

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Miscellaneous Appeal No. 247 of 2023

In the matter of:

Managing Director, Concord Progottee
Consortium Limited and another.

... Claimants-Opposite parties-Appellants
-Versus-

Rajdhani Unnayan Kartipakkha (RAJUK) and
another.

... Respondents-Petitioners-Respondents

Mr. Mustafizur Rahman, Advocate

... For the Appellants.

Not represented

... For the Respondents.

Heard on 20.01.2025 and 21.01.2025

Judgment on 06.02.2025

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Bashir Ullah, J.

This appeal is directed against the judgment and order dated 14.05.2023 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 428 of 2019, allowing the case and setting aside the Award dated 08.06.2019 passed by the Arbitral Tribunal consisting of three members.

The salient facts leading to preferring this appeal are:

The respondents, Rajdhani Unnayan Kartipakkha (RAJUK) published a tender notice dated 14.02.2011 for the construction of Purbachal Link Road from Kanchan Bridge to Balu River Bridge. The appellant namely, MONICO-CPC JV participated in the tender and became the lowest bidder. Being the lowest bidder, the Notification of Award was issued on 17.02.2011 in favour of the appellant for the construction of the said project. The value of the contract was fixed at Taka 197,55,79,045.90 and to that effect, an agreement was executed between the appellant and respondent on 05.10.2011. In the contract, it was stipulated that the said construction work would be completed within 18 months that is, by 11.04.2013. Thereafter, the period was extended up to 31.03.2014 but the appellant failed to complete the work within the extended period due to a lot of reasons for which the claimant-appellant was not responsible. On 23.09.2014; the Ministry of Housing and Public Works modified the project and instructed the appellant to work equivalent to Taka 140,73,18,828/- according to variation order No. 1. Later on, the respondent found the work was stopped by the appellant from 19.01.2014. On that ground, the respondents terminated the contract on 11.03.2014 by giving a notice.

The appellant requested for amicable settlement on 21.04.2014. Accordingly, a meeting was held at RAJUK Bhaban on 12.05.2014. As the termination issue was not settled in that meeting, a decision was then taken for the appointment of an Adjudicator under GCC clause no. 94.2 of the contract. Then one, Mr. Md. Idrish Miah, retired Additional Chief

Engineer, Roads and Highways Department was appointed as Adjudicator.

In the adjudication process, both the parties were asked to submit their written statements.

Accordingly, the appellant and respondent submitted their written statements. Upon hearing the parties and after going through the records of written statements, the adjudicator passed the following adjudication award on 11.07.2018:

- (a) Against value of work order of Taka 197,55,79,045.90, the contractor was instructed to work for Taka 140,73,18,828/- in variation order no. 01.
- (b) The contractor executed the work of value of Taka 66,01,29,950/- which is 33.41% of work order value or 46.91% of value of variation no. 1.
- (c) Termination of the contract is appropriate.
- (d) Imposition of penalty should be 10% of the amount of variation order 01.

Being aggrieved by the adjudication award dated 11.07.2018, passed by the adjudicator, the respondent as petitioner then filed an Arbitration Miscellaneous Case before the learned Senior District Judge, Dhaka. The Court then appointed one, Professor Mohammad Zakaria of the Department of Civil Engineering, BUET, Dhaka and Mr. Md. Mofizul Islam, Former Additional Chief Engineer, Roads and Highway Department as Arbitrators with the consent of both the parties. Thereafter, the arbitrators appointed one, Mr. Justice Farid Ahmed,

Former Judge of the High Court Division of the Supreme Court of Bangladesh as Chairman of the Arbitral Tribunal.

After the appointment, the Arbitral Tribunal directed the parties to submit a statement of claim and a statement of defence. Accordingly, the parties submitted their respective statements. However, the Arbitral Tribunal after considering the “Statement of Claim” filed by the appellant and that of the “Statement of Defence” submitted by the respondent and the documents produced by both parties passed the following unanimous award on 08.06.2019:

1.(A) The Adjudication Award "Against value of work order of Taka 197,55.79,045.90, the Contractor was instructed to work for Taka 140,73,18,828/- in variation order no.1" in serial-(a) is declared unlawful.

(B) The Adjudicator Award "The contractor executed the work of value of Taka 66,01,29,950/- which is 33.41% of work order value or 46.91% of value of variation order no. 1" in serial-(b) was for absolute values of records for which Arbitral Tribunal passes no comment.

(C) The Adjudication Award "Termination of the Contract is appropriate in serial-(c) is declared unlawful.

(D) The Adjudication Award "Imposition of penalty should be 10% of the amount of variation order 01" in serial-(d) is declared baseless & unlawful.

2. The "Termination of Contract" approved by RAJUK Authority & notified by the Project Director, Purbachal New Town Project of RAJUK on 11.03.2014 is declared illegal & without Lawful Authority.

3. RAJUK is directed to pay to MONICO-CPC JV the remaining payment of the executed works including all retention money (Security Deposit) as mentioned in their submission by MONICO-CPC JV vide IPC-12RF & IPC-13 for a total amount of Taka 5,64,26,351.45 as per final measurements & records with corrections if any within 60 days from the date of receipt of this award. After this 60 days, commercial rates of interest will be added to the original value to be paid by RAJUK.

