IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

Present:

Mr. Justice Md. Toufiq Inam

Arbitration Application No.14 of 2023.

An application under Sections 42 and 43 of the Arbitration Act, 2001.

IN THE MATTER OF:

Manikganj Power Generations Limited.

.......Petitioner.

-Versus-

Yew Choon Private Limited.

.... Respondent.

Mr. Junayed Ahmed Chowdhury, Senior Advocate, with
Mr. Asif Bin Anwar, Advocate and
Mr. Jobayer Mohammad Aourangzeb, Advocates

.........For the petitioner.

Mr. Khaled Hamid Chowdhury, Senior Advocate with
Mr. ABM Hamidul Mishbah, Advocate and
Mr. Bishow Jith Deb, Advocate

.... For the Respondent.

Judgment Delivered On 10.08.2026.

Md. Toufiq Inam, J.

This is an application under sections 42 and 43 of the Arbitration Act, 2001 seeking to set aside the arbitral award dated 20.06.2023 rendered by the Arbitral Tribunal in favour of the respondent.

Relevant Facts

The petitioner and the respondent entered into a contract whereby the respondent undertook to provide heavy lifting and transportation services in connection with, among others, the Bhairob Project.

Disputes subsequently arose between the parties regarding, inter alia, the respondent's claim for compensation on account of the alleged delay in the commencement of the Bhairob Project and other ancillary claims arising out of the performance of the contract.

Pursuant to the arbitration agreement contained in the contract, the disputes were referred to arbitration. Both parties filed their respective pleadings, adduced oral and documentary evidence, and participated fully in the arbitral proceedings.By the Final Award dated 20.06.2023, the Arbitral Tribunal partly allowed the respondent's claims. So far as the present application is concerned, the Tribunal awarded the respondent USD 511,150, comprising compensation for the alleged 103-day delay in the commencement of the Bhairob Project together with USD 42,500 towards the use of three alternator units. The Tribunal also directed the petitioner to pay BDT 35,50,000 as the respondent's share of the costs of the arbitral proceedings.

Being aggrieved by the aforesaid findings and directions, the petitioner has filed the present application under sections 42 and 43 of the Arbitration Act, 2001, seeking to set aside the award to the extent it grants the aforesaid compensation and costs.

The petitioner's principal grievance is that the Tribunal erroneously shifted the burden of proof from the respondent, as claimant, to the petitioner, accepted uncorroborated logbook entries maintained by the respondent while disregarding material documentary evidence produced by the petitioner, and thereby arrived at findings which are perverse and *prima facie* opposed to the law for the time being in force in Bangladesh within the meaning of section 43(1)(b)(ii) of the

Arbitration Act, 2001. The petitioner further challenges the award relating to costs as arbitrary and unsupported by reasons.

The respondent, on the other hand, contends that the Tribunal considered the entire evidentiary record, appreciated the evidence in accordance with law, and arrived at findings that were reasonably open on the materials before it. It is further contended that the present application merely seeks a reassessment of facts and evidence, which falls outside the limited supervisory jurisdiction of this Court under section 43 of the Arbitration Act, 2001.

Submissions of the Petitioner

Mr. Junayed Ahmed Chowdhury, learned Senior Advocate, appearing with Mr. Asif Bin Anwar for the petitioner, submits that the impugned award is vitiated by patent illegality and is liable to be set aside under section 43 of the Arbitration Act, 2001. He contends that although an arbitral tribunal is not bound by the strict rules of the Evidence Act, 1872, it must nevertheless adhere to the fundamental principles governing burden of proof and fair adjudication. Referring to sections 23, 24, 29, 35 and 38 of the Arbitration Act read with section 101 of the Evidence Act, he argues that the respondent, as claimant, bore the initial burden of proving the factual foundation of its claim by credible evidence, which it failed to discharge.

According to him, the respondent's claim for additional delay charges rested entirely on the allegation that the Bhairob Project site and jetty were not ready for commencement of work for 103 days. In the absence of proof of that foundational fact, no evidential burden could shift to the petitioner. Instead of examining whether the respondent had discharged its initial burden, the Tribunal accepted the respondent's case solely on the basis of entries in its own operational logbook, prepared by its personnel and unsupported by any independent corroboration, while disregarding the petitioner's documentary evidence. He submits that the Tribunal thereby reversed the burden of proof by requiring the petitioner to establish that the project site was ready for commencement of work, contrary to section 101 of the Evidence Act.

