Present:
Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 282 of 2004

Trading Corporation of Bangladesh (TCB) and another

….Appellants/Defendants

Versus

M/S Italtrade International Ltd. A Company incorporated in the United Kingdom, represented by its local agent, Cosmos Marketing Consultant (Ltd.), A company incorporated under the Companies Act, 1913, with its Head Office, Cosmos Center, 69/1, New Circular Road, P.S. Ramna, District-Dhaka, and others

….Respondents

Mr. Mohammad Mosfequs Salehin, Advocate
….For the Appellants

No one appears
….For the Respondents

Judgment on 24.08.2025.

Md. Iqbal Kabir, J:

At the instance of the defendants/ appellants, Trading Corporation of Bangladesh (TCB) filed the instant First Appeal against the judgment and decree dated 06.04.2004 (decree signed on 11.08.2004) passed by the Court of learned Joint District Judge, 3rd Court, Dhaka, being a suit for making the award dated 25.07.1996 as per the rule of the Court.

The plaintiff's case in brief is that the principal defendant No. 1, a trading corporation of Bangladesh, floated an international tender for the import of 11,000 MT of PIGIRON for the foundry.

The Trading Corporation of Bangladesh (TCB), acting as buyer, entered into a contract on 06.06.1992 with M/S Italtrade (International) Ltd., whose local representative was M/S Cosmos Marketing Consultant (Pvt.) Ltd., for the supply of 11,000 MT (+10% at the seller’s option) of Brazilian-origin pig iron at a price of US$173.60 per metric ton. Pursuant to clause 9 of the Contract, Italtrade furnished a performance guarantee valued at US$57,288.50 through Banque

Indosuez, Dhaka. Upon receipt of the guarantee, TCB opened Letter of Credit No. D/W/927421 through American Express Bank Ltd., Dhaka, to facilitate the import. However, in execution of the contract, the plaintiff, Italtrade, chartered the vessel M.V. Tory Hill and shipped 13,550 MT of pig iron following a pre-shipment inspection. The vessel arrived at the Chittagong Port in September, 1992. Pursuant to clause 8(b) of the contract, the Trading Corporation of Bangladesh (TCB) nominated SGS (Bangladesh) Ltd. to conduct the landing survey. SGS submitted its final survey report on 01.10.1992, recording a short landing of 240.46 MT along with 16.34 MT of broken pieces and dust. Based on the findings of this survey, TCB raised a claim of US$49,413.35 against Italtrade.

The dispute having arisen, Italtrade referred the matter to arbitration. TCB contested the case by filing a reply along with supporting documents. The TCB claimed that the final survey report established a shortage of 240.46 MT, whereas Italtrade relied on an earlier draft survey. The Arbitral Tribunal, however, relying on the draft survey, awarded in favour of TCB only a sum of US$6,723, equivalent to 39.015 MT short deliveries, and directed the immediate release of the performance guarantee of Italtrade. According to TCB, the Tribunal thereby committed misconduct by ignoring the final survey report of the nominated surveyor and by accepting Italtrade's submissions without supporting evidence.

It is at this juncture that Italtrade instituted Title Suit No. 149 of 1997 before the Court of the learned Joint District Judge, 3rd Court, Dhaka, seeking a decree in terms of the award. TCB, on the other hand, filed an application under the Arbitration Act, 1940, to set aside the award on the ground of misconduct and error of law. By judgment and decree dated 06.04.2004, the learned Subordinate Judge decreed the suit on contest, making the award rule of the Court.

Aggrieved by the award, TCB preferred the present appeal. During the pendency of this appeal, TCB filed an application under Order XLI Rule 27 of

the Code of Civil Procedure for adducing additional evidence, which was allowed on 17.11.2019, subject to payment of costs. Pursuant to this order, TCB produced the additional evidence, including the deposition of TCB officials, which has been adduced to show that the Tribunal committed legal misconduct by ignoring the final survey.

On the contrary, defendant No.1 contested the suit by filing a written statement denying the entire material allegation so made in the plaint. However, alleging *inter alia* that the learned Arbitrator received and considered only the 1st party, nothing has been stated in the Award whether any submission was at all made by the second party. It appears the sole proceeding was conducted in the absence of the second party. That's why the defendant party sought to set aside the award dated 25-07-1996.

In order to dispose of the suit, the learned trial Court framed as many as three issues, and by settling the issue, the suit has been disposed of.

The trial Court, upon considering the materials and evidence on record, in conclusion decreed the suit on contest against the defendant Nos. 1 and ex parte against the rest. Thereby, the Award dated 25-07-1996 was made Rule of the Court.