4. It is ordered that the suit for the BG for Performance Guarantee against the Bank & others is to be withdrawn immediately.

5. There is no order as to the Compensation & Claims raised by MONICO-CPC JV vide IPC-14CC).

Feeling aggrieved by the said Award dated 08.06.2019, the respondent, Rajdhani Unnayan Kartipakkha (RAJUK) and another as petitioners then filed Arbitration Miscellaneous Case No. 428 of 2019 before the learned District Judge, Dhaka under section 42 read with section 43 of the Arbitration Act, 2001 for setting aside the Award.

The appellants as respondents contested the said Arbitration Miscellaneous Case by filing a written objection annexing relevant documents. However, after hearing the parties and perusing the materials on record, the learned Senior District Judge, Dhaka allowed the case on 14.05.2023 and thereby set aside the Arbitral Award dated 08.06.2019.

Being aggrieved by and dissatisfied with the said judgment dated 14.05.2023 passed in Arbitration Miscellaneous Case No. 428 of 2019 the claimant-opposite parties to the said Miscellaneous Case as appellant then preferred this appeal.

Mr. Mustafizur Rahman, learned Advocate appearing for the appellants-petitioners contends that the learned District Judge erred in law in passing the impugned judgment upon wrongful consideration. The Court found that “the arbitral tribunal omits to decide some of the important issues raised by the party which are covered the terms of reference causing the impugned award bad in law” but the issues were not specified by the learned District Judge.

He further submits that the Court below failed to consider that the notice which requires 28 days to be served before termination as per GCC Clause 89.1 but it was not complied with by the respondent and thus the impugned judgment is bad in law. He lays emphasis that since the provisions laid down in special law have not been followed by the Court below as the respective provision of law does not permit to grant relief in favour of the respondents.

He next submits that the Court has not explained how the award was passed in contravention with and opposing to section 36 of the Arbitration Act, 2001.

The learned counsel further submits that the learned Senior District Judge set aside the award on vague and unsubstantiated grounds, claiming it was “opposed to public policy”, “in conflict with the basic notion of morality and justice”, and “opposed to the law of the country” but fact remains, the learned Judge has not assigned any reason which laws have been violated.

With those submissions, the learned counsel finally prays for allowing the appeal.

None represented the respondent though record shows that the notice was duly served upon the respondents vide order dated 03.11.2024. Even this Court asked the learned Assistant Attorney General, Ms. Kamrunnahar Tamanna to contact the respondent and inform them about hearing of the appeal. Accordingly, the learned Assistant Attorney General contacted the concerned officer of the Rajdhani Unnayan Kartipakkha (RAJUK) by sending a copy of the Memorandum of Appeal yet none bothered to appear or contest the appeal for RAJUK in spite of the fact that the appeal has been appearing in the daily cause list on several occasions.

Be that as it may, we have considered the submission of the learned counsel for the appellants-petitioners and gone through the memorandum of appeal, award and the impugned judgment and order annexed therewith.

It appears from the General Condition of Contract (GCC) that the Procuring Entity or the contractor may terminate the contract by giving twenty-eight days' written notice to the other side, as per GCC Clause 89.1. The relevant portion of the said clause reads as follows:

"89.1 Termination for Default

(a) The Procuring Entity or the Contractor, without prejudice to any other remedy for breach of contract, by **giving twenty-eight (28) days written notice of default** to the other party, may terminate the Contract in whole or in part if the other party causes a fundamental breach of Contract."

(b) Fundamental breaches of the Contract shall include, but shall not be limited to, the following:

(i) The Contractor stops work for twenty-eight (28) days when no stoppage of work is shown on the current Programme and the stoppage has not been authorized by the Project Manager.

(ii) The Project Manager instructs the Contractor to delay the progress of the works, and the instruction is not withdrawn within eighty- four (84) days;

(iii) The Project Manager gives Notice that failure to correct a particular defect is a fundamental breach of Contract and the Contractor fails to correct it within a

reasonable period of time determined by the Project Manager;

(iv) The Contractor does not maintain a Security, which is required:

(v) The Contractor has delayed the completion of the Works by the number of days for which the maximum amount of Liquidated Damages can be paid, as specified in GCC Sub Clause 73;

(vi) The Contractor has subcontracted the whole of the Works or has assigned the Contract without the required agreement and without the approval of the Project Manager;

(vii) The Contractor, in the judgement of the Procuring Entity has engaged in corrupt or fraudulent practices, as defined in GCC Sub Clause 39, in competing for or in executing the Contract.

(viii) A payment certified by the Project Manager is not paid by the Procuring Entity to the Contractor within eighty-four (84) days of the date of the Project Manager's certificate."

But record shows, respondent no. 2 gave only 03(three) days' time, by issuing a letter on 09.02.2014 under Memo No. PD/Purbachal/RAJUK/426/2010(Part -2)/113 stating, "In the above circumstances, it is apparent that you do not have the intention to complete the work at all. But the current working season is passing in vain. However, you are

requested to inform us whether you shall carry on and complete the work in whole or not in writing within **03 (three)** days from the date of receiving **this letter**. Otherwise, steps shall be taken as per terms and conditions of the contract of the work without serving any further notice.”