Elaborating the submission, he argues that the Tribunal's reasoning, that there was no plausible reason for the respondent to record false delays in its logbook, was speculative and incapable of substituting legal proof. He further submits that the Tribunal either ignored or rejected without adequate reasons the petitioner's materials, including progress reports, official correspondence, email exchanges with MAN Energy Solutions SE, Germany, reports submitted to the Independent Power Plant Cell of the Bangladesh Power Development Board, and photographic records, all indicating that the project had substantially been completed and was ready for operation. Such selective appreciation of the evidence, he contends, rendered the Tribunal's findings perverse.

In support of these submissions, he relies on section 101 of the Evidence Act and submits that section 24 of the Arbitration Act excludes only the strict procedural application of the Code of Civil Procedure and the Evidence Act, not the underlying principles of burden of proof and fair adjudication. He further places reliance on *M/S Ambika Construction Co. v. Union of India*, 2012 (2) Arb LR 249 (Bom), and *Oil and Natural Gas Corporation Ltd. v. Oil Country Tubular Ltd.*, 2011 (4) Arb LR 139 (Bom), for the proposition that, notwithstanding the procedural flexibility of arbitral proceedings, the claimant must establish its claim by sufficient pleadings and evidence before any award of damages can be sustained. He also relies on *Gas Transmission Company Limited v. Drilltec-Maxwell Joint Venture*, 22 ALR 31, particularly paragraph 57, to contend that a finding reached by ignoring material evidence, misreading the record or reversing the settled burden of proof amounts to a perverse finding and is therefore *prima facie* opposed to the law for the time being in force in Bangladesh within the meaning of section 43(1)(b)(ii) of the Arbitration Act.

On the question of costs, learned Senior Advocate submits that the Tribunal exercised its discretion arbitrarily by directing the petitioner to bear the entire costs of the arbitration despite the respondent having substantially failed in its claim. He argues that no reasons were assigned for departing from the settled principle that costs ordinarily follow the event and, accordingly, the direction as to costs is equally unsustainable.He accordingly submits that the impugned award, having been founded upon an erroneous application of the burden of proof, reliance on uncorroborated self-serving documents, disregard of material evidence, and a perverse appreciation of the record, is liable to be set aside under section 43(1)(b)(ii) of the Arbitration Act, 2001.

Submissions of the Respondent

Conversely, Mr. Khaled Hamid Chowdhry, learned Senior Advocate appearing on behalf of the respondent, submits that the present application is, in substance, an attempt to reopen the merits of the arbitral award under the guise of sections 42 and 43 of the Arbitration Act, 2001. According to him, the petitioner has failed to bring its case within any of the limited statutory grounds upon which an arbitral award may be set aside.

At the outset, he submits that the challenge is confined to two parts of the Final Award dated 20.06.2023, namely, (i) the award of USD 511,150, comprising compensation for the 103-day delay in the commencement of the Bhairob Project together with USD 42,500 towards the use of three alternator units, and (ii) the award of BDT 35,50,000 towards the respondent's share of the arbitral costs. The petitioner's objections, he submits, are essentially threefold: first, that the Tribunal reversed the burden of proof under section 101 of the Evidence Act, 1872; secondly, that its finding regarding the readiness of the Bhairob Project is perverse; and thirdly, that the order as to costs is arbitrary. None of these grounds, he contends, falls within the ambit of section 43 of the Arbitration Act.

Developing his submissions, he contends that the Arbitration Act, 2001 embodies the legislative policy of minimal judicial intervention and accords finality to arbitral awards. Referring to sections 24, 39 and 43 of the Act, together with Articles 5 and 34 of the UNCITRAL Model Law, he submits that this Court exercises only a supervisory jurisdiction and not an appellate one. Accordingly, the Court cannot reassess the evidence, substitute its own interpretation of the documents, or interfere merely because another view of the facts is possible. The expression "prima facie opposed to the law for the time being in force in Bangladesh" occurring in section 43(1)(b)(ii), he argues, cannot be construed as conferring a general right of appeal against arbitral awards but must be interpreted consistently with the legislative policy of finality.

In support of these propositions, he places reliance upon *Helm Dungemittel GmbH v. Bangladesh Chemical Industries Corporation*, 16 BLC 783; *Rising Sun Traders Ltd. v. Chittagong Port Authority*, 43 DLR 1; *Bangladesh Telegraph and Telephone Board v. Lithi Enterprise Ltd.*, 46 DLR 122; *Titas Prokaushali Ltd. v. Roads and Highways Department*, 46 DLR 665; *Bangladesh Power Development Board v. Arab Contractors (BD) Ltd.*, VI ADC (2009) 952; *Bangladesh Railway v. Pamkaya (M) SDN BHD*, 2 CLR (HCD) 114, affirmed in 2 CLR (AD) 139; and *Bangladesh Water Development Board v. United Builders*, 9 ALR (AD) 97. These authorities, he submits, consistently affirm that an arbitral award cannot be set aside merely because another interpretation of the evidence or the contract is possible and that judicial interference is warranted only where the award suffers from jurisdictional infirmity, rests upon inadmissible evidence or legal principles unknown to law, or reflects total non-consideration of material evidence. He further submits that the observations in *Gas Transmission Company Limited v. Drilltec-Maxwell Joint Venture*, 22 ALR 31, must be understood in the factual context of that case and do not authorise the Court to treat every alleged error in appreciation of evidence as a ground for annulment.

