Present:
Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Rafizul Islam

In the Matter of:

Arbitration Appeal No. 05 of 2022
And
Arbitration Appeal No.06 of 2022

Unique Construction (Pvt.) Limited.

.....Claimant-Opposite Party-Appellant.

-Versus-

Project Manager Chandana-Barasia River Excavation Project and another

.....Respondent- Petitioner-Respondents.

Mr. M. Ashraf Ali, Advocate

.... For the appellant.

Mr. Md. Zoynal Abedin, Advocate

.... For the respondents.

Heard in part on 04.05.2026, 14.05.2026, 18.05.2026, 14.06.2026 and judgment on 25.06.2026.

Md. Rafizul Islam, J:

This Arbitration Appeal No.05 of 2022 is directed against the impugned judgement and order dated 24.07.2022 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No.490 of 2017 filed under section 42(1) of the Arbitration Act, 2001 setting aside the award dated 17.07.2017 passed by the Arbitral Tribunal in arbitration proceeding held between Unique Construction (Pvt.) Limited and Executive Engineer, Rajbari.

And, Arbitration Appeal No.06 of 2022 is also directed against the impugned judgement and order dated 24.07.2022 passed by the learned Senior District Judge, Dhaka in Money Execution Case No.26 of 2017 filed under section 44 of the Arbitration Act, 2001, for enforcement of award dated 17.07.2017 passed by the Arbitral Tribunal in arbitration proceeding held between Unique Construction (Pvt.) Limited and Executive Engineer, Rajbari.

Since both these appeals are between the same parties and arising out of Arbitration Miscellaneous Case No.490 of 2017 and Money Execution Case No.26 of 2017 and related with each other, they are taken up together for hearing and are being disposed of by this single judgment.

Facts, relevant for disposal of this appeal, in brief are that, the appellant as claimant instituted the arbitration proceeding being Arbitration Misc Case No.643 of 2014 in the Court of the Arbitral Tribunal, Dhaka against the respondent for realization of unpaid amount of bill along with some other prayer. The Arbitration Case in brief is that the petitioner-respondent on 11.09.2011 invited Tender Notice No.01/2011-2012 for re-excavation of Chandana River under Rajbari O & M Division, BWDB, Rajbari for the year of 2011-2012 (Exhibit No.1). The appellant along with others participated in the said tender for Lot No.CBP-W2/2011-12/Lot-01 and the appellant became the lowest bidder and the respondent vide its office order dated 26.12.2011 issued the letter of Notification of Award in favour of appellant for re-excavation of Chandana river for an amounting to Tk.2,55,86,145.08 (Exhibit-2). Upon accepting the said notification of award, the appellant deposited performance security amount to Tk. 25,58,615.00 as per direction of respondent. Thereafter, the appellant and the respondent 23.01.2012 entered into a contract agreement stating the terms thereof. As per clause No.2 of the said agreement the notification of award, complete tender documents and the appendix to the tender, PCG, GCC and other drawing and specification are the part of the contract agreement. As per tender, the time of completion of the tender work was between 23.01.2012 and 31.05.2012. Subsequently the appellant filed application for extension of completion date on the ground that the Director General, BWDB visited the site on 14.05.2012 and opined that the excavation work should be done more deeply and also orally ordered to revise the plan. The respondent No.1 found the reasons for extension of time justified and recommended the same for approval on 16.06.2013 where he also found that the work was 90% completed on 31.05.2013. Accordingly, the respondent has extended the completion period till 30.06.2013 vide its letter dated 30.06.2013. The appellant has completed the re-excavation work on 12.06.2013 as per the condition of the contract and on the same date the appellant asked the respondent for taking the final measurement. From the progress report dated 07.07.2013 signed by the Executive Engineer and Sub-Divisional Engineer, it appears that the appellant has completed 99.79% (nearly 100%) re-excavation work till 30.06.2013 with full satisfaction of the authority. After taking the final measurement, the project Manager (Executive Engineer) issued Certificate of Completion on 15.09.2013 as per GCC 80.1 and also took possession of the site with full satisfaction. It appears from the said certificate of completion that the respondent No.1 has found that the work has been substantially completed. The appellant has completed the tender work on 12.06.2013 and obtained Certificate of Completion on 15.09.2013 but the respondent was very reluctant to pay the final bill within next 7 months. During this period, the appellant requested the respondent for the final bill but the respondent did not pay any heed to it. Then finding no other alternatives, the appellant on 08.06.2014 referred the matter to the adjudicator to take steps for realization of final bill as per GCC 94.2(a). But the Adjudicator failed to take any decision upon the said letter within the next 28 days as per GCC 94.2(c). In such compelling circumstances, the appellant appointed an arbitrator to settle the disputes through arbitration as per GCC. The appellant has served an arbitration notice to the project manager on 07.07.2014 mentioning the name of his arbitrator. Since the respondent did not make any reply of the arbitration notice, the appellant then filed Arbitration Miscellaneous Petition No.643 of 2014 in the Court of District Judge, Dhaka under section 12 of the Arbitration act, 2001.