Being aggrieved by and dissatisfied with the said judgment and decree dated 06-04-2004 passed by the learned Joint District Judge, 3rd Court, Dhaka, the defendants, as appellants, preferred this appeal.

Mr. Mohammad Mosfequs Salehin, the learned Advocate appearing for the appellant/TCB, has assailed the impugned judgment and thereby submits that the Arbitral Tribunal committed legal misconduct.

He submits that the learned Arbitration Tribunal itself acknowledged in its findings that "both parties filed their statements of claim, but neither party submitted any documents in support thereof." Despite this admission, the Tribunal proceeded to consider the submissions of the 1st Party without any supporting reference. The Tribunal further held that the draft survey was conducted by SGS, the surveyor appointed by TCB, and that the draft survey

allegedly recorded a short delivery of 39.015 MT, which was said to have been accepted by TCB. However, TCB did not recognize any such short delivery, and no document evidencing TCB's acceptance of the alleged short delivery of 39.015 MT was produced by the 1st Party, M/s Italtrade (International) Ltd., before the Tribunal.

He submits that the SGS (Bangladesh) Ltd., which was nominated by the TCB, submitted their final survey report on 01.10.1992 and as per the schedule of said survey report, 240.46 M.T. of pig iron was found short due to dust and broken pieces. Thus, based on said survey report, the appellant TCB submitted its reply and statement of claim before the Tribunal, but the learned Tribunal only considered the submission of the 1st party in such a manner that, on the face of the award, given an impression that the award had been passed ex-party ignoring the submission of the 2nd party TCB.

According to him, the Tribunal was constituted by two learned Advocates and no Secretary has been formally appointed for the proceedings of the Tribunal, since the arbitration proceedings was completed in 1996, and no suitable venue has been designated by the Tribunal, the TCB as the second party submitted documents in support of their claim which were received by an arbitrator's clerk on 12.06.1996, as a result, the Tribunal did not follow any formalities or proceedings.

He submits that the appellant TCB submitted an application for setting aside an award on the grounds of misconduct under section 30 of the Arbitration Act, 1940 but the learned Joint District Judge, 3rd Court, Dhaka committed an error of law in not setting aside the award inasmuch as it was apparent on the face of the award that the learned arbitrators misconduct themselves and the proceedings.

He submits that when the goods arrived at the Chittagong port the consignment was surveyed as per request of TCB dated 12.08.1992 and the survey report revealed that 240.46 M.T was short landed, 16.43 M.T goods was found broken and mixed with dust, therefore, in the absence of the final survey

report dated 01.10.1992, the appellant TCB had no option to demand the bill and statement of claim mentioning the correct figures, but the learned Tribunal relied on the first party statement which was based on the draft survey, and the tribunal have committed legal misconduct.

He submits that as per clause 9 (b) of the contract the buyer shall have absolute and unqualified and indivisible right to forfeit the performance guarantee in the event of non-performance, part performance and or breach, breaches of any terms, clause/clauses, provision/provision of the contract by seller and dammed encashment of Performance guarantee under this clause on the ground of forfeiture.

He submits that the appellant TCB has raised the issue of misconduct before the Subordinate Court which was not considered by the learned Court, since the appeal was pending before the High Court Division the TCB has submitted an application under order 41 rule 27 of the Code of Civil Procedure to add or produce some additional evidence in the memo of appeal which was allowed by one of the benches of High Court Division on 17.11.2019 along with cost of Tk. 5,000.

He brought to our notice that the Trading Corporation of Bangladesh (TCB) is a non-profit organization that receives government support, which further indicates its non-profit nature and focus on social welfare rather than profit. It was established to ensure an adequate supply of essential commodities and raw materials, particularly for low-income families. While TCB sells some products, its primary goal is not profit maximization, but rather to stabilize the market and provide affordable goods.

No one appears to contest the appeal.

However, we have considered the submissions of the learned counsel for appellant, perused the memorandum of appeal, including the impugned judgment and decree, and all other connected documents appended in the paper book.

It is pertinent to note that the dispute between the parties was referred to arbitration as per the terms of the contract. The parties duly filed their statements of claim, and the appellant submitted a bundle of papers and documents in support of its claim. The record of the Trial Court shows that Order No. 03 dated 08-10-1997, Order No. 26 dated 17-09-2002, and the Judgment dated 06-04-2004 relate to an application for setting aside the arbitral award on the ground of misconduct. That application specifically mentions that a bundle of documents was submitted before the arbitral tribunal. The venue of the arbitration was the chamber of one of the arbitrators. In the absence of a learned advocate, the arbitrator's clerk received the bundle of papers. As no secretary had been formally appointed to assist the tribunal, and in the absence of a formal system of record-keeping, the appellant had no option but to deliver the documents to the arbitrator's clerk.