Referring to *Redfern and Hunter on International Arbitration* and Gary Born's *International Commercial Arbitration*, he submits that courts exercising supervisory jurisdiction over arbitral awards do not sit in appeal over findings of fact. Ordinary errors in appreciation of evidence, contractual interpretation or factual inference, even if assumed, do not constitute grounds for setting aside an award unless they disclose a jurisdictional defect or violate fundamental public policy.

Applying these principles to the present case, he submits that the Tribunal carefully examined the entire documentary record, including the email correspondence dated 06.01.2019 and 08.01.2019, the progress reports, the email dated 13.01.2019 addressed to MAN Energy Solutions SE, the report submitted to the Independent Power Producer Cell, the subsequent correspondence between the parties and the chronology of events. Upon such evaluation, the Tribunal concluded that none of those documents established that the Bhairob Project site and jetty were ready for commencement of heavy lifting operations during the disputed period. The Tribunal further relied upon the respondent's email dated 21.04.2019, the absence of any immediate complaint that the respondent had failed to mobilise despite site readiness, and the surrounding commercial circumstances, including the respondent's completion of the Manikganj Project within 87 days and its completion of the Bhairob Project within nine days after the requisite facilities became available. These findings, he submits, were drawn from the cumulative effect of the evidence and not merely from the petitioner's inability to disprove the respondent's case.

Mr. Khaled Hamid Chowdhury further submits that the award must be read as a whole and not by isolating individual expressions. The Tribunal's observations that the petitioner had "failed to disprove" certain assertions or had "not conclusively proved" the readiness of the project cannot be divorced from the extensive discussion preceding those observations. Read fairly, the award demonstrates that the Tribunal first evaluated the evidence adduced by both parties and thereafter reached its conclusions on the basis of the entire evidentiary record. Even assuming another tribunal might have drawn different inferences, the sufficiency, reliability and weight of the evidence remain matters exclusively within the province of the arbitral tribunal and cannot be reassessed under section 43.

With regard to costs, he submits that section 38(7) of the Arbitration Act expressly vests the Tribunal with discretion to determine both the quantum and incidence of costs. Such discretion, he contends, is open to interference only where it has been exercised arbitrarily, capriciously, in excess of jurisdiction or upon an erroneous principle of law. Since the respondent substantially succeeded in the arbitration, the Tribunal rightly regarded it as the successful party for the purpose of costs. The petitioner's challenge to the award on costs, like its challenge on the merits, therefore seeks nothing more than a rehearing on facts and evidence, which is wholly inconsistent with the legislative policy of finality embodied in the Arbitration Act, 2001. Accordingly, the application merits dismissal.

Analysis and Findings

Having heard the learned Advocates appearing for the respective parties at length, and having carefully examined the application, the affidavits filed by the parties, the impugned arbitral award, the pleadings and documentary evidence placed before the Arbitral Tribunal, the written submissions, the authorities cited by the parties, and the relevant provisions of the Arbitration Act, 2001, this Court is now called upon to determinewhether the petitioner has succeeded in bringing the impugned award within any of the limited statutory grounds for judicial interference under section 43 of the Arbitration Act, 2001. The principal questions that arise for determination are whether the Tribunal committed any error of law by misapplying the burden of proof, whether its findings suffer from such perversity or non-consideration of material evidence as to render the award *prima facie* opposed to the law for the time being in force in Bangladesh within the meaning of section 43(1)(b)(ii), and whether the Tribunal's direction relating to costs discloses any jurisdictional or legal infirmity warranting interference by this Court.

Scope Of Judicial Review Under Section 43

Before examining the rival contentions, it is necessary to bear in mind the nature of this Court's jurisdiction under sections 42 and 43 of the Arbitration Act, 2001. The Act was enacted to minimise judicial intervention in arbitral proceedings and to uphold the principle of finality of arbitral awards. Unlike an appellate Court, the High Court Division does not sit in appeal over an arbitral award. Its jurisdiction is supervisory and not appellate.Section 43 exhaustively enumerates the circumstances in which an arbitral award may be set aside. Unless the applicant is able to bring the case within one or more of those statutory grounds, the Court cannot interfere merely because another view on the facts or the contract is possible.