The respondent filed a written objection in the said Miscellaneous Petition and for the first time they disclosed that a Task Force took post work measurement of re-excavation work on 15.07.2013 and found that the appellant did not comply the condition of the contract and has only completed 71.84% of the tender work.

However, after hearing the learned District Judge, Dhaka was pleased to appoint panel of arbitrators and both the arbitrator selected the Chairman of the Arbitral Tribunal. The Arbitral Tribunal by award dated 17.07.2017 allowed the arbitration case.

Thereafter, respondent preferred Arbitration Miscellaneous Case being Miscellaneous Case No.490 of 2017 before the learned District Judge, Dhaka for setting aside the award. The learned Senior District Judge, Dhaka allowed the petition setting aside the arbitral award, vide the impugned judgment and order dated 24.07.2022.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 24.07.2022, passed by the learned Senior District Judge, Dhaka, the appellant preferred this Arbitration Appeal before this Court.

The learned Advocate Mr. M. Ashraf Ali appearing for the claimant-appellant submits that the Arbitral Tribunal considering all the facts and circumstances of the case as well as the evidence on records rightly passed the impugned judgment and order dated 17.07.2017. He further submits that, the claimant-appellant is entitled to get an award for rest amount of bill for the completed work, bill for additional work, interest on the receivable amount, legal cost, refund of earnest money, compensation for loss of business. He next submits that the lower court while setting aside the award found that the claimant could not prove the claim for additional work, but the court did not mention any reason as to why other claims of the claimant should not be sustained and the learned court below has failed to explain any reason to set-aside entire award. The learned District Judge has failed to consider section 38(6) and 38(7) of the Arbitration Act, 2001 and thereby erroneously set-aside the award. He further submits that an award can be set-aside only on the grounds provided in section 43 of the Arbitration Act, 2001. Section 43 of the Arbitration Act provides a very narrow gateway and leaves a limited sphere of operation for the court. He concludes that this appeal has merit and the same may kindly be allowed.

The learned Advocate Mr. Md. Joynal Abedin appearing for the respondent, on the other hand, submits that the Arbitral Tribunal specifically mentioned that additional claim of 15% work allegedly done by the contractor has not been supported by any documents, even there is no evidence of measurement regarding this claim of 15% additional work. He further submits that the Tribunal whimsically allowed 10% as additional work amounting to Tk.24,67,997/- which is contradictory to the contract document as well as the prevailing law of the land. He again submits that the Court below rightly set-aside the arbitral award holding that the award was passed in violation of sections 38(6) and 38(7) of the Arbitration Act, 2001 inasmuch as the tribunal awarded excessive and unauthorized interest contrary to law and the contract. He next submits that the learned Court below rightly found that the impugned award was contrary to law, contrary to the contract, and against the public policy of Bangladesh and therefore correctly interfered with and set-aside the award under section 43 of the Arbitration Act, 2001. He concludes that this appeal has no merit and the same is liable to be dismissed.

