

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

Arbitration Application No. 03 of 2014.

IN THE MATTER OF:

An application under Section 42 read with section
43 of the Arbitration Act, 2001.

And

IN THE MATTER OF:

Save the Children.

----- Petitioner.

-Versus-

Padakhep Manabik Unnayan Kendra.

----- Respondent.

Mr. Kazi Ershadul Alam, Advocate with
Ms. Nazmun Binte Islam, Advocate

----- For the Petitioner.

Mr. Muhammad Mohsen Rashid, Senior Advocate
with

Mr. Md. Kader Molla, Advocate

----- For the Respondent.

The 3rd day of March, 2026.

Present:

Mr. Justice Md. Toufiq Inam

The present proceeding, being Arbitration Application No. 3 of 2014, has been filed under sections 42 and 43 of the Arbitration Act, 2001 (“the Act 2001”) by the arbitration respondent seeking to set aside the Award dated 26.12.2013 passed by majority decision of a three-member Arbitral Tribunal comprising Mr. Justice Sultan Hossain Khan, Mr. Justice Syed Amirul Islam and Mr. M. K. Rahman, Senior Advocate. Mr. Justice Syed Amirul Islam delivered a dissenting opinion.

Factual Backdrop

The petitioner, *Save the Children*, entered into two sub-grantee Agreements dated 10.02.2010 with the respondent, *Padakkhep Manabik Unnayan Kendra*, continuing earlier arrangements for disbursement of donor funds:

(i) Agreement No. 84044879D (effective 01.12.2009–31.03.2012) for Tk. 2,10,77,449/- for the programme titled “Advocacy & Sensitization with Policy Makers, National Institutions, Managers, Community Leaders and Law Enforcers to Create an Enabling Environment”; and

(ii) Agreement No. 84044979G (effective 01.12.2009–30.11.2012) for Tk. 18,38,20,662/- for the programme titled “Expanding Provisions of Essential Harm Reduction Services for Injecting Drug Users”.

An internal inquiry detected misappropriation of US\$ 30,000 by the respondent, later confirmed by an audit conducted by A. Wahab & Co. in 2010. Subsequently, the Office of the Inspector General (OIG), an independent unit of the Board of the Global Fund to Fight AIDS, Tuberculosis and Malaria, by letter dated 01.09.2011, reported credible evidence of misappropriation and authorised protective measures. Acting under that instruction and Clause “S” of the

Agreements, the petitioner terminated both Agreements by letter dated 25.09.2011.

The respondent initiated arbitration challenging the termination as unlawful and sought a declaration that it was illegal and ineffective, along with entitlement to continue and complete the projects. The petitioner contested the claim, filed a counterclaim for Tk. 10,45,00,000/- as damages, and objected to maintainability of a single arbitration in respect of two distinct agreements.

By majority Award dated 26.12.2013, the Tribunal:

- a. Declared the termination illegal and without effect, holding the claimant was and had been within his right to continue and complete the projects;
- b. Awarded BDT 80,16,406/- for expenses incurred from August 2011 to March 2012; and
- c. Awarded BDT 11,60,80,879/- for expenses incurred from August 2011 to November 2012.

In dissent, Mr. Justice Syed Amirul Islam recorded that no deliberation took place on 15.11.2013 as stated in Order No. 25; rather, the Chairman had already prepared and circulated the Award.

The petitioner challenges the Award under section 43 of the Act, 2001, contending that it is prima facie contrary to the law in force in Bangladesh, vitiated by procedural impropriety, misconduct and bias, and in conflict with the public policy of Bangladesh.