This principle has repeatedly been recognised both in Bangladesh and in other Model Law jurisdictions. In *Helm Dungemittel GmbH v. Bangladesh Chemical Industries Corporation* (16 BLC 783), this Court held that proceedings under section 43 do not permit a reassessment of evidence or reconsideration of the merits of the dispute. Likewise, in *Bangladesh Railway v. Pamkaya (M) SDN BHD* (2 CLR (HCD) 114), affirmed by the Appellate Division (2 CLR (AD) 139), it was held that the Court cannot substitute its own appreciation of the evidence merely because another conclusion appears preferable. Similar principles were reiterated by the Appellate Division in *Bangladesh Water Development Board v. United Builders* (9 ALR (AD) 97), emphasising that judicial intervention is confined to cases where the award suffers from a jurisdictional defect or is vitiated by one of the statutory grounds recognised by the Arbitration Act.

The expression "prima facie opposed to the law for the time being in force in Bangladesh" occurring in section 43(1)(b)(ii) cannot be construed as conferring a general appellate jurisdiction over every alleged error committed by the arbitral tribunal. If every error in appreciation of evidence or contractual interpretation were treated as a violation of law, the distinction between an appeal and an application for setting aside would disappear altogether, thereby frustrating the legislative policy of finality embodied in the Arbitration Act.

Whether The Tribunal Reversed The Burden Of Proof

The petitioner's principal contention is that the Arbitral Tribunal fundamentally misdirected itself in law by reversing the burden of proof. According to the petitioner, the respondent, being the claimant in the arbitral proceedings, was required to establish by cogent evidence that the delay in the commencement of the Bhairob Project was attributable to the non-readiness of the project site and jetty. Instead of requiring the respondent to discharge that burden, the Tribunal allegedly proceeded on the basis that the petitioner had failed to prove that the site was ready, thereby impermissibly transferring the burden of proof contrary to section 101 of the Evidence Act, 1872.

There can be no quarrel with the legal proposition that the initial burden of proving a fact rests upon the party who asserts it. Section 101 of the Evidence Act embodies this cardinal principle by providing that whoever desires a Court to give judgment as to any legal right or liability dependent upon the existence of facts asserted by him must prove those facts. Although, by virtue of section 24 of the Arbitration Act, 2001, an arbitral tribunal is not bound by the technical rules of the Code of Civil Procedure or the Evidence Act, it is nevertheless required to adhere to the fundamental principles of fair adjudication, including the proper allocation of the burden of proof. The authorities relied upon by the petitioner, including *M/S Ambika Construction Co. v. Union of India* and *Oil and Natural Gas Corporation Ltd. v. Oil Country Tubular Ltd.*, correctly reiterate that proposition. This Court respectfully agrees that procedural flexibility in arbitration cannot justify a departure from the elementary principle that the claimant must first establish the factual foundation of its claim.

The crucial question, however, is not whether section 101 applies in principle, but whether, on a fair reading of the award as a whole, the Tribunal in fact reversed the legal burden of proof.

Having carefully examined the impugned award, this Court is unable to accept the petitioner's contention. The award, read in its entirety, does not support the proposition that the Tribunal imposed the initial burden upon the petitioner. On the contrary, the Tribunal first examined the evidence adduced by the respondent in support of its claim. The Tribunal considered the contractual allocation of responsibilities, the operational logbooks, correspondence exchanged between the parties, the chronology relating to the readiness of the Bhairob Project, the oral testimony and the surrounding commercial circumstances before arriving at its factual conclusions.

The Tribunal thereafter proceeded to examine the evidence relied upon by the petitioner in rebuttal. In particular, the Tribunal separately analysed the email correspondence dated 06.01.2019 and 08.01.2019 upon which considerable reliance had been placed by the petitioner. The Tribunal explained why the statement that "by this time the jetty will be fully ready" represented an expectation regarding future readiness rather than confirmation that the jetty had actually become ready on the relevant date. Likewise, the Tribunal examined the progress reports and the email dated 13.01.2019 addressed to MAN Energy Solutions SE and recorded its reasons for holding that those communications, though indicative of the overall progress of the project, did not clearly establish the actual readiness of the site and jetty for commencement of heavy lifting operations. Similar consideration was given to the progress report dated 17.01.2019 submitted to the IPP Cell, which the Tribunal found insufficient to establish that the contractual conditions for mobilisation had in fact been fulfilled.

The Tribunal further considered the respondent's email dated 21.04.2019, sent after the meeting between the parties, wherein the respondent recorded that it remained ready and willing to commence whichever project became ready first, subject to confirmation of the readiness of the relevant site and jetty. The Tribunal also examined the subsequent chronology of events and observed that no communication had been produced demonstrating that the petitioner had called upon the respondent to mobilise immediately on the footing that the site had become fully ready or had accused the respondent of refusing to commence work despite such readiness.