We have carefully considered the submissions advanced by the learned Advocates for the respective parties, perused the impugned judgment, the arbitral award and the materials available on record.

The principal question involved in this Appeal, that is, the scope and ambit of section 43 of the Arbitration Act, 2001.

As per provision of section 43 of the Arbitration Act, 2001 an award may be set-aside for the following reasons.

Section 43: Grounds for setting aside arbitral tribunal-

(1) An arbitral award may be set-aside if-

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity;

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case.

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set-aside;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

(b) the court or the High Court Division, as the case may be, is satisfied that-

(i) the subject matter of the dispute is not capable of settlement by the arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh or

(iv) the arbitral award is induced or affected by fraud or corruption.

(2) Where an application is made to set-aside an award, the court or the High Court Division, as the case may be, may order that any money payable by the award shall be deposited in the Court or the High Court Division, as the case may be, or otherwise secured pending the determination of the application.

On scrutiny of the record, it appears that the learned Senior District Judge allowed Arbitration Miscellaneous Case No.490 of 2017 holding that the arbitral award was in conflict with public policy (জননীতি) and contrary to law.

On perusal of the impugned judgment it transpires that the learned Court below has stated in his findings in the language that –

"তর্কিত সালিশী রোয়েদাদ পর্যালোচনায় দেখা যায়, বিজ্ঞ আরবিট্রাল ট্রাইব্যুনাল উক্ত রোয়েদাদে মন্তব্য করেন যে, দাবীদার-প্রতিপক্ষ ১৫% কাজ অতিরিক্ত সম্পাদন করেছেন মর্মে দাবী করলেও উক্ত অতিরিক্ত কাজের প্রথমতঃ কোন অনুমোদন নেই এবং উহার সমর্থনে দাবীদার-প্রতিপক্ষে কোন উপযুক্ত সাক্ষ্য-প্রমান নেই। এ বিষয়ে কোন পরিমাপ হয়নি। এতদসত্বেও বিজ্ঞ আরবিট্রাল ট্রাইব্যুনাল মনগড়াভাবে ন্যায় বিচারের কথা উল্লেখে দাবীকৃত ১৫% এর স্থলে ১০% অতিরিক্ত কাজের মূল্য বাবদ ২৪,৬৭,৯৯৭/- টাকা পরিশোধ করার নির্দেশ দেন। উক্তরূপ নির্দেশ চুক্তি ও এদেশে প্রচলিত আইনে পরিপন্থি হয়।

আবার, তর্কিত রোয়েদাদ পর্যালোচনায় দেখা যায়, বিজ্ঞ আরবিট্রাল ট্রাইব্যুনাল ৬ষ্ঠ চলতি ও চুড়ান্ত বিল বাবদ ৫৯,৯০,৪৯২/- টাকা প্রদান করার নির্দেশ দেন এবং উক্ত টাকাসহ অতিরিক্ত কাজের পরিশোধযোগ্য টাকা জামানত হিসেবে জমাকৃত টাকা ইত্যাদির উপর ১২.৫% হারে সুদ প্রদানের নির্দেশ দেন এবং একই সাথে ৩ বৎসরের ব্যবসায়িক ক্ষতির অংশ হিসেবে অতিরিক্ত ২০,০০০,০০/- টাকা পরিশোধ করার আদেশ দেন। কিন্তু, উক্ত আদেশটি সালিশী আইন, ২০০১ এর ৩৮ (৬), ৩৮ (৭) ধারারপরিপন্থি হয়। উক্তরূপে দেখা যায়, তর্কিত সালিশী রোয়েদাদটি মূলতঃ চুক্তিপত্র এবং বাংলাদেশে প্রচলিত আইনের এবং বাংলাদেশের জননীতির পরিপন্থি হয়। উক্তরূপে দেখা যায়, তর্কিত রোয়েদাদটি উক্ত আইনের ৪৩ (১) (খ) (আ) (ই) ধারার বিধান অনুসারে বাতিলযোগ্য হয়।"

In the instant case, we find that the learned District Judge held that the award was in conflict with public policy and law. However, upon a careful reading of the impugned judgment, we do not find any discussion as to which public policy of the State has been violated by the award.