Petitioner's Standpoints

Mr. Kazi Ershadul Alam, appearing with Ms. Nazmun Binte Islam, learned counsel relies on *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* (2003(3) SCC 705 (paragraph No. 31, page 727) to argue that an award is liable to be set aside if patently illegal, being contrary to substantive law. In the present case, the principal contention of the petitioner is that even assuming the termination of the Agreements to have been unlawful, the claimant's remedy in law could only be a claim for damages and not restoration or continuance of the contractual relationship. It is submitted that section 73 of the Contract Act, 1872 confines relief for breach of contract to compensation for loss or damage actually suffered. The law does not contemplate revival or enforcement of a determinable contract once terminated. According to the petitioner, the impugned majority Award, by declaring that the claimant was entitled to continue and complete the projects has in substance granted specific performance and restored the contractual arrangement. Such a direction, it is argued, travels beyond the scope of section 73, which provides only for monetary compensation in the event of breach. Therefore, even if the

termination were held to be wrongful, the Tribunal could at best have assessed and awarded proven damages; it had no jurisdiction to order continuance of the contract. Thus, the impugned Award is contrary to the law for the time being in force in Bangladesh, inasmuch as it violates section 73 of the Contract Act, 1872.

It is submitted that even if an illegally terminated contract obtains damages, not order/award of continuance of that contract. But this impugned award ordered continuance of contract contrary to section 73 of the Contract Act, 1872, which provides for only damages. It is further contended that the Award violates the Specific Relief Act, 1877 by effectively restoring a determinable contract. Reliance is placed on *Indian Oil Corporation Ltd. v. Amritsar Gas Service* SCC 1991 (1) 97 (para 12, 14) and *Rajasthan Breweries Ltd. v. The Stroh Brewery Company* SCC 2000 (3)509 (para 14, 16, 18) to submit that a determinable contract cannot be specifically enforced and the only remedy, if any, is compensation. By declaring that the claimant is entitled to continue and finish the projects, the Tribunal effectively granted specific performance beyond its jurisdiction, although the Tribunal observed that damages required elaborate inquiry and might be sought before an appropriate forum, it nonetheless awarded substantial sums without evidentiary basis.

Citing *Bangladesh v. Aminul Huq* 72 DLR (AD) (2020) 246 (para 28-30, 34), it is argued that failure to consider material evidence constitutes misconduct. The Award is said to be self-contradictory in acknowledging inability to assess damages while granting compensation without proof. Reference is also made to *bKash Limited v. Md. Moinul Alam* LEX BDHC/1928/2024 (para 18, 20, 21) and *Syed Sajjadul Karim v. Kazi Jahangir Hossain* 72 DLR (2020) 25 to submit that jurisdiction includes the nature of relief granted and that arbitral tribunals must apply substantive Bangladeshi law. Further reliance is placed on *Gas Transmission Company Limited v. Maxwell Engineering Works Limited* 22 ALR (HCD) 2021 31). (para 57) to contend that perverse findings based on misreading or non-consideration of evidence attract section 43. The rejection of seven witnesses merely because they were employees is described as legally untenable.

On public policy, Mr. Kazi Ershadul Alam, the learned counsel cites *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd.* (paragraphs 37–39) to argue that public policy encompasses fundamental legal principles, justice and morality. An award granting the unexpended contract value without proof of actual loss is said to violate the fundamental policy of Bangladeshi law. Reliance is also placed on *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.* (paragraphs 46 and 67) to submit that awards must

not be perverse or disregard vital evidence, and on *Thyssen Stahlunion GmbH v. Steel Authority of India*, MANU/DE/0068/2002, (para 24, 116) and *State of Rajasthan v. Puri Construction Co. Ltd.*⁶ SCC (1994) 485 to contend that patent errors of law and fact justify interference.

Finally, citing *Union of India v. G. Ramachandra Reddy & Co.* 2007(1) Arb. LR 41 (Madras), (para 9.3), it is submitted that arbitral adjudication must remain impartial and restrained. The majority's observations are alleged to reflect bias and lack of judicial detachment. On the cumulative effect of these grounds, the petitioner contends that the majority Award suffers from patent illegality, perversity and conflict with public policy, and is thus liable to be set aside under section 43 of the Act, 2001.