The Tribunal also evaluated the evidence from the standpoint of commercial probability. It observed that the respondent had successfully completed the Manikganj Project within 87 days and found no rational commercial explanation why an experienced contractor would deliberately keep its heavy equipment and manpower idle for a further period of 103 days, fabricate continuing operational records and postpone commencement of another project which, upon becoming ready, was completed within only nine days. Whether that inference ultimately represents the only possible conclusion is beside the point. The Tribunal was entitled to draw reasonable inferences from the evidence before it, and the drawing of such inferences falls squarely within its adjudicatory function.

Much emphasis has been placed by the petitioner upon certain observations in the award that the petitioner had "failed to disprove" the respondent's assertions or had "not conclusively established" the readiness of the project site. In the opinion of this Court, those expressions cannot be read in isolation. An arbitral award, like a judgment, must be construed as a whole. Isolated words or phrases cannot be divorced from the context in which they were used. The observations relied upon by the petitioner were made after the Tribunal had undertaken an extensive examination of the documentary and oral evidence produced by both parties. Read contextually, those observations merely reflect the Tribunal's conclusion that the petitioner's rebuttal evidence was insufficient to displace the case established by the respondent. They do not demonstrate that the Tribunal dispensed with the respondent's obligation to prove its own claim.

The respondent has also rightly contended that the present case involves consideration of section 106 of the Evidence Act. Section 106 does not relieve a claimant of the burden imposed by section 101, nor does it reverse the legal burden of proof. Its operation is confined to those facts which are especially within the knowledge of a particular party. Once the claimant has adduced prima facie evidence supporting its case, the evidential burden may shift in relation to facts peculiarly within the “knowledge” of the opposite party. Thus, matters relating to the petitioner's own internal project management, the actual readiness of the project site and jetty, mobilisation instructions, internal communications with contractors and consultants, and the circumstances under which the respondent was allegedly expected to commence work were facts particularly within the petitioner's own knowledge and records. In such circumstances, it was neither unusual nor legally impermissible for the Tribunal to examine whether the petitioner had produced satisfactory evidence to substantiate those matters. Such an enquiry does not amount to reversing the legal burden of proof; rather, it reflects the ordinary operation of section 106 in relation to facts especially within the knowledge of one party.

The distinction between the legal burden and the evidential burden must be carefully maintained. The legal burden of establishing the claim remained throughout upon the respondent as claimant. However, once the respondent/claimant had adduced evidence capable of supporting its case, the Tribunal was fully entitled to examine whether the petitioner had produced evidence explaining or rebutting facts lying particularly within its “own knowledge”. The Tribunal's observations regarding the inadequacy of the petitioner's evidence, therefore, relate to the weight and sufficiency of the rebuttal evidence rather than to any impermissible reversal of the legal burden of proof.

Ultimately, the petitioner's criticism is directed less at the allocation of the burden of proof than at the Tribunal's appreciation of the evidence. Whether greater weight ought to have been attached to the petitioner's progress reports, internal correspondence and other documentary materials, or whether the Tribunal should have drawn different inferences from the same body of evidence, are matters falling within the exclusive domain of the arbitral tribunal. Unless the findings are shown to be wholly unsupported by evidence, manifestly irrational or vitiated by any of the statutory grounds enumerated in section 43 of the Arbitration Act, this Court cannot substitute its own assessment for that of the Tribunal merely because another view of the evidence may also be possible.Accordingly, this Court is unable to hold that the Tribunal misdirected itself in law by reversing the burden of proof. The challenge founded upon sections 101 and 106 of the Evidence Act is, therefore, without merit.

Whether The Findings Of The Arbitral Tribunal Are Perverse

The petitioner's second principal contention is that the findings recorded by the Arbitral Tribunal regarding the delay in the commencement of the Bhairob Project are perverse. It is submitted that the Tribunal ignored material documentary evidence produced by the petitioner, including the progress reports, email correspondence and photographic records, while placing undue reliance upon the respondent's operational logbooks. According to the petitioner, such findings are prima facie opposed to the law for the time being in force in Bangladesh within the meaning of section 43(1)(b)(ii) of the Arbitration Act, 2001.

The expression "perversity" has not been defined in the Arbitration Act, 2001. However, its legal meaning is well settled. A finding is not perverse merely because another view of the evidence is possible or because the Court itself might have reached a different conclusion on the same materials. Nor does every erroneous finding amount to perversity. Courts and tribunals may commit errors in appreciating evidence without rendering their decisions legally perverse.