The principal contention of the respondent is that the arbitral tribunal, having itself recorded that the claimant failed to establish the alleged claim of 15% additional work, acted arbitrarily in awarding compensation equivalent to 10% additional work amounting to Tk.24,67,997/- merely on the ground of justice. It is further contended that the tribunal awarded excessive and unauthorised interest in violation of Sections 38(6) and 38(7) of the Arbitration Act, 2001 as well as the contractual stipulations, and therefore the Court below rightly set-aside the entire arbitral award.

The appellant, on the other hand, submits that the Court below has failed to assign any cogent reason as to why the entire award was liable to be set-aside. It is further contended that the learned Judge merely referred to Sections 38(6) and 38(7) of the Arbitration Act without examining the scope and applicability of those provisions or identifying the precise illegality allegedly committed by the arbitral tribunal. According to the appellant, even assuming that there was any error in awarding compensation for additional work or in awarding interest, such error, by itself, could not justify for setting aside the whole award in the absence of a finding that the award, or any severable part thereof, suffered from any infirmity recognised by law.

An arbitral tribunal derives its jurisdiction from the agreement executed between the parties and is bound to adjudicate the disputes in accordance with the terms of the contract. Undoubtedly, the tribunal cannot rewrite the contract nor can it grant a relief expressly prohibited by the contractual provisions. Equally, the tribunal cannot award an amount having no nexus with the evidence on record. However, every erroneous finding or every possible error in appreciation of evidence does not render the arbitral award liable to be set-aside. The Court exercising jurisdiction under the Arbitration Act does not sit as a court of appeal over the findings of the arbitral tribunal.

So far as the award of Tk.24,67,997 towards additional work is concerned, the arbitral tribunal assessed the evidence adduced by the parties and ultimately granted compensation for 10% additional work instead of the claimed 15%. Whether such assessment is factually correct or erroneous pertains to the merits of the dispute. Unless such finding is shown to be wholly unsupported by the record, beyond the jurisdiction of the arbitral tribunal, or contrary to an express prohibition contained in the contract.

The respondent has repeatedly asserted that the arbitral tribunal acted beyond the scope of law in the name of justice and fairplay. However, neither the impugned judgment nor the submissions made before this Court disclose which specific contractual clause prohibited the tribunal from determining the quantity of admissible additional work or how the award of 10% was wholly beyond the scope of the reference.

The Court below further held that the arbitral tribunal violated Sections 38(6) and 38(7) of the Arbitration Act, 2001 while awarding interest. By the way section 38 (6) & 38(7) of the Arbitration Act, 2001 may be referred to.

Section 38(6): Unless otherwise agreed by the parties-

(a) Where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest, at such rate as it deems reasonable, on the whole or any part of money, for the whole or any part of the period between the date on which the cause of action arouse and the date on which the award is made.
(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent per annum which is more than the usual Bank rate from the date of the award to the date of payment.

Section 38(7): Unless otherwise agreed by the parties-

(a) The cost of an arbitration shall be fixed by the arbitral tribunal.

(b) The arbitral tribunal shall specify-

(i) the party entitled to costs;

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Section 38(6) empowers the arbitral tribunal to award interest for the pre-award period unless otherwise restricted by the agreement between the parties. Likewise, Section 38(7) authorises the tribunal to direct payment of post-award interest at the statutory rate unless the award otherwise provides. These provisions recognise the competence of the arbitral tribunal to award interest, subject to the terms of the contract and the governing law. Therefore, where the contract expressly prohibits interest or prescribes a specific rate or manner of payment, the tribunal cannot ignore such stipulation. Conversely, if the agreement does not impose any such restriction, the award of interest falls squarely within the discretion of the tribunal under Sections 38(6) and 38(7). Consequently, before holding that the tribunal acted in violation of the said provisions, the Court was under an obligation to identify the relevant contractual clause, examine its legal effect and demonstrate in what manner the arbitral tribunal transgressed the limits imposed by the contract or the statute.