Respondent's Contentions

In reply, Mr. Muhammad Mohsen Rashid, learned Senior Advocate appearing with Mr. Md. Kader Molla for the respondents, supports the impugned Award and opposes the application in toto. At the outset, he submits that this Court, while exercising jurisdiction under section 43 of the Act, 2001, does not sit as a court of appeal over an arbitral award. The scope of interference is narrow and circumscribed by the specific grounds enumerated in the statute. It is not open to the Court

to reappraise the evidence, reassess the factual findings, or substitute its own view merely because another interpretation may be possible.

Mr. Rashid contends that none of the grounds urged by the petitioner fall within the ambit of section 43. The allegations regarding misreading of evidence, quantum of damages, or appreciation of testimony, according to him, are essentially challenges on facts and cannot be elevated to the level of patent illegality or conflict with public policy. Relying on *Chittagong Port Authority v. Ananda Shipyards and Slipways Ltd.*, he submits that although the expression “public policy of Bangladesh” has a broad meaning, it does not permit the Court to act as an appellate forum. An award can be interfered with only when it shocks the conscience of the Court, violates the fundamental policy of law, or is tainted by clear illegality apparent on the face of the record. Mere dissatisfaction with the reasoning or conclusion of the Tribunal is insufficient.

He further argues that the Arbitral Tribunal, upon consideration of the pleadings, documents and oral evidence, arrived at a finding that the termination of the Agreements was illegal and without lawful basis. Once such finding was reached, the claimant became entitled to appropriate relief flowing from wrongful termination. The quantification of damages, according to learned counsel, falls squarely within the domain of the arbitrators, who are the chosen judges of the

parties. Referring to *Gas Transmission Company Limited v. Maxwell Engineering Works Limited*, he submits that while a perverse finding may invite interference, perversity must be apparent and demonstrable. A finding cannot be termed perverse merely because another view is possible or because the Court might have weighed the evidence differently. In the present case, the Tribunal discussed the materials on record and gave reasons for accepting the claimant's case. Therefore, it cannot be said that the Award was made without evidence or in disregard of material documents.

As regards the argument that the contracts were determinable and incapable of specific enforcement, learned counsel contends that the Tribunal did not award specific performance in the strict sense but declared the termination to be unlawful and granted consequential monetary relief. The observation that the claimant was entitled to continue and finish the projects must be read in the context of the finding that the termination was invalid. He also submits that the petitioner's reliance on authorities concerning proof of damages is misplaced in arbitral proceedings. An arbitral tribunal is not bound by the technicalities of strict civil trial and is empowered to assess compensation on the basis of materials placed before it, including accounts, reports and surrounding circumstances. The sufficiency of such materials is a matter within the exclusive province of the Tribunal.

On the allegation of bias, learned counsel contends that a dissenting opinion by one member does not ipso facto establish misconduct or prejudice on the part of the majority. Arbitration law recognises majority awards as valid and binding. Strong observations made in the course of reasoning cannot be equated with legal bias unless there is cogent material demonstrating partiality or lack of independence, which is wholly absent in the present case. In fine, Mr. Rashid submits that the petitioner has failed to bring the case within any of the statutory grounds under section 43 of the Act, 2001. The challenge, in substance, seeks a rehearing on facts and merits, which is impermissible. Accordingly, the application is liable to be dismissed and the Award upheld.

Having heard the learned Counsels for the parties at length and having perused the materials on record, this Court proceeds to examine the rival submissions within the limited statutory framework governing an application for setting aside an arbitral award. At the outset, it must be remembered that jurisdiction under section 43 of the Act, 2001 is supervisory and not appellate. The Court cannot re-hear the dispute on facts, re-evaluate evidence, or substitute its own conclusions for those of the arbitral tribunal merely because another view may seem preferable. The legislative intent is to accord finality

to arbitral awards, subject only to narrowly circumscribed grounds of interference. The core issues, therefore, are: (i) whether the impugned majority Award is prima facie opposed to the law for the time being in force in Bangladesh; and/or (ii) whether it is in conflict with the public policy of Bangladesh within the meaning of section 43(1)(b).

