Act itself. Admittedly, the very intention of the enactment of the Act of 2001 is to resolve the dispute by Alternative Dispute Resolution and mostly by amicable settlement. The provisions of section 12 of the Act of 2001 clearly speaks about the agreement of party in respect of appointment of arbitrator and in case of disagreement only the court can appoint the arbitrator to do so. Apart from that it transpires from the entire order sheet of the Miscellaneous Case No. 01 of 2015 that the Joint District Judge proceeded with the case made appointment amended the same twice and ultimately when the Award was placed the said court set

aside the same and returned the application/plaint as per the provision of the Code of Civil Procedure. In the present case in hand the petitioner intends to adopt only the appointment and the Award not the subsequent order passed by the Joint District Judge, 1st court, Patuakhali. When the petitioner is accepting the jurisdiction of the Joint District Judge, 1st Court, Patuakhali but at the same time the petitioner is not ready to accept the remaining part of the proceeding, namely setting aside the Award and return of the plaint. I do not find any papers and documents to show that the present petitioner has challenged the aforesaid setting aside of the Award by the Joint District Judge or return of the plaint though the learned counsel for the petitioner vehemently argued that the Award can only be set aside by a competent court, namely the District Judge only exercising the power conferred under section 42 of the Arbitration Act of 2001. It further transpires that though the section 17 and section 20 of the Act of 2001 empowers the parties to see the legality and propriety of the jurisdiction of the tribunal but no attempt was made by the petitioner at any stage and though in the present proceeding, namely Misc. Case No. 01 of 2018 in the written objection the petitioner mentioned about the disposal of the proceeding being Arbitration Case No. 01 of 2015 but there is no vigorous attempt made by the present petitioner to stop the present proceeding or challenging the same in any manner.

On meticulous perusal of the submissions as made by the learned Amicus Curie it transpires that the Amicus Curie while making elaborate submissions emphasized about the very nature of the law

itself and the question of jurisdiction. The Amicus Curie also placed the different authorities and the procedures followed by in different jurisdiction as well as international establishments, namely ICC, LCIA, SIAC, etc. and based upon the set of rules by UNCITRAL MODEL LAW. The opinion as it appears from the trend of the submission is that the jurisdiction of the court while dealing with the Arbitration Act should be followed strictly and as much as possible as the law says and there is no scope to give waiver at least the question of jurisdiction.

It transpires from the law itself as well as the different provisions that to ensure the main purpose of enacting the Act of 2001 the intention of the legislature is the less interference of the court and while enacting the law by specific language the legislature defined the definition of court and also made an exception in the provision of Code of Civil Procedure which clearly found in the provisions of section 2(b) of the Act itself. Since the language is specific it is very much clear and there is no doubt to hold the view that the proceeding being Arbitration Case No. 01 of 2015 is a nullity and is being done or proceeded absolutely without jurisdiction and any such order passed by the said court has no legal bearing or impact in any manner. The proceeding cannot do or aid any subsistent support to any further proceeding or cannot be considered to set aside or challenge the subsequent proceeding. The only right thing was done by the Joint District Judge, 1st Court, Patuakhali in my view is the return of the application as the court has no jurisdiction to hear and dispose of the same. All these counts I find no reason to interfere.

Accordingly, the instant rule is discharged without any order as to cost. The impugned judgment and order passed by the court below is hereby affirmed.

The office is directed to communicate the judgment and order to the concerned court below at once.

(Mamnoon Rahman,J:)

Emdad.B.O.