A plain reading of the impugned judgment reveals that no such exercise has been undertaken. The learned Judge merely observed that the interest awarded was excessive and unauthorised without recording any finding regarding the contractual rate, the statutory limitation or the calculation adopted by the arbitral tribunal. Such a conclusory observation, unsupported by reasons, cannot sustain the setting aside of an arbitral award.

It is a settled principle that judicial interference with an arbitral award is of a limited nature. The Court cannot reassess the evidence, correct alleged factual errors or interfere merely because another interpretation of the contract appears preferable. Unless the award suffers from a patent jurisdictional error, violates an express statutory prohibition or grants relief clearly prohibited by the agreement between the parties, the award ought not to be disturbed.

At the time of hearing the learned Advocate for the respondent cited the cases of Bangladesh Agricultural Development Corporation (BADC) Vs. Kibria & Associates Ltd, reported in 46 DLR (AD) (1994), Page-97 and the case of M/s. Bux Shipping Line Vs. Bangladesh Water Development Board and another, reported in 22 BLD (AD), 2002, Page-93. We have thoroughly gone through the decisions cited by the learned Advocate for the respondent. We think that the decisions cited by the learned Advocate for the respondent have no manner of application as to the facts and circumstances of the instant case.

In the case before us, the Court below has not demonstrated how the tribunal exceeded its jurisdiction, nor has it identified the contractual provisions allegedly violated by the tribunal while awarding compensation or interest. More importantly, the learned Judge has failed to explain why the alleged defects, even if assumed to exist, rendered the entire award unsustainable. The impugned judgment thus suffers from absence of reasons and reflects a mechanical exercise of jurisdiction.

Accordingly, we find substance in the contention of the appellant that the Court below misdirected itself in setting aside the entire arbitral award without assigning legally sustainable reasons or properly appreciating the scope of Sections 38(6) and 38(7) of the Arbitration Act, 2001.

Section 43 of the Arbitration Act 2001 provides limited grounds upon which an arbitral award may be set-aside. The legislative intent behind the provision is to ensure finality of arbitral proceedings and to minimize judicial intervention. It has been discussed earlier that the court exercising jurisdiction under section 43 of the Arbitration Act, 2001 is not sitting as a court of appeal over the arbitral award. It can not reassess evidence, re-appreciate facts, or substitute its own view for that of the arbitral tribunal.

An arbitral award may be interfered with only when one of the statutory grounds specifically enumerated in section 43 is established. The expression "conflict with public policy" can not be construed expansively so as to permit a review on merits. The court must identify the precise element of public policy allegedly violated and assign convincing reasons demonstrating how the award offends such policy. With regard to the question of public policy a reference may be made to the decision in the case of TATA Power Company Limited Vs. M/s Dynamic Construction reported in 2 SCORB (2015) AD. In the said decision it has been held :-

“We also feel that a definition of public policy would make it easier to decide what would be considered as being in conflict with pubic policy. In the absence of such definition, we are to rely upon the usual meaning of the phrase ‘public policy’ which according to Black’s Law Dictionary, 18th Edition is: “Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society”. It could be said, for example, that if the decision of the learned Arbitrator would have a negative impact on the future of international agreements by foreign companies investing in Bangladesh, then such a decision could be terms as being in conflict with public policy. However, in the facts of the instant case we do not consider that the contract entered into by the parties or the award made by the learned Arbitrator has any impact on the state and the whole of society. We also cannot agree with the submission of the learned Counsel for the appellant that a decision contrary to the law of the country is necessarily in conflict with public policy an envisaged by the Act, 2001. That would be an illegality pure and simple. It would be giving too broad a meaning to the phrase 'in conflict with public policy' to include decisions which are contrary to law, or where the learned Arbitrator has travelled beyond the terms of his reference, or has misinterpreted a principle of law or precedent, or for misreading or non-consideration of evidence. These matters can be considered as matters relating to propriety, but are not, in our view, matters relating to public policy. "