It was alleged that the Tribunal had ignored the pleadings and evidence and thereby proceeded solely on the first party's submissions. Such disregard of material evidence amounts to misconduct and gives the clear impression that the award was passed virtually ex parte, without considering the case of the TCB.

In this context, a decision, namely, Bangladesh T & T Board vs. Lithi Enterprises, reported in 50 DLR (AD) 1998, where it has been observed that Misconduct on the part of the arbitrators may be a ground for setting aside their award. But such misconduct, when not agitated in the trial court, could not be raised afresh before the superior Courts. Another decision passed in the case of Titas Prokashali Limited vs. Roads and Highways, reported in 46 DLR (1994), as regards legal misconduct, we are of the view that if arbitrators have done anything in deciding the matter or in passing the award contrary to any specific provision of law, that can be treated as legal misconduct. Further, this legal misconduct can be extended to the extent that if the arbitrators have done anything beyond the contract or beyond the reference, or beyond the issues, then it can also be termed as legal misconduct. As to personal misconduct, we

are of the view that it relates to the personal dealings of the arbitrators in conducting the proceedings of an award in a case.

Mr. Salehin is relying upon a decision, namely KLM Royal Dutch Airlines vs. Travelsence, reported in 61 DLR (2009), which took us to paragraph 4 of the decision, and submits that misconduct is not a connotation of moral lapse. It comprises legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents, which throw abundant light on the controversy to arrive at a just and fair decision and it is in this sense that arbitrator has misconducted the proceeding in the case.

However, in this case, it was the claim of the appellant that a short landing of 240.46 MT plus 16.43 M.T. of broken and dust for an amount of Tk. 16,33,545.61 and Tk. 1,11,615.88 respectively to USD $ 44,863.

From the discussion, it appears some documents, including the report, was not considered, though those documents were produced, due to the poor or improper recording system which was not before the Tribunal. Finally, on an application, this court accepted those documents which were also marked as exhibits B-H, and in support of the documents, an official of TCB made his deposition dated 21.05.2025. Such a document shows that if those were present before the Tribunal, at the time of passing the award, the result would be otherwise.

However, upon a careful perusal of the record, it appears that the final survey report dated 01.10.1992 (Exhibits G, H, and I), submitted by SGS, recorded a total short landing of 240.46 metric tons (MT), which figure includes 16.34 MT of broken pieces and dust. It is further evident from Exhibit B, read together with the other relevant documents on record, that the total short landing consistently remains 240.46 MT, inclusive of the said 16.34 MT, and that this very quantity constitutes the claim of the appellant. In such circumstances, there is no scope for any separate or additional calculation on behalf of TCB, as the figures cannot be treated independently or cumulatively.

Accordingly, in the given context, TCB is entitled to claim only 240.46 MT as the total short supply.

In view of the above circumstances of the case, and considering the substance of the submissions, and the decisions cited above, we are of the view that the appellants have succeeded in part in the appeal.

Accordingly, the First Appeal is allowed in part without any order as to costs.

The impugned judgment and decree dated 06.04.2004 passed in Title Suit No. 149 of 1997 by the learned Joint District Judge, 3rd Court, Dhaka, is hereby modified to the extent of the award that the 1st party, M/S Italtrade (Int.) Ltd., shall pay to the 2nd party, TCB, a sum of USD 41,743.85 as the value of 240.46 MT for short landing. Accordingly, TCB is entitled to recover the said amount from M/S Italtrade (Int.) Ltd. However, upon such payment, a remaining sum shall subsist, and M/S Italtrade (Int.) Ltd. shall be entitled to receive the balance amount of USD 15,544.65 or its equivalent in local currency within 90 (ninety) days. In default or if M/S Italtrade (Int.) Ltd. fails to receive the same within 1(one) month, AGRICOLE INDOSUZE Bank is directed to deposit the said remaining amount with the Bangladesh Thalassemia Foundation, Account No. 1081100037703, Dutch-Bangla Bank Limited, Shantinagar Branch, Dhaka.

However, the AGRICOLE INDOSUZE Bank shall also be at liberty to release the Performance Guarantee bearing No. PB/USD/61/92 dated 04.06.1992, amounting to USD 57,288.50, within 1(one) month.

Let a copy of this judgment, along with the lower Court records, be communicated to the Court concerned forthwith.

Md. Riaz Uddin Khan, J:

I agree.