A finding becomes perverse only where it is based on no evidence at all, where material evidence having a direct bearing on the dispute has been completely ignored, where the conclusion rests solely upon inadmissible or inherently unreliable evidence, or where the conclusion is so irrational and unreasonable that no reasonable tribunal, properly directing itself in law, could have reached such a finding. In other words, perversity is not merely a wrong conclusion; it is a conclusion which lacks any rational foundation in the evidence on record.

This distinction between an erroneous finding and a perverse finding is of fundamental importance. An erroneous finding may arise because another view of the evidence appears more convincing. A perverse finding, on the other hand, is one that no reasonable adjudicator could have reached on the evidence before it. Unless this higher threshold is satisfied, judicial interference under section 43 would effectively convert the supervisory jurisdiction of this Court into an appellate jurisdiction, which the Arbitration Act clearly does not contemplate.

In *Gas Transmission Company Limited v. Drilltec-Maxwell Joint Venture* reported in 22 ALR 31, this Court observed that interference with an arbitral award is justified only where the findings are demonstrably perverse, irrational or based upon a manifest misreading or complete non-consideration of material evidence. The decision further reiterates that section 43 does not authorise this Court to reassess the evidence or substitute its own conclusions merely because another view appears more plausible.

Keeping the above principles in view, this Court has carefully examined the impugned award. The submission that the Tribunal based its decision solely upon the respondent's operational logbooks is not borne out by the award itself.The award demonstrates that the Tribunal undertook a detailed examination of the entire evidentiary record. Apart from the respondent's operational logbooks, the Tribunal considered the contractual provisions governing the parties' respective obligations, thecorrespondence exchanged between them, the progress reports relied upon by the petitioner, the oral testimony of witnesses, the chronology of the project and the surrounding commercial circumstances before arriving at its conclusions.

The Tribunal separately examined the petitioner's email correspondence dated 06.01.2019 and 08.01.2019 and explained why the statement that "by this time the jetty will be fully ready" represented only an expectation of future readiness rather than proof that the jetty had actually become ready. Likewise, the Tribunal considered the email dated 13.01.2019 addressed to MAN Energy Solutions SE and explained why communications made to a third-party regarding project progress did not establish that the site and jetty were in fact ready for commencement of heavy lifting operations. Similar consideration was given to the progress report submitted to the IPP Cell on 17.01.2019, which the Tribunal found insufficient to establish actual site readiness under the contract.

The Tribunal further considered the respondent's email dated 21.04.2019 recording that it remained ready and willing to commence whichever project became ready first, subject to confirmation that the site was fully prepared. The Tribunal also examined the subsequent conduct of the parties and observed that there was nocommunication showing that the petitioner had called upon the respondent to mobilise immediately or had complained that the respondent was refusing to commence work despite the site having become ready.

The Tribunal also took into account the surrounding commercial circumstances. It found that the respondent had completed the Manikganj Project within 87 days and considered it commercially improbable that an experienced contractor would deliberately keep its heavy equipment and manpower idle for a further period of 103 days, fabricate operational log entries and voluntarily delay another project which it ultimately completed within only nine days after the necessary facilities became available. Whether this was the only possible inference is immaterial. The Tribunal was entitled to draw reasonable inferences from the evidence before it.

It is true that the Tribunal ultimately attached greater weight to the respondent's operational records than to the petitioner's progress reports and internal correspondence. However, the weight to be attached to a particular piece of evidence is a matter lying exclusively within the province of the arbitral tribunal. Once the Tribunal has considered the rival evidence and assigned reasons for preferring one body of evidence over another, this Court cannot reassess the comparative weight of that evidence merely because a different conclusion is also possible.

The petitioner's submission that the Tribunal ignored the progress reports, the correspondence with MAN Energy Solutions SE and the photographic evidence is likewise not supported by the award. The Tribunal expressly referred to these documents and recorded its reasons for concluding that they did not conclusively establish the readiness of the Bhairob Project. Whether those reasons are ultimately persuasive is not the issue before this Court. The relevant question is whether the evidence was considered. The award clearly demonstrates that it was.

Similarly, the Tribunal's reliance upon the respondent's operational logbooks does not by itself render the award perverse. The Tribunal did not treat those logbooks as the sole basis of its conclusions. Rather, they were evaluated together with the contractual documents, the correspondence exchanged between the parties, the oral evidence and the overall chronology of events. The assessment of the reliability and evidentiary weight of such documents falls squarely within the jurisdiction of the arbitral tribunal.An arbitral tribunal is also entitled to draw reasonable inferences from facts. The mere circumstance that another inference could also have been drawn does not render the inference actually drawn irrational or perverse. Judicial review under section 43 is directed to the legality of the decision-making process, not to the correctness of every factual inference reached by the Tribunal.