The submission of the learned Advocate for the respondent on the matter that the award allowing 10% additional work amounting to Tk.24,67,997/- is against public policy. But in view of the above discussions we can not agree with submission of the learned Advocate Mr. Md. Zaynal Abedin that merely giving the award allowing additional work can not be considered as public policy.

Likewise, a mere observation that the award is "against law" is not sufficient unless the court points out the specific legal prohibition or patent illegality affecting the award.

The findings recorded by the learned District Judge are wholly conclusory in nature. Mere reproduction of statutory language without supporting valid reasons cannot sustain an order setting aside an arbitral award. A judicial determination under section 43 must be founded upon cogent reasons and objective analysis of the statutory grounds.

The learned Advocate for the appellant contended that an award can be set-aside only on the grounds provided in section 43 of the Arbitration Act, 2001. Section 43 of the Arbitration Act, 2001 provides a very narrow gateway and leaves a limited sphere of operation for the court. The learned Senior District Judge interfered with the award in a casual and cavalier manner and set-aside the same though there were no grounds provided in section 43 of the Arbitration Act, 2001.

In support of his contention he has cited the case of Saudi Arabian Airlines Corporation Vs. Saudi Bangladesh Services Company Limited, reported in 73 DLR (AD), page 277. It has been held in that case (para-13) that –

"Provisions of section 43 of the Arbitration Act have to given a strict interpretation and that the effort should be made to uphold the award, unless it squarely falls within the ambit of the said section. The award of the arbitrator is ordinarily final and conclusive as long as the arbitrator was acted within his authority and according to the principle of fair play. The Court should not interfere with award unless award portrays perversity and the same should not be interfered with in a casual and cavalier manner."

From the above, we find a clear view of law as it stands today that an arbitral award can only be set-aside under Section 43 of the Arbitration Act, 2001 if the challenging party proves specific procedural defects, jurisdictional errors, or a fundamental breach of legal norms. The court will not re-evaluate the merits of the case itself.

The record further reveals that the respondent issued a certificate regarding completion of the work. The findings of the learned District Judge relating to the report of the Task Force concerns disputed questions of fact which were within the exclusive domain of the arbitral tribunal. The learned District Judge could not reopen those factual issues in a proceeding under section 42. In the absence of any finding supported by reasons showing that the award falls within any of the statutory grounds mentioned in section 43 of the Arbitration Act, 2001, the impugned judgment and order cannot be sustained.

Accordingly, we find substances in the appeals.

In the result, the appeals being Arbitration Appeal No.05 of 2022 and Arbitration Appeal No.06 of 2022 are allowed.

The impugned judgement and order dated 24.07.2022 passed by the learned Senior District Judge, Dhaka in Arbitration Miscellaneous Case No.490 of 2017 filed under section 42(1) of the Arbitration Act, 2001, setting aside the award dated 17.07.2017 passed by the Arbitral Tribunal in arbitration proceeding held between Unique Construction (Pvt.) Limited and Executive Engineer, Rajbari and the impugned judgement and order dated 24.07.2022 passed by the learned Senior District Judge, Dhaka in Money Execution Case No.26 of 2017 filed under section 44 of the Arbitration Act, 2001, for enforcement of award dated 17.07.2017 passed by the Arbitral Tribunal in arbitration proceeding held between Unique Construction (Pvt.) Limited and Executive Engineer, Rajbari are set-aside, without any order as to cost. Send down the LCR and communicate this order at once.

Sheikh Abdul Awal, J:

I agree.

A.Aziz, B.O.