Scope of Interference under Section 43

The ambit of section 43 has been explained in *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd.*, where it was held that “public policy of Bangladesh” includes violation of the fundamental policy of law, the interest of Bangladesh, justice or morality, and patent illegality. At the same time, the Court cautioned that judicial review does not extend to re-appreciation of evidence as in an appeal. Similarly, in *Gas Transmission Company Limited v. Maxwell Engineering Works Limited*, it was observed that interference on the ground of perversity is warranted only where findings are based on misreading, misconstruction, or non-consideration of material evidence. A mere possibility of an alternative factual view is not enough. The task of this Court, therefore, is to determine whether the majority Award discloses patent illegality or manifest disregard of binding substantive law, rather than to revisit the merits.

On the Effect of Section 73 of the Contract Act, 1872

The principal plank of the petitioner's case is that even assuming the termination of the Agreements to have been unlawful, section 73 of the Contract Act, 1872 limits the remedy strictly to compensation for loss or damage caused by the breach. The statutory framework is compensatory in nature. It does not envisage revival of a terminated contract, nor does it authorise enforcement of continued performance. Upon breach, the aggrieved party is entitled to monetary compensation for loss which naturally arose in the usual course of things or which the parties knew to be likely at the time of contract. Nothing beyond such compensation is contemplated.

This proposition is legally sound and admits of no serious dispute. Section 73 embodies the settled common law principle that breach of contract gives rise to a claim in damages and not to restoration of the contractual relationship. More particularly, where a contract is determinable in nature, even wrongful termination ordinarily results only in a claim for damages, subject to proof of actual loss suffered. Courts do not compel continuance of such contracts, as that would in effect amount to specific performance in circumstances where the law does not permit it.

The critical question, however, is whether the Arbitral Tribunal, in substance and effect, granted relief beyond what the law permits. A

careful reading of the operative portion of the Award dated 26.12.2013 reveals that although the majority declared the termination illegal and observed that the claimant was entitled to continue and complete the projects (which, in fact, had ended in March 2012 and November 2012 respectively, prior to the Award), the operative and enforceable relief granted was monetary in character. No coercive direction was issued compelling restoration of contractual relations, nor was there any mandate requiring future performance by the petitioner.

Significantly, by the time the Award was rendered, the contractual period had substantially run its course. In that context, the declaration as to entitlement to continue must be understood as a legal consequence flowing from the finding of wrongful termination, essentially a reasoning step underpinning the quantification of damages, rather than as an executable decree of specific performance. The Tribunal did not, in practical terms, resurrect the contract or compel its continuance. Even if certain expressions in the Award may, in isolation, appear to suggest continuation of the contract, the substance of the Award remains confined to compensation for expenditure incurred and loss suffered during the relevant period. It is well settled that in examining an arbitral award, the Court must look to its substance and real effect, not to stray or loosely worded

observations. The form of expression cannot override the operative relief actually granted.

Therefore, unless it is clearly demonstrated that the Tribunal in fact enforced a determinable contract by granting relief in the nature of specific performance in the teeth of an express statutory prohibition, the Award cannot be characterised as prima facie opposed to section 73 of the Contract Act, 1872. At best, the petitioner's grievance relates to the manner in which the Tribunal appreciated the legal consequences of wrongful termination. An erroneous application of law within jurisdiction does not, by itself, amount to patent illegality or contravention of the law for the time being in force so as to attract interference under section 43.