Having considered the award as a whole, this Court is satisfied that the findings of the Tribunal are supported by evidence on record and are founded upon reasons disclosed in the award. The petitioner has not been able to demonstrate that the Tribunal ignored any material evidence, relied upon no evidence, misread the evidence in any material respect or arrived at a conclusion that no reasonable tribunal could have reached.In substance, the petitioner's grievance is that the Tribunal ought to have attached greater weight to the petitioner's evidence and lesser weight to the respondent's evidence. Such a contention goes to the appreciation of evidence rather than to the legality of the award. Section 43 does not permit this Court to undertake a fresh evaluation of the evidence for the purpose of determining whether another conclusion would have been preferable.

Accordingly, this Court is of the considered view that the petitioner has failed to establish that the impugned findings suffer from perversity in its legal sense or that they are prima facie opposed to the law for the time being in force in Bangladesh. The challenge, in essence, invites this Court to reappreciate the evidence and substitute its own conclusions for those of the Tribunal. Such an exercise lies beyond the limited supervisory jurisdiction conferred upon this Court under sections 42 and 43 of the Arbitration Act, 2001.

Whether The Award Relating To Costs Warrants Interference

The petitioner has also challenged that part of the impugned award whereby the Tribunal directed the petitioner and Bhairob Power Limited to pay BDT 35,50,000 towards the respondent's share of the costs of the arbitral proceedings. The principal contention is that the respondent had originally claimed approximately USD 2.86 million but ultimately succeeded only to the extent of USD 511,150, representing approximately 17.88% of its total monetary claim. It is, therefore, argued that the Tribunal failed to exercise its discretion judicially by directing the petitioner to bear the respondent's costs without making a proportionate allocation or assigning adequate reasons for doing so.

The submission requires this Court to examine the nature and extent of the Tribunal's discretion in awarding costs under the Arbitration Act, 2001.Section 38 of the Arbitration Act, 2001 confers upon the arbitral tribunal the power to determine the costs of the arbitration, including the party by whom, or the manner in which, such costs are to be paid. The provision is couched in broad language and does not prescribe any rigid formula governing the allocation of costs. The legislative intent is evidently to leave the matter to the sound judicial discretion of the arbitral tribunal, which, having conducted the proceedings and observed the conduct of the parties throughout, is in the best position to determine the incidence of costs.

It is equally well settled that although the discretion to award costs is wide, it is not absolute. Like every judicial discretion, it must be exercised reasonably, fairly and upon relevant considerations. It cannot be exercised arbitrarily, capriciously, mala fide or upon an erroneous understanding of the law. Consequently, where an arbitral tribunal awards costs in disregard of a mandatory statutory provision, ignores an express contractual stipulation governing costs, proceeds upon irrelevant considerations or fails altogether to exercise the discretion vested in it, the Court would undoubtedly be justified in exercising its supervisory jurisdiction under section 43 of the Arbitration Act. However, the Court's concern is directed to the legality of the exercise of discretion and not to its correctness or desirability.

The petitioner's challenge is founded principally upon the proposition that since the respondent recovered only about 17.88% of its original claim, the Tribunal ought either to have denied costs altogether or apportioned the costs strictly in proportion to the amount awarded. Attractive though the submission may appear at first blush, this Court is unable to accept it as a proposition of law.The Arbitration Act does not lay down that costs must invariably be awarded in direct mathematical proportion to the amount recovered. Nor does it prescribe that a claimant who fails to recover the entirety of its claim automatically forfeits its entitlement to costs. Had the legislature intended such a rigid rule, it could easily have said so. Instead, the matter has been left to the discretion of the arbitral tribunal.

The expression "costs follow the event", which has long been recognised in civil and commercial litigation, is a general rule and not an inflexible principle. The word "event" signifies the overall outcome of the proceedings rather than a purely arithmetic comparison between the amount claimed and the amount awarded. In commercial disputes, success cannot invariably be measured solely by reference to the quantum recovered. Frequently, the real contest concerns liability itself. Once liability is established, the quantification of damages or compensation may involve numerous disputed components, some of which may succeed while others fail.

In the present case, although the respondent did not succeed in recovering the entire amount claimed, it nevertheless succeeded in establishing its entitlement to substantive relief. The Tribunal rejected several components of the respondent's claim, yet accepted its claim in respect of the delay in the commencement of the Bhairob Project and awarded compensation accordingly. It cannot, therefore, be said that the respondent was an unsuccessful party. On the contrary, the respondent emerged as the successful party in the arbitration, albeit only partially successful in terms of the quantum ultimately awarded.

The distinction between a wholly unsuccessful claimant and a partially successful claimant is of considerable importance. A claimant who wholly fails may ordinarily be denied costs. However, where the claimant succeeds on the principal issue of liability and obtains an enforceable award in its favour, the Tribunal is entitled to regard such claimant as the successful party for the purpose of determining costs, notwithstanding that certain heads of claim have been rejected or the amount awarded is substantially less than that originally claimed.