Finally, respondent no. 2 terminated the contract on 11.03.2014 issuing a letter under Memo No. PD/Purbachal/ RAJUK/426/2010/214 stha whereas the respondent no. 2 extended the period of construction to the appellant up to 31.03.2014. The approval letter of extension of time is reproduced below:

Office of the Project Director
Purbachal New Town Project, RAJUK
RAJUK Bhaban, Dhaka -1000

Memo No. PD/Purbachal/RAJUK/426/2010/part-01/206 stha Date: 09/03/2014

MONICO- CPC JV
5/10, Lalmatia Housing Society,
Block-D, Dhaka -1207
Bangladesh

Subject: Construction of Purbacahal Link Road (from chainage 0+000 km to 6+380 km), Package #01, Lot #01.

Approval of extension of time.

This is to inform you that, for Construction of Purbachal Link Road (from chainage 0+ 0+000 km to 6+380 km), Package #01, Lot #01 extension of time has been extended up to 31-03-2014 by the approval of the Chairman, RAJUK.

Sd-
(Engr. Md. Anwar Hossain)
Project Director
Purbachal New Town Project, RAJUK
RAJUK Bhaban, Dhaka -1000
Phone: 9554969

We find that on one hand respondent no. 2 extended the time for construction up to 31.03.2014, on the other hand, it terminated the contract on 11.03.2014 after two days of issuance of the above-mentioned letter. Before termination respondent no. 2 issued notice on 09.02.2014 giving three days' notice violating GCC Clause no. 89.1 of the Contract. So, The Arbitral Tribunal rightly declared that Termination of the Contract is unlawful. However, the learned Senior District Judge, Dhaka did not make any discussion or gave finding regarding the legality or propriety of the Termination of the Contract. So, we are of the view that the termination of the contract is not valid and appropriate in the eye of law. Hence, the impugned judgment and order passed by the learned Senior District Judge, Dhaka is liable to be set aside.

Record further shows that respondent no. 2 issued a certificate under Memo. No. PD/Purbachal/ RAJUK/131/2007/ part-01/680 stha dated: 28/08/2014 (vide Annexure- X, Page 122) stating *inter alia* that the claimant-appellant completed construction works spending Taka 63,24,14,146. The adjudicator opined that the contractor executed the work that cost him Taka 66,01,29,950/- which is 33.41% of the work order or 46.91% of the value of variation no. 1.

Following the above observation, Arbitral Tribunal opined and declared that, “the net payable amount of remaining dues against the executed works including Retention Money of MONICO-CPC JV against the contract of work, mentioned in their submitted IPC-12RF and IPC-13 for an amount of Taka 2,48,05,644.12+ Taka 3,16,20,707.33 = Taka 5,64,26,351.45 is to be paid forthwith.

The Compensation and Claims of MONICO-CPC JV vide their IPC-14CC for a net amount of Taka 213.93 Crores were not submitted in a proper way for which the Arbitral Tribunal passed no order for them.”

Given the above-mentioned observation and opinion passed by the Arbitral Tribunal we find no substance in the impugned judgment and order passed by the learned Senior District Judge, Dhaka to the effect that, “the impugned award appeared to be arbitrary and capricious in as much as no principle indicating therein as to how the figures of the total amount of Taka 5,64,26,351.45 regarding the claims were arrived at.”

On going through the impugned judgment, we find that the learned District Judge opined that the impugned award is opposed to the law of the country and the same is passed in contravention and opposed to section 36 of the Arbitration Act, 2001 but the Court did not explain how the award contravened and opposed to section 36 of the Arbitration Act, 2001 and which law was not followed.

Learned Senior District Judge, Dhaka observed in the impugned judgment and order that, the Arbitral Tribunal violated the provisions of section 43(1)(a)(iv), 43(1)(b)(ii)(iii) of the Arbitration Act, 2001 in passing the award and there is cogent ground for setting aside the award. But the Court did not explain how the said provision is applicable in the case in hand. We find that the arbitral award is not *prima facie* opposed to the law of Bangladesh and is not in conflict with the public policy of Bangladesh as well.

Given the above facts and circumstances, we do not find any iota of substance in the impugned judgment and order which is liable to be set aside. The learned Senior District Judge, Dhaka rather erred in law in setting aside the arbitral award dated 08.06.2019. The arbitral tribunal acted beyond its jurisdiction when the award is consistent with the prevailing law.

Taking into account of all the materials stated above, we find merit in the appeal.

Accordingly, the appeal is allowed, however without any order as to costs.

The judgment and order dated 14.05.2023 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No. 428 of 2019 is thus set aside.

Consequently, the award dated 08.06.2019 passed by the Arbitral Tribunal is thus affirmed.

Let a copy of this judgment and order along with the lower court records be transmitted to the Court concerned forthwith.

Md. Mozibur Rahman Miah, J.

I agree.