On Quantification and Proof of Damages

The petitioner further contends that the damages were awarded without strict proof, thereby violating section 73. It is indeed a settled principle that compensation must correspond to loss actually suffered and that remote or speculative damages are not recoverable. The claimant bears the burden of establishing, on a reasonable basis, both the fact and extent of loss. At the same time, arbitral proceedings are not bound by the rigid technicalities of a civil trial. The Tribunal is entitled to assess compensation on the basis of documents, accounts, and surrounding circumstances placed before it. The Court, in

exercising jurisdiction under section 43, does not re-weigh the sufficiency or adequacy of such materials unless it is shown that the Award is wholly unsupported by evidence or rendered in conscious disregard of a mandatory statutory provision.

The Award reflects that the Tribunal considered financial statements, expenditure records, and evidence relating to continuation of project activities after termination. The observation that elaborate inquiry might be required for detailed assessment does not necessarily imply absence of evidentiary foundation for the sums ultimately granted. Unless the findings are demonstrably perverse or entirely without basis, this Court cannot substitute its own assessment.

On Public Policy and Alleged Perversity

The contention that the Award is contrary to public policy is essentially predicated on the alleged violation of substantive contract law and the supposed disregard of evidence. However, as clarified in *Chittagong Port Authority v. Ananda Shipyard and Slipways Ltd.*, public policy cannot be invoked to convert section 43 into a general appellate jurisdiction. The Court must interfere only where the Award strikes at the fundamental policy of Bangladeshi law or results in manifest injustice.

The majority Award discloses consideration of evidence adduced by both parties and reasons, whether persuasive or not, for accepting or rejecting particular testimony. Evaluation of credibility lies primarily within the domain of the arbitral tribunal. The existence of a dissenting opinion does not invalidate a majority decision, as arbitration law expressly recognises majority awards. In the absence of clear demonstration that the Tribunal enforced a determinable contract in defiance of statutory prohibition, or awarded damages wholly without evidentiary basis, the impugned Award cannot be said to be prima facie opposed to the law for the time being in force in Bangladesh or in conflict with public policy within the meaning of section 43. The supervisory jurisdiction of this Court must therefore be exercised with restraint, bearing in mind that arbitral autonomy and finality are central to the legislative scheme.

Effect of Performance Without Injunctive Relief

Petitioner's contention that continuation of service after termination, without injunctive protection, created no enforceable contractual or legal right is wholly misconceived. The claimant's entitlement did not stem merely from continuing performance after termination; rather, it flowed from the Tribunal's categorical finding that the termination itself was unlawful. If a termination is invalid in law, the contract is deemed to have remained in force, and any performance during that period is attributable to a subsisting contractual relationship. An

injunction is only a protective remedy and does not confer substantive rights. Consequently, the absence of interim injunctive relief neither validates an unlawful termination nor extinguishes accrued or continuing contractual claims. Therefore, continuation of service without injunctive protection does not defeat enforceable contractual rights once the termination has been declared illegal.

Conclusion

Upon an anxious consideration of the submissions advanced and the materials on record, this Court is of the view that the grounds urged by the petitioner do not attract the limited scope of interference contemplated under section 43 of the Act, 2001. The principal contention that section 73 of the Contract Act, 1872 permits only damages and not continuance of a terminated contract states a correct proposition of law. However, on a proper reading of the impugned Award as a whole, the Tribunal did not pass any enforceable direction compelling restoration or specific performance of the Agreements. The operative relief granted was monetary in nature. The declaration regarding entitlement to continue the projects must be understood as a legal consequence flowing from the finding of wrongful termination, not as an executable mandate reviving the contractual relationship.

As regards quantification of damages, it cannot be said that the Award was rendered wholly without evidence or in conscious disregard of a

mandatory statutory provision. The Tribunal considered the materials placed before it and assessed compensation on that basis. Whether another view on appreciation of evidence was possible is immaterial in proceedings under section 43, which do not permit re-appraisal of facts.

No case of patent illegality, jurisdictional overreach, or manifest perversity has been made out. Nor does the Award appear to be in conflict with the fundamental policy of Bangladeshi law or the public policy of Bangladesh.

Accordingly, **the Arbitration Application is dismissed.**

There shall be no order as to costs.

(Justice Md. Toufiq Inam)