The Tribunal, while exercising its discretion regarding costs, is not confined to considering only the percentage of the claim ultimately allowed. It may legitimately take into account the complexity of the proceedings, the duration of the arbitration, the conduct of the parties, the extent to which either party unnecessarily prolonged the proceedings, the number of issues upon which each party succeeded or failed, the necessity of expert evidence and the overall justice of the case. These are matters peculiarly within the province of the arbitral tribunal, which alone has the advantage of having presided over the entire proceedings.

It is significant that the petitioner has not pointed to any portion of the award demonstrating that the Tribunal acted upon an erroneous principle of law or failed to appreciate the extent to which the respondent had only partially succeeded. Nor has it been shown that the Tribunal ignored any statutory provision governing costs or took into account any irrelevant consideration. The petitioner's grievance is essentially that another tribunal might reasonably have exercised the discretion differently. That, however, is not the test under section 43 of the Arbitration Act.

This Court must bear in mind that proceedings under section 43 are not appellate proceedings. The Court is not concerned with whether it would itself have awarded a lesser amount by way of costs or directed each party to bear its own costs. The question is whether the Tribunal's exercise of discretion is so unreasonable or arbitrary as to amount to a jurisdictional error or to render the award prima facie opposed to the law for the time being in force in Bangladesh.

Having carefully examined the impugned award, this Court does not find that the Tribunal acted arbitrarily or capriciously. The award demonstrates that the Tribunal was fully conscious of the fact that the respondent had not succeeded in recovering the entirety of its claim.

Nevertheless, after considering the overall outcome of the arbitration, the Tribunal regarded the respondent as the substantially successful party and exercised the statutory discretion vested in it under section 38 by directing the petitioner to bear the respondent's costs. Such an exercise of discretion cannot be said to be irrational merely because another tribunal, or even this Court, might have apportioned the costs differently.To interfere with the award of costs in the present case would require this Court to substitute its own discretion for that of the Tribunal. Such an approach would be inconsistent with the limited supervisory jurisdiction conferred by section 43 of the Arbitration Act and would undermine the legislative policy of according finality to arbitral awards.

Accordingly, this Court is unable to hold that the Tribunal committed any jurisdictional error or legal infirmity in awarding costs. The petitioner has failed to establish that the discretion vested in the Tribunal under section 38 of the Arbitration Act was exercised arbitrarily, upon irrelevant considerations, in disregard of any mandatory provision of law or in a manner so unreasonable as to warrant interference under section 43 of the Arbitration Act, 2001. The challenge to this part of the award, therefore, fails.

Conclusion and Order

Upon a careful consideration of the submissions advanced by the learned Advocates for the parties, the impugned award and the authorities cited by the parties, this Court is satisfied that none of the grounds enumerated in section 43 of the Arbitration Act, 2001 has been established. The Arbitration Act consciously accords finality to arbitral awards and confers upon this Court only a limited supervisory jurisdiction. It does not permit the Court to sit in appeal over the findings of fact recorded by an arbitral tribunal or to reappreciate the evidence merely because another view may also be possible.

For the reasons already recorded, this Court finds that the Tribunal did not reverse the burden of proof. The respondent, as claimant, discharged the initial burden by leading evidence in support of its claim, whereafter the Tribunal evaluated the rebuttal evidence produced by the petitioner and reached a reasoned conclusion. Equally, the findings of the Tribunal cannot be characterised as perverse. The award is supported by evidence on record, reflects consideration of the material documents relied upon by both parties and discloses reasons for the conclusions reached. The petitioner's grievance, in substance, is directed against the Tribunal's appreciation of the evidence rather than the legality of the award.

Likewise, no ground has been made out to interfere with the Tribunal's determination regarding costs. Section 38 of the Arbitration Act expressly vests the arbitral tribunal with the discretion to determine the incidence of costs. The petitioner has failed to demonstrate that such discretion was exercised arbitrarily, capriciously, in excess of jurisdiction or in contravention of any mandatory provision of law. The fact that the respondent succeeded only in part does not, by itself, render the award of costs legally unsustainable.

Viewed as a whole, the present application is an attempt to reopen the factual findings and evidentiary appreciation undertaken by the Tribunal. Acceptance of such a challenge would convert the supervisory jurisdiction under section 43 into an appellate jurisdiction, contrary to the scheme and object of the Arbitration Act, 2001. This

Court, therefore, finds no jurisdictional infirmity, patent illegality or other statutory ground for setting aside the arbitral award.

Accordingly, **the application is dismissed.**

There shall, however, be no order as to costs

(Justice Md. Toufiq Inam)

Ashraf/ABO.